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Theresa Jensen
Director – Washington Regulatory Affairs
Policy and Law

April 24, 2001

Ms. Carole Washburn
Executive Secretary
Washington Utilities and
Transportation Commission
1300 S. Evergreen Park Drive S. W.
P. O. Box 47250
Olympia, Washington 98504-7250

Re: WAC 480-120-083 Emergency Rule

Attention: Bob Shirley and Glenn Blackmon

Dear Ms. Washburn:

On April 23, 2001, the Commission Staff issued an electronic notification that it intended to propose an emergency rule under RCW 34.05.350 at the April 25, 2001 open meeting. The notice stated that when the Commission proposes and adopts an emergency rule, the normal requirements for notice and comment do not apply and, if adopted, the emergency rule takes effect when filed with the Code Revisor. The notice invited interested parties to comment no later than 1:00 P.M. Tuesday, April 24, 2001. Qwest appreciates the opportunity to provide comments.

However, Qwest is most concerned that there has been no attempt to establish or define the emergency pressing the need for adoption of this proposed rule as part of the industry notice. Qwest understands through discussion with other industry members, that staff has suggested the emergency is driven by the recent media disclosure concerning the bankruptcy of Winstar Wireless, Inc. There may be other circumstances that are less public. There has been no demonstration by the Staff that the conditions exist as specified in RCW 34.05.350 that justify the extraordinary step of the adoption of a rule broadly affecting the telecommunications industry without notice or comment. There have been no decisions construing RCW 34.05.350. However, in RCW 34.05.001 the Legislature declared its intent that court decisions interpreting the APA in effect prior to July 1, 1989 remain in effect. In *Mauzy v. Gibbs*, 44 Wn. App. 625, 723 P. 2d 458 (Div. 2 1986) the Court of Appeals interpreted the predecessor to the current emergency rulemaking provision, RCW 34.04.030. In that case, the court invalidated a rule that had been adopted on an emergency basis because the agency had merely stated in a conclusory fashion that its order was necessary for the preservation of the public health, safety or general welfare and that observance of the requirements of notice and opportunity to present views on the proposed action would be contrary to the public interest. The court announced the test for reviewing agency determinations of emergency that have the effect of denying interested persons

any opportunity of notice and comment: “When an agency must announce its reasons for declaring an emergency that requires protection of the public health or welfare, and attempts to dispense with public notice and comment, the reasons should be truly emergent and persuasive to the reviewing court.” (44 Wn. App. at pp. 630, 631) The court specifically rejected the approach the agency took in that case, which is the same as that in the staff’s memo transmitting the text of the proposed rule, of merely parroting the language of the emergency rulemaking statute. (Id. at p. 632)

However, if the Commission staff is reacting to the recent media coverage of the potential bankruptcy of Winstar Wireless, what isn’t clear is what steps Winstar Wireless has already taken to inform their customers of their future plans. Nor is it clear whether such customers have arranged for alternative service, whether the customers of Winstar Wireless consider their service in jeopardy, or whether these same customers believe they should select their carrier as opposed to the proposal where the Commission designates their carrier without their approval. Also it has not been shared as to whether such customers have contacted the Commission concerning this issue and how such customers view the proposed rule. This is just a sample of the considerations that must be factored into a decision to proceed. Qwest respectfully requests the Commission staff respond to these questions prior to the April 25, 2001 open meeting. Qwest has attempted to contact Mr. Shirley to better understand the alleged emergency.

Qwest appreciates the Commission response to a very serious and pressing issue. In other states, Qwest has received calls from customers who have lost service because their provider no longer exists. However, these customers have decided to return to Qwest and were not forced to return to Qwest. Bankruptcy or business related decisions to exit a market may occur in a competitive market. The Commission should refrain from adopting rules designed to “save” customers who may choose an alternative provider, without customer or industry input to such rules or request for such rules.

