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(As Reported by S. Ways & Means)

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BILL SUMMARY

- 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 approaches to deter slamming: 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 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 Senate Ways and Means Committee appeared in the Senate Journal. Note that the list of co-sponsors and the legislative history may be incomplete.*

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CONTENT AND OPERATION

Overview

In brief, the bill's focus is on what is commonly known in the natural gas and telecommunications industries as "slamming"; that is, switching a customer's service provider without the customer's prior authorization.

Generally, the bill establishes three approaches to deter slamming: 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 PUCO's enforcement authority arises from its existing rules and the bill, which requires that the PUCO order a public utility that has slammed a consumer to undertake various actions to make the consumer whole.

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 expressly provides for enforcement by private right of action or by criminal prosecution.

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. 4901:1-5-06(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 PUCO rule prohibits changing a subscriber's local exchange company or interexchange 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, or (3) appropriately qualified and independent third-party verification. Procedures (2) and (3) require follow-up with an information package containing 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. Additionally, 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 existing law (secs. 4905.54 and 4905.57) and any other applicable statute. Those laws 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 against consumers

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 person, acting for or employed by a public utility, while acting within the scope of that authority or employment, is the act or failure of the public utility (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. 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).)

These 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 rate and service schedule of a public utility filed under continuing Ohio public utility law (sec. 4905.30). Additionally, the prohibitions do not apply to a provider of 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

the federal exclusion no longer is in effect. The PUCO is then required to adopt rules applicable to a commercial mobile radio service provider in accordance with the bill. (Sec. 4905.72(C).)

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. 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).)

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 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 provides 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 by a public utility of the bill's slamming prohibitions (sec. 4905.73(A)).

The bill requires 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 rescind the aggrieved consumer's change in service provider and require the public utility to do all of the following:

(1) 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;

(2) 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;

(3) 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).)

Further, 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 engaging 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.). Additionally, the bill provides that any forfeiture collected under the public utility portions of the bill must be deposited into the state treasury to the credit of the General Revenue Fund. 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 issued 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.)

Private right of action for treble damages. The bill provides that the remedy of treble damages, available under continuing Ohio public utility law, may be applied to any violation of the bill's general slamming prohibitions applicable to public utilities (sec. 4905.73(F)).

Criminal penalty for a persistent practice or pattern of slamming. The bill provides that a public utility knowingly engaging in a persistent practice or pattern of conduct of violating the general slamming prohibitions in the public utility portions of the bill is guilty of a third degree misdemeanor (sec. 4905.74).

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 nonutility supplier, in connection with a 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. 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).)

This prohibition does not apply to a provider of commercial mobile radio service, consistent with the exclusion of such providers from federal consent verification requirements. But when the federal exclusion is no longer in effect, the prohibition applies to a commercial mobile radio service provider, and the provider must verify consumer consent in accordance with the PUCO's rules. (Sec. 1345.02(E)(2).)

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).)

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 residential consumer transaction. The AG may investigate, issue cease and desist orders, and accept a written assurance of voluntary compliance. The AG 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, seek other remedies to make restitution to persons harmed or to obtain appropriate relief, and 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 prescribes 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)).

The bill provides that the AG may initiate criminal proceedings 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)(3).)

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 under existing law, including rescission of the transaction within a reasonable time or recovery of damages. A consumer also may seek a declaratory judgment, injunction, or other appropriate relief. A prevailing party in an action may be awarded reasonable attorney's fees under specified circumstances. (Sec. 1345.09, not in the bill.)

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 (including the exemption for commercial mobile radio service providers), 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 nonresidential 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 grants 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)).

The court may issue any order or enter a judgment as necessary to ensure compliance with the bill or prevent any act or practice that violates the bill's slamming 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. The court also 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).)

If a court finds, 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 bring an action to obtain compensation (1) 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, or (2) 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. A court can order this relief upon the filing of the action. (Sec. 1345.20(B).)

However, no such action may be brought more than one year after the date on which a ruling on the underlying 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 it are in addition to remedies otherwise available for the same conduct under state or local law, that investigative and other procedures available to the AG are cumulative and concurrent, and that 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

ACTION	DATE	JOURNAL ENTRY
Introduced	02-16-99	p. 198
Reported, H. Public Utilities	10-19-99	p. 1292
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