

**BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION**

IN THE MATTER OF A NOTICE OF )  
INQUIRY TO DEVELOP A RULE TO )  
IMPLEMENT HOUSE BILL 776, )  
RELATING TO ACCESS CHARGE )  
REFORM )  
\_\_\_\_\_)

Case No. 05-00211-UT

**DISSENT TO ORDER ADOPTING AN EMERGENCY RULE**

**Filed by Commissioner Marks**

A rule that implements the affordability benchmark provision of House Bill 776 through company-specific business rates exceeds the legal authority of the Commission by being contrary to the plain language of the statute. The rule produces inequitable and irrational results, by placing additional cost burdens on all residential wireline customers, most business wireline customers, and all wireless customers in the state in order to subsidize below-market telephone rates to business customers in select rural areas of the state. And, the rule makes bad telecommunications policy because, by enshrining *implicitly-subsidized* below market rates in perpetuity, it thwarts the development of competition. Therefore, I must respectfully dissent from the Majority’s decision in this matter.

The Commission is required to implement statutes “in a reasonable manner consistent with legislative intent, in order to develop the necessary policy to respond to unaddressed or unforeseen issues.” *City of Albuquerque v. N.M. Public Regulation Commission*, 2003-NMSC-028, ¶ 24, 134 N.M. 472. The Commission may not implement a statute in a manner that is unreasonable or unlawful, and if it does so, it is subject to being reversed by the Supreme Court. *Morningstar Water Users Ass’n v. N.M. Pub. Util. Comm’n*, 120 N.M. 579, 583, 904 P.2d 28, 32 (1995). In New Mexico, the “primary indicator” of legislative intent is the plain language of the statute, and words used in the statute are to be given *their ordinary meaning* unless the legislature indicates a different intent. *Alba v. Peoples Energy Res. Corp.*, 2004-NMCA-084, 17, 136 N.M. 79, 94 P.3d 822; N.M. State. Ann. §§ 12-2A-2 & 12-2A-19 NMSA (1978).

House Bill 776 requires the Commission to “establish affordability benchmark rates for local residential and business services.” A benchmark is widely understood to be a single standard. The American Heritage Dictionary of the English Language, Fourth Edition (2000) defines it as “a standard by which something can be measured or judged”; in Black’s Law Dictionary (8th ed. 2004) it is “a standard unit used as a basis for comparison.” See also *In the Matter of Held Orders of U S West Communications, Inc.*, 1997-NMSC-031 ¶25, 123 N.M. 554, 943 P.2d 1007 (discussing the terms “benchmark” and “standard”).

The language adopted by the Majority does not implement a single affordability standard for local business rates, but instead allows for business rates that range from less than \$15 (Leaco Rural Co-op) to well over \$40 (Tularosa Basin and Navajo Communications<sup>1</sup>). As such, it represents the opposite of the legislative intent in HB 776, as given by the ordinary meaning of the words used in the statute, and is beyond the lawful power of the Commission. *Morningstar*, 120 N.M. at 583.

The use of company-specific business rates not only frontally challenges the general concept of a “benchmark,” it is even more repugnant to legislative intent in specific manner in which it was used in HB 776: “affordability benchmark rates.” How can less than \$20 and more than \$50 both be a standard of “affordability” for the identical service? The rural communities served by local exchange carriers (LECs) with both lower and higher business rates under the Majority’s rule span a variety of geographic and demographic mixes, but this rule making proceeding adduced no evidence whatsoever that the rate differences have any correlation to the ability of businesses served by the various LECs to afford realistically priced telephone service. Furthermore, it was acknowledged that business customers of Qwest, who will be paying around \$36 for basic services, include not only businesses in Albuquerque and Santa Fe, but also many businesses in economically challenged rural communities, such as Questa and Grants.

A rational telecommunications policy would seek to have the Commission establish affordable and comparable telecommunications service rates for comparable markets or market areas, and give consideration to the economic conditions and costs to provide service in the each area in determining affordability. Indeed, New Mexico has such a policy, as the language in the preceding sentence is taken directly from the state’s Telecommunications and Rural Telecommunications Acts. N.M. Stat. Ann. §§ 63-9A-2, 63-9H-2 & 63-9H-3. But, rather than addressing affordability, the company-specific method seems principally addressed to protecting the current beneficiaries of below-market business telephone rates from rate increases and towards protecting rural LECs from competition.

This first concern, protecting customers from large rate increases, is a legitimate and important concern for the Commission. The increases necessary to bring many rural LEC business rates up to the statewide benchmark (estimated to be \$36.05) constitute “rate-shock,” and for that reason, I supported extending the phase-in period for the rate increases to as long as five years in the rule adopted November 1. I also favored relaxing the conditions, either through amendment or variance, to allow all companies to qualify for the extended period. I believe that an extended phase-in period is the best way to harmonize the unambiguous benchmark language in HB 776 with the rate impact

---

<sup>1</sup> Oral comment by Charles Farrell at the December 15, 2005 hearing indicated that Navajo Communications’ current \$51.95 basic business rate was at least partly justified by the large extended calling area available to customers. However, Farrell also indicated that business customers of his own Tularosa Basin telephone company in the town of Carrizozo paid around \$45 per month for a local calling area that was limited to Carrizozo and its 800 phone lines.

issue that was not fleshed-out during the legislative consideration of the bill.<sup>2,3</sup> *City of Albuquerque*, 2003-NMSC-028 at ¶ 24 (Commission may respond to unforeseen issues when implementing legislation).

