

## LEGAL REVIEW NOTE

**Bill No.:** HB 597

**LC#:** LC 3321, To Legal Review Copy, as of  
February 22, 2021

**Short Title:** An act providing for public service  
commission regulation of access software provider

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**Date:** February 22, 2021

### CONFORMITY WITH STATE AND FEDERAL CONSTITUTIONS

*As required pursuant to section 5-11-112(1)(c), MCA, it is the Legislative Services Division's statutory responsibility to conduct "legal review of draft bills". The comments noted below regarding conformity with state and federal constitutions are provided to assist the Legislature in making its own determination as to the constitutionality of the bill. The comments are based on an analysis of jurisdictionally relevant state and federal constitutional law as applied to the bill. The comments are not written for the purpose of influencing whether the bill should become law but are written to provide information relevant to the Legislature's consideration of this bill. The comments are not a formal legal opinion and are not a substitute for the judgment of the judiciary, which has the authority to determine the constitutionality of a law in the context of a specific case.*

*This review is intended to inform the bill draft requestor of potential constitutional conformity issues that may be raised by the bill as drafted. This review **IS NOT** dispositive of the issue of constitutional conformity and the general rule as repeatedly stated by the Montana Supreme Court is that an enactment of the Legislature is presumed to be constitutional unless it is proven beyond a reasonable doubt that the enactment is unconstitutional. See Alexander v. Bozeman Motors, Inc., 356 Mont. 439, 234 P.3d 880 (2010); Eklund v. Wheatland County, 351 Mont. 370, 212 P.3d 297 (2009); St. v. Pyette, 337 Mont. 265, 159 P.3d 232 (2007); and Elliott v. Dept. of Revenue, 334 Mont. 195, 146 P.3d 741 (2006).*

#### **Legal Reviewer Comments:**

HB 597, as drafted, may raise potential federal constitutional issues related to the Supremacy Clause under the United States Constitution, Article VI, clause 2, which provides that the United States Constitution, federal laws passed pursuant to the United States Constitution, and treaties made under the United States Constitution's authority constitute the supreme law of the land. Under the Supremacy Clause, if a conflict between state law and federal law exists,

federal law prevails. *California v. ARC America Corp.*, 490 U.S. 93 (1989), and *Jones v. Rath Packing*, 430 U.S. 519 (1977).

HB 597, as drafted, generally provides authority to the Public Service Commission to regulate a big technology communication corporation. The draft generally provides that a big technology communication corporation facilitates communication between persons on a national or international scale. The draft provides that the term includes social media companies, video or data hosting platforms, e-mail carriers, and other messaging facilitators.

HB 597 provides that the Public Service Commission has regulatory authority over a big technology communication corporation; specifically, the bill requires the Public Service Commission to conduct expedited proceedings relating to user disputes. The draft provides that user disputes include but are not limited to the big technology communication corporation postponing or refusing to transmit a message. Finally, the draft, in salient part, provides that the Public Service Commission may levy a fine against a big technology communication corporation for a consumer message that was postponed or refused contrary to the act.

Section 230(c)(2) of the federal Communications Decency Act provides what is commonly known as the "Good Samaritan" protections. Generally, this subsection protects operators of interactive computer services from civil liability in the removal or moderation of third-party material. The subsection provides that the interactive computer services may remove this material, even if constitutionally protected speech, as long as it is done in good faith. Section 230(c)(2) provides in full:

**(c) Protection for "Good Samaritan" blocking and screening of offensive material**

**(1) Treatment of publisher or speaker**

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

**(2) Civil liability**

No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

Finally, section 230 provides a provision relating to state law, generally stating that the act does not prevent states from enforcing any law that is consistent with section 230. However, section 230 also provides that no "cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section."

As applied, HB 597 could be viewed as potentially being inconsistent with the "Good Samaritan" clause because it would prohibit access software providers from moderating content.

While the draft uses its own definitions for a big technology communication corporation, it may nevertheless overlap with section 230's definition for an interactive computer service. Indeed, the federal definitions appear to encompass entities contemplated by HB 597's definition of a big technology communications corporation. Thus, HB 597, as drafted, may raise potential constitutional conformity issues with respect to the Supremacy Clause.

**Requester Comments:**