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SB 189

MONTANA
TELECOMMUNICATIONS
ASSOCIATION

SB 189. S. Kitzenberg.
Periodic Rate Review and Reversal of Burden of Proof in Rate Cases
House Business and Labor Committee
April 20, 2007

Statement of the Montana Telecommunications Association

I. Introduction and Summary:

SB 189 does three things. First, it requires (only) regulated telecommunications providers (that is, NOT other providers of telecommunications services) to file an application for a general rate case every five years, for no other reason than the fact that 5 years have elapsed. Second, in a direct affront to due process rights, it reverses the burden of proof in rate case proceedings. If passed, regulated telephone companies would stand accused—with no showing of malfeasance—of being guilty of complying with rates that the Public Service Commission (Commission) itself approved. The assumption would be that rates that commission approved five years earlier now are unjust and unreasonable, and it is the utilities' responsibility to prove otherwise. Third, incredibly, SB 189 applies these new regulatory burdens retroactively, effectively saying that parties are guilty of implementing unreasonable rates from the day their rates were last approved by the Commission.

MTA opposes SB 189. It puts a **cloud over investment** in Montana. It **penalizes all rural telecommunications providers** for following rates approved by the Public Service Commission. Contrary to the proponents' assumptions that rates will go down with regular rate reviews, it is more likely that the opposite will happen. Thus, SB 189 **threatens consumers with rate increases** for no reason other than the Commission would like rates adjusted every five years. By focusing only on a small segment of the telecom industry, most of which comprises small, rural telecom providers, while all other providers of similar telecommunications services in Montana are immune from similar regulatory burdens altogether, **SB 189 is discriminatory** and punitive. Finally, SB 189 completely **turns upside down established law regarding due process and burden of proof**, as well as the **established rates doctrine**.

II. Rate Cases are expensive and burdensome for consumers, carriers, and the Commission alike

General rate cases are expensive, time-consuming proceedings that require diversion of significant financial and human resources. These burdens are particularly onerous on small companies and rural telecom carriers, the types of companies that MTA represents. **The expense of rate cases would be passed on to consumers in the form of rate increases, or absorbed by the companies in the form of diminished investment in Montana. Consumers lose in either event.** The time and resources expended on general rates cases can be far better spent on investment in infrastructure

and personnel for the purpose of delivering the best telecommunications services and technologies to the consumers of Montana.

MTA's members invest nearly $100 million annually in state-of-the-art telecommunications assets and quality employees with top-notch salaries and benefits. They provide near-ubiquitous access to broadband services. They are committed to their customers and their communities, often being the largest taxpayer and benefactor in the counties in which they operate.

So why is it that suddenly the Legislature needs to threaten these companies with potentially costly proceedings merely so they can prove their innocence?

This Committee should be careful about what it asks for. The assumption behind SB 189 is that if we require regular rate cases, rates will go down. This assumption is speculative, at best. While the national consumer price index (CPI), increased by 2% through November of last year, consumer prices for telephone services declined 0.3 percent, largely reflecting a 0.7 percent decrease in charges for long distance land-line telephone services. (The last time this bill was heard, Legg Mason, a financial research firm, reported that the general CPI had risen 2.3% while the CPI for telephone services fell 1.4 %.) Rates for Montana's regulated telecom providers have been generally stable for years, while inflation continuously crept upward. **It is entirely possible if brought in for a general rate case, Montana's rural telecom providers' rates would qualify for increases, not decreases.** As noted above, MTA's members are investing heavily in their networks, bringing broadband communications capabilities to consumers throughout their service territories. They are incurring increasing debt and expanding capital expenditures. Since rates for most of these companies haven't increased in years, it is likely that any rate case would result in upward adjustment of rates to reflect the heavy capital expenditures these companies are investing in their Montana operations.

Current law already provides the Commission with all the authority it needs to initiate a rate case and adjust rates, if it so desires.

- 69-3-102 invests the Public Service Commission "with full power of supervision, regulation, and control of...public utilities..."
- 69-3-106 authorizes the Commission "to obtain from any public utility all necessary information to enable the commission to perform its duties." And,
- 69-3-324 provides that "the **commission may at any time, upon its own motion, investigate any of the rates**, tolls, charges, rules, practices and services and after a full hearing...make...such changes as may be just and reasonable..."

Not only are general rate cases expensive for regulated telecom providers, they're expensive for the Public Service Commission. There are nine regulated telecommunications carriers in Montana. This doesn't include however many regulated energy companies there are in our state. So SB 189 would require more than nine general rate cases at regular intervals. **The burden on Public Service Commission staffing requirements should be reflected in a Fiscal Note**.

