Bill Analysis

Mary S. Connor *Legislative Service Commission*

Sub. H.B. 177*

123rd General Assembly

(As Reported by H. Public Utilities)

Reps. **Goodman, Mead, Tiberi, Olman, Roman, Taylor, Schuler, Metzger, Britton, Krupinski, Sullivan, Damschroder, Van Vyven, Jones, Allen, Boyd, Padgett, Opfer, Core, Jolivette, Terwilleger, Netzley, Gardner, Buchy, Thomas, O'Brien, Callender, Flannery, Grendell, Trakas, DePiero, Harris, Cates, Barrett, Bender, Pringle, Patton, Corbin, Jerse, Evans, Winkler, Austria, Myers, Hoops, Verich, Hartnett, Ogg, Hartley, Buehrer, Schuring, Krebs**

BILL SUMMARY

- In general, addresses "slamming" by prohibiting a person from changing a consumer's provider of natural gas or public telecommunications service, without first obtaining the consumer's consent.
- Establishes three primary approaches to slamming enforcement: enforcement by the Public Utilities Commission against the slamming of a consumer by a public utility; enforcement by the Attorney General under the Consumer Sales Practices Act against the slamming of a residential consumer by a nonutility; and enforcement by private right of action or local prosecution against slamming of any other consumer by a nonutility.
- Provides various remedies and penalties for slamming beyond those currently available under law, including criminal penalties.

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* *This analysis was prepared before the report of the House Public Utilities Committee appeared in the House Journal. Note that the list of co-sponsors and the legislative history may be incomplete.*

CONTENT AND OPERATION

Overview

In brief, the bill's focus is natural gas service and public telecommunications service. It addresses what is commonly known as "slamming," that is, switching a customer's service provider without prior authorization of the customer.

Generally, the bill establishes three approaches to slamming enforcement: enforcement against slamming of any consumer by a public utility, enforcement against slamming by a nonutility in connection with a consumer transaction (in effect, slamming of a residential consumer), and enforcement against slamming of any other consumer by a nonutility. These approaches are reflected respectively in what this analysis refers to as the "public utility portions of the bill" (secs. 4905.72, 4905.73, 4905.74, and 4905.99(D)), the "nonutility/residential consumer portions of the bill" (secs. 1345.01, 1345.02(E), and 1345.99(C)), and the "nonutility/nonresidential consumer portions of the bill" (secs. 1345.18, 1345.19, 1345.20, and 1345.99(C)).

The bill vests the Public Utilities Commission (PUCO) and the Attorney General (AG) with express authority regarding unauthorized switching of natural gas and public telecommunications service providers. The authority is complementary in the sense that the PUCO is empowered to enforce the bill against a violator that is a public utility, and the AG is empowered to enforce the bill against any nonutility.

The AG's enforcement authority arises from the Consumer Sales Practices Act, which, under existing law and the bill, applies to consumer transactions that are primarily personal, family, or household in nature. This, in effect, means that the AG's enforcement authority will be applied in slamming cases involving nonutilities and residential consumers of natural gas and public telecommunications services.

With respect to slamming cases involving nonutilities and other consumers, such as business consumers, the bill provides for enforcement by private right of action or by criminal prosecution.

Relative to current law, the bill retains the general division of authority that currently exists between the PUCO and the AG, but provides a broader range of enforcement mechanisms.

Current law

Under authority of existing Ohio public utility law, the PUCO has incorporated into its minimum telephone service standards a rule that addresses slamming (Rule No. 4901:5-06(A), Ohio Administrative Code; see *In the Matter of the Amendment of the Minimum Telephone Service Standards as Set Forth in Chapter 4901:1-5 of the Ohio Administrative Code*, Case No. 96-1175-TP-ORD (June 26, 1997)).

The current PUCO rule prohibits changing a subscriber's local exchange company or interchange carrier unless the change has first been confirmed in accordance with one of three procedures, which generally include (1) written subscriber authorization on a "letter of agency," (2) electronic authorization by a subscriber, and (3) appropriately qualified and independent third-party verification. Procedures (2) and (3) require follow-up with a letter of agency.

The PUCO rule further provides that any local exchange company or interexchange carrier that violates the rule's verification procedures and collects local service charges from a subscriber must rerate the subscriber's calls and is liable to the local exchange company or interexchange carrier previously selected by the subscriber in an amount equal to all charges paid by the subscriber after the violation.

