

28 (ii) in the ordinary course of its business makes operator assisted services available to the
29 public or to customers and transient users of its business or property through an operator service
30 provider; and

31 (iii) receives from an operator service provider by contract, tariff, or otherwise,
32 commissions or compensation for calls delivered from the aggregator's location to the operator
33 service provider.

34 (b) "Aggregator" may include any hotel, motel, hospital, educational institution,
35 government agency, or coin or coinless telephone service provider so long as that entity qualifies
36 under Subsection (1)(a).

37 (2) "Anticompetitive conduct" means conduct of an incumbent telephone corporation that
38 creates economic or technical barriers to competition, including:

39 (a) predatory pricing;

40 (b) preferential, prejudicial, or disadvantageous treatment in the pricing or provisioning
41 of an essential facility or service;

42 (c) a material breach of:

43 (i) rules adopted by the commission under authority of this chapter regarding
44 carrier-to-carrier service quality standards;

45 (ii) a commission-approved interconnection agreement under Sections 251 and 252 of the
46 Federal Telecommunications Act; or

47 (iii) a statement of generally available terms under Section 252(f) of the Federal
48 Telecommunications Act; or

49 (d) a material violation of:

50 (i) the requirements of Subsection 54-8b-2.2(1)(b)(ii); or

51 (ii) the pricing requirement of Subsection 54-8b-3.3(3).

52 ~~(2)~~ (3) "Certificate" means a certificate of public convenience and necessity issued by
53 the commission authorizing a telecommunications corporation to provide specified public
54 telecommunications services within a defined geographic service territory in the state.

55 (4) "Competitive local exchange carrier" means a telecommunications corporation that:

56 (a) is authorized by the commission to provide public telecommunications service to retail
57 customers; and

58 (b) is not an incumbent telephone corporation.

59 ~~[(3)]~~ (5) "Division" means the Division of Public Utilities established in Section 54-4a-1.

60 ~~[(4)]~~ (6) "Essential facility or service" means any portion, component, or function of the
61 network or service offered by a provider of local exchange services:

62 (a) that is necessary for a competitor to provide a public telecommunications service;

63 (b) that cannot be reasonably duplicated; and

64 (c) for which there is no adequate economic alternative to the competitor in terms of
65 quality, quantity, and price.

66 ~~[(5)]~~ (7) "Federal Telecommunications Act" means the Federal Telecommunications Act
67 of 1996, Pub. L. No. 104-104, 110 Stat. 56.

68 ~~[(6)]~~ (8) "Incumbent telephone corporation" means a ~~[telephone]~~ telecommunications
69 corporation, its successors or assigns, which, as of May 1, 1995, held a certificate to provide local
70 exchange services in a defined geographic service territory in the state.

71 ~~[(7)]~~ (9) "Intrastate telecommunications service" means any public telecommunications
72 service in which the information transmitted originates and terminates within the boundaries of
73 this state.

74 ~~[(8)]~~ (10) "Local exchange service" means the provision of telephone lines to customers
75 with the associated transmission of two-way interactive, switched voice communication within the
76 geographic area encompassing one or more local communities as described in maps, tariffs, or rate
77 schedules filed with and approved by the commission.

78 ~~[(9)]~~ (11) (a) "New public telecommunications service" means a service offered by a
79 telecommunications corporation which that corporation has never offered before.

80 (b) "New public telecommunications service" does not include:

81 (i) a tariff, price list, or competitive contract that involves a new method of pricing any
82 existing public telecommunications service;

83 (ii) a package of public telecommunications services that includes an existing public
84 telecommunications service; or

85 (iii) a public telecommunications service that is a direct replacement for:

86 (A) a fully regulated service;

87 (B) an existing service offered pursuant to a tariff, price list, or competitive contract; or

88 (C) an essential facility or an essential service as defined in ~~[Section 54-8b-2]~~ this section.

89 ~~[(10)]~~ (12) "Operator assisted services" means services which assist callers in the

90 placement or charging of a telephone call, either through live intervention or automated
91 intervention.

92 ~~[(11)]~~ (13) "Operator service provider" means any person or entity that provides, for a fee
93 to a caller, operator assisted services.

94 ~~[(12)]~~ (14) "Price-regulated service" means any public telecommunications service
95 governed by Section 54-8b-2.3.