The current rural LEC business rates are from rate cases heard by the Commission's predecessor in the 1980s. Those rates, and the variations between companies, presumably reflect the interplay of numerous company-specific factors in another era of telecommunications. All other things being equal, allowing the wide variation in rates for similar services, in similar communities, to persist into the future would have been undesirable (and contrary to the goals stated in our Telecommunications Acts), but tolerable. However, all things are not equal, HB 776 created a new regime of statewide rate rebalancing.

In this context, subsidizing below-market, company-specific business rates through additional surcharges on all other customers is inequitable, even if the additional charge is small. *See Mountain States Legal Foundation v. New Mexico State Corp. Com'n*, 101 N.M. 657, 658 687 P.2d 92, 93 (1984) (which, in addition to holding that the Commission lacked authority for social engineering, held that rates that discriminated between similarly *economically situated* customers based on age were unjust). Evidence presented by the N.M. Exchange Carrier's Group indicates that the additional state universal service fund subsidies required by the low business rates will need to be paid for by an additional 0.4% surcharge on all intrastate telecommunications services. For a business customer in Qwest's service territory, this is an extra 14 cents each month. For a residential customer (anywhere in the state, since there will be a unitary rate for basic residential local exchange services), it will be about 6 cents. These small burdens become inequitable when their effect is to cause a customer who is already paying a higher rate for a service to pay even more so that someone else can continue to pay much less.

Utility rate design principles permit rational rate discrimination, for example to reflect higher costs of service to an area. Even cross-subsidization, while disfavored, is allowed when it serves a rational purpose, as when business telephone rates were set higher than cost in order to enable broad access to affordable residential telephone

---

<sup>2</sup> Comment at the December 15, 2005 hearing, as well as my personal recollection and relevant documents, indicate that the business benchmark issue was glossed-over when the legislation was presented. For example, as originally introduced, the access reform bills specified a particular methodology to calculate the residential benchmark (similar to what the PRC ultimately adopted in the rule), but said nothing about how to establish the business benchmark. I believe that the legislature, had it been fully informed, would have felt the same dilemma as the Commission confronted, and would have been unable to muster a majority for a bill that either called for large rate increases for some customer classes or one that required residential and other consumers to subsidize arbitrary, below-market business rates in select areas. The equity trade-offs, *invariably* illustrated with the statewide residential benchmark, were an important rationale for securing agreement to a new and significant subsidy to the rural LECs.

<sup>3</sup> While, in my mind, extended phase-ins are the best way to address the rate shock issue, the other legally permissible alternative that am aware of would have been setting a single statewide benchmark rate below the Qwest business rate.

service. The amended rule stands these principles on their head, in the absence of factual evidence to support the necessity of the low business rates in selected rural areas.

When the Commission re-opened the record in this case after issuing our November 1, 2005 rule, Commission Chair Lujan noted his desire to receive information about the impact of the rate increases on businesses in the affected areas. The Commission did receive a large volume of written comment in support of keeping low rates for rural areas. Almost all were identically-worded form letters citing general concerns with economic development. In the only comment in the record I am aware of that even partially addresses the question, Ruidoso Valley Chamber of Commerce did write that its area had a high proportion of sole-proprietorships among its businesses.

In response to my direct questions at the December 15, 2005 hearing, the proponents of company-specific rates disclaimed any knowledge of specific businesses or classes of business who would be harmed to the point of losing profitability or even retarding their growth by a rate increase to the \$36.05 benchmark. They did not even say that they believed there might be some businesses affected in those ways. What they did say, and I refer to the comments of Bill Templeman and David Cohen, representing the NMECG and MATI Telecommunications, respectively, was that they were worried that higher rates would cause some rural LEC customers to switch to competitive telecommunications providers and/or to decrease the number of lines to which they subscribed. Comment from PRC Staff and wireless providers corroborated that below-market basic business rates were a barrier or disincentive to the development of competitive telecommunications markets.

Ironically, while one of the stated policy purposes of access charge reform was to substitute an explicit subsidy mechanism for implicit subsidies, and thereby facilitate the development of competitive markets, the implementation of HB 776 forced by the NMECG is profoundly anti-competitive. No competitive carrier, no matter how efficient their platform is, can afford to compete – in a low density, high cost area -- with a retail rate that has been subsidized down to \$15 or even \$25. NMECG members, with a few exceptions, are now insulated long term from competition, regardless of what type of technologies their competitors might have brought to bear. Ultimately, rural communities who are the short-term beneficiaries of the amended rule may turn out to be long-term losers as they lose the opportunities that competition was supposed to deliver.

Entered this 16 day of December 2005.

---

Jason Marks  
Commissioner