The PUCO rule also states that the subscriber may file a complaint under existing Ohio public utility law (sec. 4905.26), and the PUCO may seek additional penalties and remedies against the offending company or carrier under sections 4905.54 and 4905.57 of the Revised Code and any other applicable statute. Sections 4905.54 and 4905.57 authorize the imposition of forfeitures not exceeding $1,000 for each day of a violation.

According to the PUCO and AG, the PUCO currently applies its slamming rule to facilities-based providers of telecommunications services and providers that lease facilities. Resellers of telecommunications services, who merely buy generic time but do not own or lease facilities to provide telecommunications service, currently are not subject to the PUCO rule, and the AG asserts jurisdiction over such resellers under the Consumer Sales Practices Law.

On the federal level, the Federal Communications Commission (FCC) has adopted rules requiring customer verification of orders for long-distance service generated by telemarketing (see 47 C.F.R. 64.1100 through 64.1190). The verification procedures specified are generally similar to those authorized by the PUCO rule, and various remedies and penalties are available.

Regarding the issue of slamming with respect to natural gas service, there are no current PUCO rules or guidelines, but the supplier participants in the PUCO-authorized "Gas Choice" program have reached an agreement among themselves that a customer will not begin natural gas service with a new supplier until the customer is released by its prior supplier.

The bill

Slamming by public utilities

The bill establishes general slamming prohibitions applicable to any public utility, as that term is defined in continuing Ohio public utility law (sec. 4905.02). It also establishes a prohibition regarding a persistent practice or pattern of conduct, which is discussed below under "***Criminal penalty for a persistent practice or pattern of slamming***." Under continuing Ohio public utility law, the act, omission, or failure of an officer, agent, or other individual, acting for or employed by another person, while acting within the scope of that authority or employment, is the act or failure of that other person (sec. 4905.55).

General slamming prohibitions. The bill prohibits a public utility from requesting or submitting, or causing to be requested or submitted, a change in the provider of natural gas or public telecommunications service to a consumer in Ohio, without first obtaining, or causing to be obtained, the consumer's verified consent in accordance with PUCO rules authorized under the bill (sec. 4905.72(B)(1)). The bill also prohibits a public utility from violating or failing to comply with any provision of such a PUCO rule or any provision of a PUCO order under the bill (sec. 4905.72(B)(2)).

Under the bill, the prohibitions do not apply to the transfer of a customer's natural gas service or public telecommunications service that occurs solely due to the operation of default provisions in the schedule of a public utility filed under continuing Ohio public utility law (sec. 4905.30) (sec. 4905.72(C)(1)). Additionally, the prohibitions do not apply to the transfer of a customer's commercial mobile radio service, consistent with an exclusion for providers of such service under federal regulations prescribing consent verification requirements. The bill's exclusion applies until such time as the federal exclusion no longer is in effect. The PUCO is then required to adopt rules applicable to a commercial radio mobile service transfer in accordance with the bill. (Sec. 4905.72(C)(2).)

For purposes of these slamming prohibitions, the bill defines "natural gas service" as the sale of natural gas, exclusive of any distribution or ancillary service (sec. 4905.72(A)(1)). It defines "public telecommunications service" as the transmission by a telephone company, by electromagnetic or other means, of signs, signals, writings, images, sounds, messages, or data originating in Ohio regardless of actual call routing, but excluding (1) a system (including its operation, maintenance, or operation) for the provision of telecommunications service, or any portion of that service, by an entity for the sole and exclusive use of that entity, its parent, a subsidiary, or an affiliated entity, and not for resale, directly or indirectly, (2) the provision of terminal equipment used to originate telecommunications service, (3) broadcast transmission by federally regulated radio, television, or satellite broadcast stations, or (4) cable television service (sec. 4905.72(A)(2)).

PUCO rule-making authority. The bill requires the PUCO to adopt competitively neutral rules prescribing procedures necessary for verifying the consent of a consumer for purposes of the slamming prohibitions, and any procedures necessary for the filing of a security as authorized under the bill and explained below in "***PUCO enforcement authority***." The bill also authorizes the PUCO to adopt such other competitively neutral rules as it considers necessary to carry out the public utility portions of the bill. With respect to public telecommunications service only, the rules prescribing procedures for verifying consumer consent must be consistent with specified federal rules (47 C.F.R. 64.1100 and 64.1150). (Sec. 4905.72(D).)