III. SB 189 turns the filed rate doctrine upside down and denies companies' due process rights by reversing the burden of proof

SB 189 assumes that rates are unlawfully unjust and unreasonable and that every five years utilities need to come before the commission to demonstrate—without any evidence or showing—that their rates are not unjust and unreasonable.

However, both state and federal law treat approved rates as prima facie lawful.

- 69-3-110 provides that "**all rates...fixed by the commission...are prima facie lawful** from the date of the order until changed or modified by the commission..."
- 69-3-201 requires that "the charge made by any public utility for...regulated telecommunications service...shall be reasonable and just, and every unjust and unreasonable charge is prohibited and declared unlawful."

Yet **SB 189 effectively declares lawfully-approved rates unjust and unreasonable the moment they're approved,** since the premise of the bill is that a company must justify its rates retroactively from the moment of the last rate approval.

This bill, further turns upside down the due process rights of corporate citizens under the statutory **rules of evidence**.

- 26-1-402 states that "a party has the **burden of persuasion** as to each fact the existence or nonexistence of which is essential to the claim for relief or defense he is asserting."

That is, if the Commission wishes to claim its approved rates suddenly have become unlawful, then **the commission must bear the burden of persuasion as to each fact which is essential to its claim**.

IV. The Commission's Attempt to Reverse the Burden of Proof has been Denied in Court

This bill is in part prompted by the Commission's attempt to force Qwest to state that its rates are not just and reasonable, despite those rates having been approved by the Commission and despite the Commission's existing authority to initiate a rate case at any time. In 2004, the First District Court overruled the Commission's attempt to force Qwest into a rate case without carrying its burden of proof. The Court said

> "the PSC is clearly attempting to force Qwest into proving its rates are just and reasonable. **Any party that wishes to challenge the existing rates must carry the burden of proof.**" (Qwest v. PSC. 1st Judicial District Court. Cause No. CDV-2003-464. October 14, 2004. Emphasis added.)

The Court also found that the Commission inappropriately attempted to use data from an annual report to establish grounds for unjust and unreasonable rates. The Court's order stated that

"**annual reports and rate cases seek different information**...If the PSC desires to show Qwest's rates are unjust and unreasonable, the PSC may collect the information it needs and carry its burden forward." (Ibid. Emphasis added.)

While in theory the Legislature could overrule the Courts with a new law, doing so would deny citizens their due process rights, and would **confer unparalleled power to a government agency to find innocent parties guilty with no showing whatsoever of malfeasance**.

V. SB 189 is Discriminatory

SB 189 applies to all regulated utilities and threatens them with a potential rate case proceeding, regardless of whether their rates are just and reasonable, and notwithstanding the fact that other providers of telecommunications services are completely nonregulated. (The Senate amended SB189 to exempt small telephone carriers from application—further adding to the discriminatory effect of the legislation by separating small companies from large companies, as well as regulated companies from non-regulated companies.) Cable companies aren't affected by this law or any other public Service Commission regulation. Neither are wireless companies, or satellite providers or any other provider of telecommunications service. In this regard, **SB 189 is limited to only a handful of companies in Montana. That is arbitrary and blatantly discriminatory.**

Telecommunications carriers in Montana are competing fiercely to maintain customer loyalty in the face of an increasing amount of consumer options for telecommunications services and service providers. They can ill afford to divert precious resources, hire consultants, and spend scarce dollars to perform rate reviews just because 5 years have elapsed since their last rate review.

For example, Bresnan and Verizon both serve more than 200,000 customers each in Montana and Alltel serves more than 100,000 customers. CenturyTel serves about 65,000 customers, less than Bresnan, Verizon or Alltel. All of these companies provide similar telecommunications services that compete with one another. Yet, CenturyTel would be targeted by this bill, while its much larger competitors run Scott free.

VI. Conclusion:

SB 189 is a threat to due process. The Commission wishes to avoid building a case for a rate review and carrying its burden of demonstrating why rates it has approved have become unlawful. Instead Commission seeks to change the law to overturn judicial precedent. Parties before the commission would effectively stand accused of being guilty of complying with lawfully approved rates.

SB189 is expensive, and its costs are likely be felt by consumers either in higher rates or lower investment. Its costs are likely to be felt at the Commission as well. The assumption that SB 189 would lead to lower rates is speculative at best and most likely just wrong.

SB 189 is discriminatory. This bill applies only to a small group of companies in Montana among a much larger group of companies providing similar, if not identical, services—none of which is affected by this legislation or even regulated by the Commission.

SB 189 is punitive by imposing substantial financial and resource expense on companies that are guilty of no more than investing in Montana's telecommunications and economic development. To the extent that such costs would be borne by consumers, or absorbed by companies, consumers would be harmed by the effects of SB 189

MTA is pleased to address any questions, comments, or concerns of the Committee and looks forward to working with the Committee on any matters of interest.

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