96 ~~[(13)]~~ (15) "Public telecommunications service" means the two-way transmission of signs,
97 signals, writing, images, sounds, messages, data, or other information of any nature by wire, radio,
98 lightwaves, or other electromagnetic means offered to the public generally.

99 (16) "Retail affiliate" means a telecommunications corporation created:

100 (a) by the competitive separation of an incumbent telephone corporation under Section
101 54-8b-19; and

102 (b) to provide public telecommunications service to retail customers.

103 ~~[(14)]~~ (17) "Same or substitutable" with reference to a public telecommunications service
104 means that the service is comparable to another service in terms of function, price, and quality to
105 an end user customer.

106 ~~[(15)]~~ (18) "Substantial compliance" with reference to a rule or order of the commission
107 means satisfaction of all material obligations in a manner consistent with the rule or order.

108 ~~[(16)]~~ (19) "Telecommunications corporation" means any corporation or person, and their
109 lessees, trustees, receivers, or trustees appointed by any court, owning, controlling, operating,
110 managing, or reselling a public telecommunications service.

111 ~~[(17)]~~ (20) "Total service long-run incremental cost" means the forward-looking
112 incremental cost to a telecommunications corporation caused by providing the entire quantity of
113 a public telecommunications service, network function, or group of public telecommunications
114 services or network functions, by using forward-looking technology, reasonably available, without
115 assuming relocation of existing plant and equipment. The "long-run" means a period of time long
116 enough so that cost estimates are based on the assumption that all inputs are variable.

117 (21) "Wholesale affiliate" means a telecommunications corporation created:

118 (a) by the competitive separation of an incumbent telephone corporation required under
119 Section 54-8b-19; and

120 (b) to provide wholesale public telecommunications service to competitive local exchange

121 carriers and the retail affiliate.

122 Section 2. Section **54-8b-17** is amended to read:

123 **54-8b-17. Procedures for enforcement of interconnection service quality -- Penalties**
124 **for violation -- Funds collected.**

125 (1) Proceedings under [~~Subsection~~] Subsections 54-8b-2.2(1)(e) and 54-8b-19(2) shall be
126 conducted in accordance with the following procedure:

127 (a) The complaint shall be served upon the defendant telecommunications corporation and
128 filed with the commission. A copy of the complaint shall also be served upon the Division of
129 Public Utilities.

130 (b) An answer or other responsive pleading to the complaint shall be filed with the
131 commission not more than ten days after receipt of service of the complaint. Copies of the answer
132 or responsive pleading shall be served on the complainant and the Division of Public Utilities.

133 (c) A prehearing conference shall be held not later than ten days after the complaint is
134 filed.

135 (d) (i) The commission shall commence a hearing on the complaint not later than 25 days
136 after the complaint is filed, unless the commission finds that extraordinary conditions exist that
137 warrant postponing the hearing date, in which case the commission shall commence the hearing
138 as soon as practicable.

139 (ii) Parties shall be entitled to present evidence as provided by the commission's rules.

140 (e) The commission shall take final action on a complaint not more than 45 days after the
141 complaint is filed unless:

142 (i) the commission finds that extraordinary conditions exist that warrant extending final
143 action, in which case the commission shall take final action as soon as practicable; or

144 (ii) the parties agree to an extension of final action by the commission.

145 (2) The commission shall have the enforcement powers listed in Subsection (3) if, in the
146 proceeding, the commission finds that:

147 (a) the telecommunications corporation has violated the terms of the commission's
148 interconnection service quality rules;

149 (b) the telecommunications corporation has breached its obligations under the provisions
150 of the Federal Telecommunications Act;

151 (c) either party to an approved interconnection agreement has violated the terms of the

152 agreement; or

153 (d) either party has violated the terms of a statement of generally available terms.