PUCO enforcement authority. The bill states that, upon complaint by any person or complaint or initiative of the PUCO, the PUCO has jurisdiction under continuing Ohio public utility law respecting complaints (sec. 4905.26) regarding a violation of the slamming prohibitions by a public utility (sec. 4905.73(A)).

The bill provides that, upon such a complaint or initiative, if the PUCO finds, after notice and hearing pursuant to the complaint law, that a public utility has violated a slamming prohibition, the PUCO, by order, must do all of the following:

(1) Rescind the aggrieved consumer's change in service provider;

(2) Require the public utility to absolve the aggrieved consumer of any liability for any charges assessed the consumer, or refund to the aggrieved consumer any charges collected from the consumer, by the public utility during the 30-day period after the violation or failure to comply occurred or, where appropriate, during such other period after that occurrence as determined reasonable by the PUCO;

(3) Require the public utility to refund or pay to the aggrieved consumer any fees paid or costs incurred by the consumer resulting from the change of the consumer's service provider or providers, or from the resumption of the consumer's service with the service provider or providers from which the consumer was switched;

(4) Require the public utility to make the consumer whole regarding any bonuses or benefits, such as airline mileage or product discounts, to which the consumer is entitled, by restoring bonuses or benefits the consumer lost as a result of the violation or failure to comply and providing bonuses or benefits the consumer would have earned if not for the violation or failure to comply, or by providing something of equal value. (Sec. 4905.73(B).)

Also, the bill provides the PUCO with additional remedies and forfeitures it may impose. Under these provisions, the PUCO may:

(1) Require the public utility to comply or undertake any necessary corrective action;

(2) Require the public utility to compensate the service provider or providers from which the aggrieved consumer was switched in the amount of all charges the consumer would have paid that particular service provider for the same or comparable service had the violation or failure to comply not occurred;

(3) Require the public utility to compensate the service provider or providers from which the aggrieved consumer was switched for any costs that the particular service provider incurs as a result of making the consumer whole as provided under the bill or effecting the resumption of the consumer's service;

(4) Assess upon the public utility forfeitures of not more than $1,000 for each day of each violation or failure to comply. However, if the PUCO finds that the public utility has engaged or is engaged in a pattern or practice of committing any such violations or failures to comply, it may assess forfeitures of not more than $5,000 for each day of each violation or failure.

(5) Require the public utility to file with the PUCO a security payable to the state of Ohio in such amount and upon such terms as the PUCO determines necessary to ensure compliance and payment of any forfeitures assessed;

(6) Rescind the public utility's authority to provide natural gas service or public telecommunications service within Ohio. (Sec. 4905.73(C).)

Enforcement proceedings of the PUCO under the bill are to be governed by continuing Ohio public utility law (Chapter 4903.) (sec. 4905.73(D)).

Additionally, the bill provides that any forfeiture collected under the public utility portions of the bill is deposited into the state treasury to the credit of the General Revenue Fund (sec. 4905.73(C)(4)). The PUCO may direct the AG to commence an action under Ohio public utility law (sec. 4905.57 or 4905.60) to enforce a PUCO order under the bill, including orders assessing forfeitures. Under the bill, the action may be brought in the Court of Common Pleas of Franklin County or the court of common pleas of any county in which venue is proper under the Rules of Civil Procedure. (Sec. 4905.73(E).)

Private right of action for treble damages. The bill provides that a specific remedy available under continuing Ohio public utility law (sec. 4905.61) may be applied to any violation of the bill's general slamming prohibitions applicable to public utilities (sec. 4905.73(F)). Under that continuing law, in the case of a violation, the public utility is liable to the person, firm, or corporation injured, in treble the amount of damages sustained (sec. 4905.61).

Criminal penalty for a persistent practice or pattern of slamming. The bill prohibits a public utility from knowingly engaging in a persistent practice or pattern of conduct of violating the general slamming prohibitions in the public utility portions of the bill (sec. 4905.74). Violation of a third degree misdemeanor is punishable, in the case of an individual, by imprisonment for not more than 60 days or a fine of not more than $500, or both, and punishable, in the case of an organization, by a fine of not more than $3,000 (sec. 2929.21(B)(3) and (C)(3); and sec. 2929.31(A)(10)).