However, should the Commission proceed with adopting the proposed emergency rules, Qwest respectfully suggests that such rules need to be reviewed for consistency with state and federal law. Unfortunately, due to the short notice interval, Qwest lawyers have not had time to complete such an analysis. Therefore, Qwest’s comments are limited to policy considerations at this time. Qwest respectfully requests the Commission proceed under normal rule procedures and not adopt an emergency rule without further consideration, legal review and customer input. Customer input should not be limited to only those customers affected by exiting carriers. Qwest may file supplemental comments should the Commission delay its decision to proceed.

Should the Commission decide to proceed, the proposed rule needs to be revised to address at least two scenarios that may occur in a competitive market. The first scenario involves a carrier who chooses to exit the market for business reasons. Verizon Northwest recently made this decision and exited the market in a very orderly fashion. GST also recently made this decision and retained customer service while they made a decision to sell their business to another provider.

The second scenario involves a carrier who has initiated bankruptcy action. While the Commission may desire to “protect” affected customers, the Commission may have very little

control. The proposed emergency rule as it relates to this scenario is anti-competitive, inconsistent with state statutes that promote diversity of supply and does little to protect customers. An example of this was recently witnessed in California when the Commission ordered a data local exchange carrier to continue service to its customers when that carrier could not financially do so. The Commission should refrain from adopting rules that attempt to address bankruptcy situations.

Following are more specific comments on the proposed rule:

Section 3:

Proposed section (3) requires at least thirty days notice prior to cessation of service. Qwest would suggest that thirty days may be an appropriate interval if more than one carrier provides service at the premises address. However, if the carrier ceasing service is the sole provider of service and is a facilities based provider, no other carrier can possibly provision facilities to provide service within thirty days. The permit for construction process itself rarely occurs in less than thirty days. Nor does the Commission have the legal authority to require the provider ceasing service to turn over its facilities or assets to another provider. Those assets belong to the exiting provider's creditors

When the carrier is the sole provider of service at the premises and no other carrier has facilities to such premises the notice requirement should be at least ninety days. The rule should further qualify the notice requirement based on the area demographics. For example, if the provider wishes to terminate service during winter months, in areas with municipality or governmental building restrictions, the requirement should be longer, perhaps 120 days.

Another consideration for revision to this rule section should be the carrier obligation to notify the commission prior to filing for bankruptcy, regardless of the thirty day interval.

Sections 6 and 7:

Proposed sections (6) and (7) need to be reviewed for consistency with bankruptcy law. Due to the limited nature of the interval to file comments, Qwest has not had time to review such laws as they may conflict or support the Commission's proposal. This clearly needs to occur prior to passage of this proposed rule.

Section 8:

Proposed section (8) should be eliminated. Absent total elimination, subsections a, b and c must be omitted. The proposed rules suggest the Commission must make decisions for customers. However, as previously stated, it is unclear as to whether customers would agree with such. The rule also implies the Commission will order a carrier to provide service, whether or not they have facilities in place to do so, and fails to address who will pay for such service.

If the Commission's intent is that service be provided for free for forty-five days to the exiting carrier's customers, the practical implication is that customers of the designated carrier will pay for such free service. Clearly, it is difficult to comprehend ratepayers supporting such a proposal. Especially ratepayers who do not have competitive choice as at some point they will carry the largest burden of such a state policy decision. Qwest respectfully suggests the

Commission refrain from such an approach until it has experience and a better understanding of consumer wishes.

If the Commission's intent is that the exiting carrier be liable for payment to the designated carrier, then bankruptcy laws clearly need to be reviewed for consistency and legality.

As stated previously by Qwest when Verizon chose to exit the market, including exiting areas where Qwest also offered service, we will provide service as expeditiously as possible to customers who select Qwest as their provider. The Commission should allow for the competitive market to operate as intended, as it did in the Verizon matter.

If you have any questions, I can be reached at 206-345-4726.

Very truly yours,