154 (3) If the commission makes any of the findings described in Subsection (2), the
155 commission shall:

156 (a) order the telecommunications corporation to:

157 (i) remedy the violation; and

158 (ii) comply, as applicable, with the terms of the commission's interconnection service
159 quality rules, the interconnection agreement, or statement of generally available terms;

160 (b) if considered appropriate by the commission, prescribe the specific actions that the
161 telecommunications corporation must take to remedy its violation, including a time frame for
162 compliance and the submission of a plan to prevent future violations;

163 (c) if considered appropriate by the commission, impose a penalty on the defendant
164 telecommunications corporation subject to the following:

165 (i) if the violation is of the duties imposed under Section 54-8b-2.2 or 54-8b-16, the
166 commission may impose a penalty for such violation as provided in Section 54-7-25; or

167 (ii) if the violating telecommunications corporation is other than an incumbent telephone
168 corporation with fewer than 50,000 access lines in this state, and the violation is of a duty imposed
169 under an interconnection agreement, a statement of generally available terms, or the obligations
170 of Section 251 of the Federal Telecommunications Act, the commission may impose a penalty
171 subject to the following:

172 (A) if the commission finds that the violation was willful or intentional, the penalty may
173 be in an amount of up to \$5,000 per day and the period for which the penalty is levied shall
174 commence on the date the commission finds the violation to have first occurred through and
175 including the date the violation is corrected; or

176 (B) if the commission finds that the violation was not willful or intentional, the penalty
177 may be in an amount prescribed by Section 54-7-25 and the period for which the penalty is levied
178 shall commence on the day after the deadline for compliance in the commission's order.

179 (4) (a) The commission shall have the authority, on its own or at the request of the injured
180 telecommunications corporation, to investigate a party's compliance with the commission's order
181 under Subsection (3)(c)(ii).

182 (b) If corrective or remedial action acceptable to the commission is not completed:

183 (i) 45 days after the deadline set by the commission, the commission may increase the
184 penalty up to \$10,000 per violation per day for a willful or intentional violation; or

185 (ii) 90 days after the deadline set by the commission, the commission may increase the
186 penalty up to \$4,000 per violation per day for a violation that is not willful or intentional.

187 (5) (a) The penalty under Subsection (3)(c) shall be in addition to, and not in lieu of, civil
188 damages or other remedies that may be available to the injured party.

189 (b) In determining the amount of the penalty or the amount agreed to in compromise, the
190 commission shall consider:

191 (i) the appropriateness of the penalty to the size of the violating party;

192 (ii) the gravity of the violation;

193 (iii) the good faith of the defendant telecommunications corporation in attempting to
194 achieve compliance after notification of the violation;

195 (iv) the impact of the violation to the establishment of competition; and

196 (v) the actual economic harm incurred by the plaintiff telecommunications corporation.

197 (c) Each day of a continuing violation or a failure to comply is a separate offense for
198 purposes of levying a penalty under this section.

199 (6) All funds collected under this section shall go into the Universal Public
200 Telecommunications Service Support Fund established under Section 54-8b-15, and shall be in
201 addition to any contributions required of a telecommunications corporation under that section.

202 Section 3. Section **54-8b-19** is enacted to read:

203 **54-8b-19. Complaint alleging anticompetitive conduct -- Proceedings -- Commission**
204 **order -- Competitive separation.**

205 (1) The Legislature finds and declares that:

206 (a) the Telecommunications Reform Act of 1995 and the Federal Telecommunications Act
207 of 1996:

208 (i) put in place a framework to achieve competition in local telecommunications markets
209 in the state; and

210 (ii) recognized that local exchange facilities are essential facilities and required incumbent
211 telephone corporations to open their networks to competition by interconnecting with and
212 providing network services to new entrants in a process to be overseen by federal regulators and
213 the commission;

214 (b) competitive carriers continue to experience great difficulty in gaining access to the
215 network of incumbent telephone corporations and, seven years after enactment of the
216 Telecommunications Reform Act of 1995, the dominant local exchange carrier in the state
217 continues to maintain dominant control over local access lines in its service territory;

218 (c) the incumbent telephone corporations do not have adequate incentives to open the local
219 exchange markets to competition, and the commission does not have adequate enforcement powers
220 to assure compliance with existing law, resulting in a situation where competition in the local
221 exchange markets of the state has not developed as rapidly as contemplated by the Legislature or
222 Congress;

223 (d) it is important for the well-being of the state to develop and maintain vibrant and
224 irreversible competition in the telecommunications market in the state;

225 (e) competition cannot be successful unless:

226 (i) all providers have nondiscriminatory access to essential facilities and services on terms
227 and conditions, including price, no less favorable than those an incumbent telephone corporation
228 provides to itself and its affiliates; and