Slamming by nonutilities against residential consumers

General slamming prohibition. The bill establishes a prohibition in the Consumer Sales Practices Act regarding slamming. Specifically, it prohibits a supplier, in connection with consumer transaction involving natural gas service or public telecommunications service to an Ohio consumer, from requesting, or submitting, or causing to be requested or submitted, a change in the consumer's provider of service, without first obtaining, or causing to be obtained, the consumer's verified consent. The bill provides that, for the purpose of the prohibition and with respect to public telecommunications service only, the procedures necessary for verifying consumer consent are those prescribed by PUCO rule under the public utility portions of the bill. Also, the bill expressly states that the act, omission, or failure of any officer, agent, or other individual, acting for or employed by another person, while acting within the scope of that authority or employment, is the act or failure of that other person. (Sec. 1345.02(E)(1).)

For purposes of this prohibition, the bill provides definitions of "natural gas service" and "public telecommunications service" that are identical to the definitions of those terms under the public utility portions of the bill, except that "public telecommunications service" means a transmission by someone other than a telephone company that is a public utility under Ohio public utility law (sec. 1345.01(F) and (G)).

Additionally, for purposes of the prohibition, "supplier," "consumer," and "consumer transaction" have the same meanings as under the Consumer Sales Practices Act. Accordingly, "supplier" is a seller, lessor, assignor, franchisor, or other person engaged in the business of effecting or soliciting consumer transactions, whether or not the person deals directly with the consumer (sec. 1345.01(C)). "Consumer" means a person who engaged in a consumer transaction with a supplier (sec. 1345.01(D)). "Consumer transaction" means a sale, lease, assignment, award by chance, or other transfer of an item of goods, a service, a franchise, or an intangible, to an individual for purposes that are primarily personal, family, or household; or solicitation to supply any of these things. Among transactions expressly exempted from the definition of "consumer transaction" are transactions between customers and a person--as the term "person" is defined in Ohio public utility law describing types of businesses qualifying as "public utilities," including telephone utilities and natural gas utilities (secs. 4905.02 and 4905.03). (Sec. 1345.01(A).)

AG enforcement authority. Through its amendment of the Consumer Sales Practices Act, the bill extends the AG's enforcement authority under that act to slamming by a nonutility in connection with a consumer transaction. The AG's authority includes investigative authority, authority to issue cease and desist orders, and authority to accept a written assurance of voluntary compliance. The AG also may act to obtain a declaratory judgment, a temporary restraining order, preliminary injunction, or permanent injunction and may seek imposition by a court of civil penalties of not more than $5,000 for each day of a violation of such an order or injunction. The AG also may bring class actions and may seek other remedies to make restitution to persons harmed or to obtain appropriate relief. In addition, the AG may initiate a process whereby any state license or permit of a violator is rescinded. (Secs. 1345.01 and 1345.02; secs. 1345.03 to 1345.13, not in the bill.)

Criminal penalties for a knowing violation involving a nonutility and a "consumer transaction." The bill additionally provides criminal penalties for a knowing violation of the prohibition against slamming by a nonutility in connection with a consumer transaction: a third degree misdemeanor for a first offense, and a misdemeanor of the second degree for a subsequent violation (sec. 1345.99(C)). Violation of a third degree misdemeanor is punishable, in the case of an individual, by imprisonment for not more than 60 days or a fine of not more than $500, or both, and punishable, in the case of an organization, by a fine of not more than $3,000 (sec. 2929.21(B)(3) and (C)(3); and sec. 2929.31(A)(10)). Violation of a second degree misdemeanor is punishable, in the case of an individual, by imprisonment for not more than 90 days and a fine of not more than $750, or both, and punishable, in the case of an organization, by a fine of not more than $4,000 (sec. 2929.21(B)(2) and (C)(2); and sec. 2929.31(A)(9)). Under continuing Ohio criminal law, a person acts "knowingly," regardless of the person's purpose, when the person is aware that his or her conduct will probably cause a certain result or will probably be of a certain nature; a person has knowledge of circumstances when the person is aware that such circumstances probably exist (sec. 2901.22(B)).

The bill provides that the AG may initiate criminal proceedings for the criminal prosecution by presenting evidence of a criminal violation to the prosecuting attorney of any county in which the offense may be prosecuted. If the prosecuting attorney does not prosecute the violation, or at the request of the prosecuting attorney, the AG may proceed in the prosecution with all the rights, privileges, and powers conferred by law on prosecuting attorneys, including the power to appear before grand juries and to interrogate witnesses before grand juries (sec. 1345.02(E)(2)).

