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BILL ANALYSIS

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Senate Bill 551 (as passed by the Senate)
Sponsor: Senator Bruce Patterson
Committee: Technology and Energy

Date Completed: 6-8-05

RATIONALE

Section 213 of the Michigan Telecommunications Act (MTA) authorizes the PSC to promulgate rules under the Administrative Procedures Act (APA). Previously, however, the section also prohibited the PSC from promulgating rules if the Michigan Supreme Court ruled that Sections 45 and 46 of the APA were unconstitutional and a statute requiring legislative review of administrative rules were not enacted within 90 days of the ruling. The Supreme Court ruled in 2000 in *Blank v Department of Corrections* that Sections 45 and 46 of the APA were unconstitutional (462 Mich 103). In 2004, the Court of Appeals cited that opinion in *Verizon v Michigan Public Service Commission* in determining that the PSC did not have the authority to promulgate quality-of-service rules concerning out-of-service telephone repairs (263 Mich App 567). (Both opinions and the relevant sections of the APA are described below, under **BACKGROUND**.)

Public Act 591 of 2004 made several amendments to Section 213, including the enactment of a provision that rules promulgated by the PSC after January 1, 1996, are considered to have been promulgated under the rule-making authority granted to the PSC by the MTA. Public Act 592 took effect on January 4, 2005.

The Commission then began the promulgation process to restore the quality-of-service rules that the Court of Appeals had nullified in *Verizon*. The process under the APA can be time-consuming, however, and Section 213 is scheduled to be repealed on July 1, 2005. It has been suggested that

the sunset be eliminated to retain the PSC's rule-making authority.

CONTENT

The bill would amend the MTA to repeal a July 1, 2005, sunset on the PSC's authority to promulgate rules.

In addition to the provisions described above, Section 213 states that specific rules may not be enforced until a court determines that the rules do not exceed the PSC's authority under the MTA, and that it is the Legislature's intent that providers voluntarily comply with the rules until a court makes a determination. Under this section, a provider that agrees voluntarily to abide by the rules does not relinquish its rights to challenge the rules' legality.

Section 213 also requires a proceeding to promulgate rules under the MTA to be concluded within 180 days from the date that the proceeding is initiated.

MCL 484.2213

BACKGROUND

Blank v Department of Corrections

Under Sections 45 and 46 of the APA, the Joint Committee on Administrative Rules (JCAR) was authorized to approve or disapprove rules promulgated by executive agencies. In this case, prison inmates challenged the validity of visitation rules that the Department of Corrections (DOC) adopted without JCAR's approval, on the ground that the DOC acted in violation of the authority granted JCAR under the APA.

Article III, Section 2 of the Michigan Constitution states, "The powers of government are divided into three branches... No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." Additionally, Article IV, Section 22 requires all legislation to be by bill, and Section 33 requires every bill passed by the Legislature to be presented to the Governor before it becomes a law.

A majority of the Supreme Court justices agreed that the authority granted JCAR under the APA usurped the Governor's authority in violation of the separation of powers doctrine. Three justices also concluded that Sections 45 and 46 violated the enactment and presentment requirements. The applicable subsections of Sections 45 and 46 subsequently were deleted from the statute.

Verizon v Michigan Public Service Commission

On September 16, 2004, the Michigan Court of Appeals reversed a lower court's ruling that the PSC had the authority to promulgate quality-of-service rules concerning out-of-service repairs. Although the MTA authorizes the PSC to promulgate rules and issue orders to establish and enforce quality standards for the provision of telecommunications services, the Court nullified rules that were adopted in August 2002.

The Court of Appeals pointed out the MTA had been amended after the *Blank* decision. According to the Court, "[T]he Legislature specifically recognized the possibility that our Supreme Court could hold... [Sections 45 and 46 of the APA] to be unconstitutional", and "provided that the PSC would retain the power to promulgate rules if a statute requiring legislative review of administrative rules were enacted within ninety days after such a Supreme Court decision". The Supreme Court decided *Blank* on June 20, 2000, and Public Act 295 of 2000 amended the MTA effective July 17: after the *Blank* decision and before the 90-day period had expired. Public Act 295, however, did not provide for legislative review of administrative rules. "[T]herefore, the PSC lacked authority under the MTA to promulgate further rules."

(In a footnote, the Court pointed out that Public Act 23 of 2004 amended the APA effective March 10, 2004. Although those amendments would have satisfied the legislative review requirement of the MTA, they were enacted after the 90-day deadline. The Court held that they should not be given retroactive effect.)

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

The PSC will not be able to complete the rule-making process by the current July 1 sunset. The rules in question will provide important consumer protections regarding billing disputes, timely responses to customer calls, and other service quality issues. Without the rules, customers will have no guarantee that their rights will be protected. The entire MTA is set to expire at the end of 2005. While a reauthorization is being considered, it would be appropriate to retain the PSC's authority to promulgate rules during the time the Act remains in effect.

Legislative Analyst: Julie Koval

FISCAL IMPACT

The bill would have no fiscal impact on State or local government.

Fiscal Analyst: Maria Tyszkiewicz

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.