229 (ii) the dominant carrier is prevented from engaging in conduct that is detrimental to the
230 development of competition;

231 (f) the wholesale prices for essential facilities and services must be regulated and based
232 on forward-looking costs that provide an expectation to investors that the competitive carriers will
233 not be competitively disadvantaged relative to the incumbent telephone corporation;

234 (g) retail pricing for telecommunications services should be driven by market forces and
235 not by regulation;

236 (h) development of fully competitive telecommunications markets in the state will ensure
237 that consumers receive the widest possible array of services at competitively determined retail
238 prices; and

239 (i) competition will promote and enhance the deployment of an advanced
240 telecommunications infrastructure to all segments of the market throughout the state, including
241 residential and rural areas.

242 (2) (a) A complaint alleging anticompetitive conduct on the part of an incumbent telephone
243 corporation may be filed with the commission by:

244 (i) the Division of Public Utilities; or

245 (ii) a competitive local exchange carrier.

246 (b) The commission shall resolve issues raised by a complaint under Subsection (2)(a) on
247 an expedited basis.

248 (c) Proceedings on a complaint under Subsection (2)(a) shall be conducted as provided in
249 Subsection 54-8b-17(1).

250 (3) (a) If the commission in a proceeding under Subsection (2) finds that the incumbent
251 telephone corporation has engaged in anticompetitive conduct, the commission shall:

252 (i) order the incumbent telephone corporation to cease the anticompetitive conduct;

253 (ii) if considered appropriate by the commission:

254 (A) prescribe specific actions that the incumbent telephone corporation is required to take
255 to remedy the anticompetitive conduct and a time frame for implementing the specific actions; and

256 (B) require the incumbent telephone corporation to submit a plan to the commission
257 specifying how the incumbent telephone corporation will prevent future anticompetitive conduct;

258 (iii) (A) for an incumbent telephone corporation that has not previously been found in a
259 proceeding under Subsection (2) to have engaged in anticompetitive conduct and if the
260 commission considers it appropriate, impose a penalty on the incumbent telephone corporation in
261 an amount not exceeding \$300,000 per day from the day the anticompetitive conduct began until
262 corrected;

263 (B) for an incumbent telephone corporation that has once previously been found in a
264 proceeding under Subsection (2) to have engaged in anticompetitive conduct, impose a penalty in
265 an amount that is double the penalty imposed for the previous anticompetitive conduct; and

266 (C) for an incumbent telephone corporation that has twice previously been found in
267 proceedings under Subsection (2) to have engaged in anticompetitive conduct;

268 (I) impose a penalty in an amount that is triple the penalty imposed for the first
269 anticompetitive conduct; and

270 (II) commence a competitive separation proceeding under Subsection (4).

271 (b) The commission's imposition of a penalty under this Subsection (3) does not preclude
272 an injured party from seeking civil remedies, including consequential and punitive damages, that
273 may be available to the injured party arising from a violation of the requirements of this chapter
274 or other law.

275 (4) (a) If the commission issues an order under Subsection (3)(a) finding that an incumbent

276 telephone corporation has for the third time engaged in anticompetitive conduct, the commission
277 shall open a docket to develop a plan to separate the incumbent telephone corporation's retail
278 operations from its wholesale operations as provided in this Subsection (4).

279 (b) At a minimum, the commission's plan under Subsection (4)(a):

280 (i) shall require the wholesale affiliate to:

281 (A) own and operate, as they existed before the effective date of the competitive
282 separation:

283 (I) all of the incumbent telephone corporation's network facilities; and

284 (II) all land, buildings, poles, conduits, and rights-of-way and building access on or in
285 which network facilities are located;

286 (B) file with the commission, within 60 days after the effective date of the competitive
287 separation, an amended schedule of generally available terms detailing the costs, terms, and
288 conditions under which a competitive local exchange carrier, including the retail affiliate, may
289 purchase or otherwise acquire essential facilities and services;

290 (C) make all products, services, and service functions, including network elements,
291 facilities, interfaces, and systems, available to each competitive local exchange carrier at the price,
292 terms, and conditions at which they are available to the retail affiliate; and

293 (D) make all products, services, and service functions available to the retail affiliate and
294 to competitive local exchange carriers through only a schedule of generally available terms
295 approved by the commission or an interconnection agreement approved by the commission;