Private right of action. By the bill's amendment of the Consumer Sales Practices Act to include the slamming prohibition pertaining to nonutilities and residential consumers, the consumer is expressly provided with a cause of action for a violation of the prohibition and is entitled to various types of relief, including rescission of the transaction within a reasonable time or recovery of damages (sec. 1345.09(A) and (C)). A consumer also may seek a declaratory judgment, injunction, or other appropriate relief (sec. 1345.09(D)). A prevailing party in an action may be awarded reasonable attorney's fees under specified circumstances (sec. 1345.09(F)).

Slamming by nonutilities against nonresidential consumers

General slamming prohibition. In the case of a consumer transaction for purposes that are primarily *other than* personal, family, or household, the bill establishes a slamming prohibition that is identical to the prohibition described above under "***Slamming by nonutilities against residential consumers; General slamming prohibition***." This prohibition includes the related provisions establishing verification procedures for public telecommunications service as those procedures are prescribed by PUCO rule and establishing liability for the act, omission, or failure of an individual when acting within the scope of his or her authority or employment. (Sec. 1345.18.)

Enforcement authority. Under the bill, an aggrieved consumer may bring an action for a declaratory judgment, an injunction, or other appropriate relief against a supplier that is violating or has violated the slamming prohibition applicable to nonutilities and nonresidential consumers (sec. 1345.20(A)), except that no such action may be brought more than two years after the occurrence of a violation (sec. 1345.20(C)). The bill provides the courts of common pleas, and municipal or county courts within their respective jurisdictions, with jurisdiction over any supplier with respect to a violation or any claim arising from a consumer transaction under the nonutility/nonresidential consumer portions of the bill (sec. 1345.19(A)).

Under the bill, the court may issue an order or enter a judgment as necessary to ensure compliance with the prohibition or prevent any act or practice that violates the prohibition. In addition, upon a preponderance of the evidence, the court must issue an order providing for all of the same remedies that are required under the public utility portions of the bill (as described in "***PUCO enforcement authority***," above), except that the nonutility/nonresidential consumer portions of the bill do not specify a 30-day period in which an aggrieved consumer is absolved of liability for charges; rather they authorize the court to specify a reasonable period. (Sec. 1345.20(A)(1).) In addition, the court may issue an order providing for two discretionary remedies that are identical to discretionary remedies authorized under the public utility portions of the bill: requiring corrective action and assessing forfeitures (as described in "***PUCO enforcement authority***," above). One-half of any collected forfeitures must be paid to the treasurer of the county in which the action was brought and one-half paid to the state treasury to the credit of the General Revenue Fund. (Sec. 1345.20(A)(2)(b).)

Further, upon a finding, in a private right of action, that a supplier is violating or has violated the slamming prohibition of the nonutility/nonresidential consumer portions of the bill, a service provider or providers of natural gas service or public telecommunications service from whom the aggrieved consumer was switched may seek either of the following types of relief (identical to the relief authorized in the public utility portions of the bill):

(1) Requiring the supplier to compensate the service provider or providers from which the aggrieved consumer was switched in the amount of all charges the consumer would have paid that particular service provider for the same or comparable service had the violation or failure to comply not occurred;

(2) Requiring the supplier to compensate the service provider or providers from which the aggrieved consumer was switched for any costs that the particular

service provider incurs as a result of making the consumer whole or of effecting the resumption of the consumer's service. (Sec. 1345.20(B).)

However, no such action may be brought more than one year after the date on which a ruling on a private action was rendered (sec. 1345.20(C)).

Criminal penalty. The bill provides criminal penalties for a violation of the slamming prohibitions under the nonutility/nonresidential consumer portions of the bill identical to the criminal penalties it provides in the nonutility/residential consumer portions of the bill, as described in "***Criminal penalties for a knowing violation involving a nonutility and a "consumer transaction"***," above (sec. 1345.99(C)).

Relationship of bill's enforcement provisions to other enforcement authority

The bill states that the powers, remedies, forfeitures, and penalties provided under the public utility portions of the bill and the nonutility/nonresidential portions are in addition to any other power, remedy, forfeiture, or penalty provided by law (secs. 1345.19(B) and 4905.73(G)). The existing Consumer Sales Practices Act provides that the remedies under that act are in addition to remedies otherwise available for the same conduct under state or local law; and that investigative and other procedures available to the AG are cumulative and concurrent, and the exercise of one procedure does not preclude or require the exercise of any other procedure (secs. 1345.06(G), 1345.07(H), and 1345.13).

HISTORY

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Introduced	02-16-99	p. 198
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