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## FISCAL IMPACT REPORT

ORIGINAL DATE 02/23/09

SPONSOR Ortiz y Pino LAST UPDATED \_\_\_\_\_ HB \_\_\_\_\_

SHORT TITLE Community Access To Media & Information Act SB 522

ANALYST Haug

### APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY09	FY10		
	NFI	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates HB 675

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Attorney General (AGO)

Public Education Department (PED)

### SUMMARY

#### Synopsis of Bill

Senate Bill 522 enacts the “Community Access to Media and Information Act” which imposes requirements on a local franchise authority (a city, town, county etc.) with regard to franchise agreements entered into with a corporation for the provision of communications, information and digital services to consumers. Those service providers could include cable television companies, telephone companies, Internet Service Providers etc.

The bill requires that a political subdivision that enters into a franchise agreement with a service provider shall require as a term of the agreement that no less than ten percent of the bandwidth and spectrum or channels, whichever may be greater, be made available for public use. The franchise agreement must include methods for the use of the bandwidth or spectrum by noncommercial agencies, organizations and institutions to provide communications and information. A telecommunications franchise agreement must also provide compensation of no less than five percent of the gross revenues of the service provider as determined by a “transparent audit mechanism”.

The bill requires a service provider, prior to entering into a franchise agreement, to conduct an assessment of the communication and information needs of the community, at its own expense. The results must be published as a matter of public record, and the political subdivision (usually the local franchise authority) must hold a hearing within ninety days of completion of the needs assessment.

The bill provides that an assignment of a franchise agreement is not valid unless the assignee assumes all of the obligations of the assignor and the political subdivision has approved the assignment.

The bill imposes certain minimum requirements for the contents of franchise agreements relating to public, educational, and governmental access, including requirements that no less than two and one-half percent of the annual gross revenues of the local service provider be passed through the political subdivision to the access management organization for general operations. The bill also provides that that no less than an additional one percent of gross revenues above franchise fees of the service provider be set aside for the provision of facilities and equipment, to be collected by the political subdivision and passed through to the public, educational and governmental access operation. Those funds must be distributed by the political subdivision among the access providers equitably in accordance with the demands upon their respective resources.

The bill defines “access management organization” to mean an entity contracted to provide the services of public, educational and governmental access. The bill provides that if the service provider also operates as the access management organization, the service provider shall establish clear administrative procedures to make equipment and channel time available to the community and shall state, on screen, that the public is watching an access channel. These requirements shall be specifically described in the franchise agreement and subject to regulation and approval by the local franchise authority. If a nonprofit organization operates as the access management organization, those obligations must be included in the contract between the political subdivision and the nonprofit organization.

The bill also mandates that cable and satellite services carry public, educational, and government access where they carry commercial channels.

The bill also requires that a communications and information service provider be capable of broadcasting emergency alerts in their systems.

The bill also provides that a cable system shall be deemed abandoned if a renewed franchise agreement has not been completed by the termination date of the existing franchise agreement unless a mutually agreed upon extension between the political subdivision and the service provider for continuation of negotiations has been reached

The bill requires diversity in programming and prohibits discrimination based upon race, religion, ethnicity, gender, age or sexual orientation.

The bill requires that the political subdivision and the service provider file a report each year with the Public Regulation Commission certifying compliance with this provision of the new Act.

The bill would allow any subscriber to the services included in the new Act to bring an action to enforce compliance with the Act.

### **FISCAL IMPLICATIONS**

Senate Bill 522 has no apparent fiscal implications.

### **SIGNIFICANT ISSUES**

The AGO states:

This bill imposes requirements on “local franchise authorities” (usually cities, towns, and counties) and “communications, information, and digital services” providers when those entities are negotiating franchise agreements for the provision of those services. It appears to dictate the terms of those agreements, even though the state is not a party and negotiations are conducted between the local franchise authority and the service provider.

Current state law does not regulate those agreements, or provide for “state-wide” franchise agreements. Federal law does not require that local franchise authorities mandate the provision of public, educational, or governmental access when negotiating those agreements. This bill would remove that discretion from the local franchise authorities.

Although the title of the bill refers to “Cable Television Franchise Agreements”, the phrase “cable television” is not used in the body of the bill. The bill’s broad definition of “service provider” could also include internet, satellite, radio, telephone, and other wireless or wired broadcast and information providers. However, the bill does impose public access requirements on “cable and satellite service” in Section 5. Satellite service could be limited to Internet access. Some of the bill’s requirements may not be practical regarding channel and bandwidth provision for public, educational, and governmental use may be difficult to implement by other mediums, such as telephone, radio, Internet access, etc, which are included in the bill’s broad definition of “service provider”. Given the title and the new Act’s requirements, this analysis assumes that the intent of the bill is to primarily regulate franchises for cable television.