296 (ii) may not permit the retail affiliate to own jointly with the wholesale affiliate any
297 network facilities or the land, buildings, poles, conduits, or rights-of-way or building access on or
298 in which network facilities are located;

299 (iii) shall:

300 (A) allow the retail affiliate to obtain essential facilities and services from the wholesale
301 affiliate under an interconnection agreement or a schedule of generally available terms on the same
302 terms and conditions as those facilities and services are made available to other competitive local
303 exchange carriers; and

304 (B) require all other transactions and agreements between the retail affiliate and the
305 wholesale affiliate to be:

306 (I) at arm's length;

- 307 (II) reduced to writing and available for public inspection; and
308 (III) effective only after approved by the commission, as provided in Subsection (4)(c);
309 (iv) shall require the wholesale affiliate and the retail affiliate to:
310 (A) operate completely independently from each other;
311 (B) maintain separate books, records, and accounts;
312 (C) have separate officers, directors, and employees; and
313 (D) operate from separate facilities and offices; and
314 (v) shall prohibit the wholesale affiliate from discriminating in favor of the retail affiliate
315 and the retail affiliate from discriminating in favor of the wholesale affiliate.
316 (c) The commission may not approve a transaction or agreement between the retail affiliate
317 and the wholesale affiliate under Subsection (4)(b)(iii)(B)(III) unless:
318 (i) all interested parties have had an opportunity to be heard; and
319 (ii) the commission finds that the transaction or agreement:
320 (A) does not discriminate against a competitive local exchange carrier; and
321 (B) will not result in any cross-subsidization between the retail affiliate and the wholesale
322 affiliate.
323 (d) The commission shall allow all interested parties a full opportunity to participate in a
324 proceeding under this Subsection (4) and to submit proposals and offer comments.
325 (e) Within 240 days after opening a docket under this Subsection (4), the commission shall
326 submit a proposed plan for competitive separation to the governor and present the proposed plan
327 to the Public Utilities and Technology Interim Committee of the Legislature.
328 (f) Before adopting an order implementing the plan for competitive separation, the
329 commission shall:
330 (i) allow the governor and the Public Utilities and Technology Interim Committee of the
331 Legislature adequate opportunity to comment on the plan for competitive separation and to make
332 recommendations for implementation of the plan; and
333 (ii) consider those comments and recommendations.
334 (g) In the order of competitive separation, the commission shall:
335 (i) establish a code of conduct governing the relationship between the retail affiliate and
336 the wholesale affiliate to ensure that:
337 (A) the retail affiliate is not given any undue preference or advantage in its relationship

338 with the wholesale affiliate; and

339 (B) all services provided by the wholesale affiliate to the retail affiliate are competitively
340 priced and provided in a nondiscriminatory manner as required by this section and other applicable
341 law;

342 (ii) include:

343 (A) the most rigorous performance standards, data validation procedures, and audit
344 requirements for interconnection agreements adopted by the Federal Communications Commission
345 or by the commission before the effective date of this section; and

346 (B) any new performance standards, data validation procedures, and audit requirements
347 needed to ensure full compliance with the requirements of this chapter for the opening of local
348 telecommunications markets to competition;

349 (iii) contain sufficient specificity to ensure that the standards, procedures, and
350 requirements identified in Subsection (4)(g)(ii) are quantifiable and sufficient to determine ongoing
351 compliance by the incumbent telephone corporation or its wholesale affiliate with the requirements
352 of their interconnection agreements, including the provision of operating support systems,
353 forecasting, special access, and customer service standards; and

354 (iv) adopt:

355 (A) a timeline for implementation of the competitive separation;

356 (B) streamlined procedures for review of transactions and agreements between the retail
357 affiliate and the wholesale affiliate;

358 (C) enforcement measures consistent with those imposed under Subsections (3)(a)(i) and
359 (ii) for violations of this section, including auditing requirements; and

360 (D) any other requirement or procedure necessary or appropriate to implement this section.

361 (5) This section does not apply to an incumbent telephone corporation that on May 6, 2002
362 has fewer than 50,000 access lines in the state.

Legislative Review Note

as of 1-28-02 11:04 AM

A limited legal review of this legislation raises no obvious constitutional or statutory concerns.

Office of Legislative Research and General Counsel