The bill raises the issue of whether the state may usurp the discretion granted to local franchise authorities by federal law to negotiate the terms of a franchise for the provision of cable television to consumers and whether the state may enact a state law dictating terms and conditions in those franchise agreements. (See 47 U.S.C. Sections 521 to 561 describing the franchise process for cable communications providers and local franchise authorities.) This state does not have a “state-wide” franchise system in place. If it did, state law could presumably regulate state-wide franchise agreements, subject to federal law and Federal Communications Commission rulings. The bill only addresses local franchise agreements.

The Public Regulation Commission does not regulate cable television in New Mexico. See NMSA 63-9A-3M. This bill would impose a requirement on local franchise authorities and service providers to submit an annual report with that Commission certifying compliance with the terms of the new Act, but does not grant the Commission any authority to enforce its provisions.

If the state can impose its authority on local franchise authorities, as opposed to establishing state-wide franchises regulated by a state agency, the provisions in this bill will be reviewed to determine whether they are “reasonable”, and whether the denial of a franchise agreement by a local franchise authority because a service provider refuses to agree to the terms required by this bill could be deemed an “unreasonable refusal to award a franchise” under federal law and applicable Federal Communications Commission rulings.

The Federal Communications Commission has adopted an order providing guidance and setting restrictions on the process and requirements that local franchising authorities can employ when considering franchise applications from potential new cable service providers and incumbent cable providers. The FCC addressed the issue of local franchise authorities imposing unreasonable conditions during franchise negotiations. The order discussed a “needs assessment” imposed on Verizon, along with the extraction of unreasonable payments for public, educational, and government access. The FCC order prohibited unreasonable demands regarding public, educational, and governmental access as an “unreasonable refusal to award a franchise. See *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, Report and Order and Further Notice of Proposed Rulemaking, adopted December 20, 2006 and released March 5, 2007 (FCC Cable Franchising Report and Order), Sections 108,109, and 110.

That Order was upheld by the Sixth Circuit Court of Appeals in *Alliance for Community Media v. Federal Communications Commission*; (No. 05-311, 2008).

This bill will have to be reviewed in light of the FCC’s order and the decision of the Sixth Circuit Court of Appeals.

Federal law generally caps an allowable franchise fee at five percent of a cable operator’s gross revenues received during any twelve month period. 47 U.S.C 542(b). This bill requires that franchise agreements provide “no less than” that maximum franchise fee. It is unknown whether this requirement will result in the failure of negotiation for franchise agreements between local franchise authorities and service providers.

The bill also defines "access management organization" as an entity contracted to provide the services of public, educational and governmental access and requires the political subdivision (local franchise authority) to “pass through” two and one half percent of “gross revenues” of the service provider, collected by that political subdivision, to an “access management organization” for “general operations”. That amount must be included in the franchise fee under federal law, and therefore will result in a reduction of revenues available to the local franchising authority.

The bill also requires that the service provider pay an *additional* “one percent of gross revenues above franchise fees” to be “set aside” by the political subdivision, and also “passed through” to access management organization for the provision of facilities and equipment. These provisions may violate 47 U.S.C. Section 542 which regulates franchise fees that may be charged to cable communications (television) operators. In the case of any franchise granted *after* October 30, 1984, the definition of “franchise fee”

excludes *capital costs which are required by the franchise to be incurred by the cable operator* for public, educational, or governmental access facilities. 47 U.S.C. 542(g)(2)(C). The Federal Communications Order differentiated between “costs incurred in or associated with the construction of PEG access facilities,” which qualify as capital costs and therefore fall into the franchisee fee exclusion, and “payments in support of the use of PEG access facilities,” which do not qualify as capital costs and so are subject to the statutory cap on franchise fees. Salaries and training in support of the use of PEG access facilities fall into the latter category, for example, and so are counted toward the five percent limit. In any event, this bill dictates the amount of the franchise fee which must be paid by the service provider to the local franchising authority, effectively removing that issue from franchise agreement negotiations.

In addition, federal law, cited above, contemplates payments from a cable operator directly to a local franchise authority. Federal law does not appear to allow a state to require that a local franchise authority collect additional fees from a cable communications provider, based upon gross revenue of that provider, and then pass them through to a private contractor. The funds received by a political subdivision from the service provider would assume the character of “public funds”, and under this bill would not be based upon actual costs incurred by the local franchising authority in order to provide negotiated public, educational, and governmental access. This bill imposes minimum payment provisions in contracts between a political subdivision and a private organization and may also conflict with the Procurement Code (NMSA Section 13-1-28 et seq) which generally requires a competitive proposal process for such contracts.

Section 7 of the bill deems a “cable system” to be “abandoned” if a franchise terminates, and a new franchise has not been negotiated, unless an extension has been agreed to between the political subdivision and the service provider. If implemented, this could be construed as an unlawful “taking” by government of private property in violation of the Due Process Clause of the Fifth Amendment to the United States Constitution.

## **DUPLICATION**

Senate Bill 522 duplicates House Bill 675.

GH/mt:svb