

Agenda Date: May 9, 2001
Item Number: 2A

Docket: UT-010558
Company Name: All Telecommunications Companies Providing Local Exchange,
Private Branch Exchange, Centrex and Private Line Service

Staff: Bob Shirley, Telecommunications Analyst

Recommendation:

Adopt an emergency rule, WAC 480-120-083, concerning Cessation of Certain Telecommunications Services, and direct the Executive Secretary to file the rule immediately with the Code Reviser.

Procedural Background

This recommendation was first made by staff to the Commission at its Open Meeting of April 25, 2001. At that time, the Commission determined that it could not conclude an emergency existed, and continued this item to the May 9, 2001 Open Meeting.

Notice and comment are not required for adoption of an emergency rule, however, there has been substantial notice and comment related to the proposed emergency rule.

On April 20, 2001, the Commission included in its agenda for the April 25, 2001, Open Meeting notice of the intent to consider adoption of an emergency rule. The agenda was mailed and e-mailed to a list of interested persons maintained by the Commission. Also on April 20, 2001, interested persons were informed through a list-serve, broadcast e-mail of the appearance of this item on the Commission's agenda. That e-mail lead directly to publication on April 23, 2001, of a story on the subject by Telecommunications Reports' "TR State NewsWire," an electronic trade publication distributed widely across the country.

Commission staff also sent electronic notice to another list of persons interested in telecommunications issues. That notice, sent April 23, 2001, invited comment on the proposed emergency rule.

Comments were received from Qwest, Verizon, Public Counsel, Washington Independent Telephone Association, and the counsel for several competitive local exchange companies, including AT&T. The State 911 Coordinator commented as well.

At the Open Meeting of April 25, 2001, the Commission received approximately one hour of testimony from representatives of Verizon, Qwest, Public Counsel, and the Washington Independent Telephone Association.

In discussion after comment, on the record in a public meeting, the Commission indicated an interest in having this item return to its agenda on May 9, 2001.

On April 26, 2001, "*TR State NewsWire*" published a report on the Commission's decision to not adopt the rule and reported that "the commission will be asking for more comments, but no timeline has been set."

On April 30, 2001, Staff e-mailed a notice to interested parties of a workshop scheduled for May 8, 2001, for discussion of a revised emergency rule. The notice invited comments by 11:00 A.M., May 7, 2001.

The workshop notice was served by first-class mail on May 1, 2001, to three lists the Commission uses to inform interested persons of its rulemakings, workshops, and other issues of interest to those generally concerned with telecommunications. The notice was e-mailed the same day to appropriate staff at the Senate and House of Representatives, and the Governor's office.

Information concerning the planned workshop and opportunity to comment were distributed by list-serve e-mail on May 1, 2001.

Recommendation for Emergency Rule

The Staff recommendation for adoption of an emergency rule arises from recent cessations of telecommunications services and Staff's view that there is an increasing amount of evidence that one or more companies providing local exchange service will cease operations before a rule may be adopted through the usual notice and comment procedures. While it is unlikely that none of these companies will secure the necessary capital additions, it also is unlikely that all of them will do so. Over the past several months, technology companies of all types have found it increasingly difficult to raise capital necessary to fund their operations and growth. Telecommunications companies have been adversely affected from both the customer side and the supplier side. Customers such as Internet service providers and information-intensive "dot com" businesses have ceased operations or stopped paying their bills. Suppliers, including switch vendors, fiber optic suppliers, and long-haul transmission providers, have encountered their own financial problems and are less willing to provide equipment or services on credit.

One financial analyst last week assessed the industry as "a sector of similarly situated firms engaged in massive infrastructure build-outs financed largely by junk bonds. Many are running out of money and need to raise large amounts of new capital, radically restructure their balance sheets and/or file for protection under the bankruptcy code."¹ Another analyst concluded that only one in three companies have sufficient liquidity to fund their operations through the end of the year. Because there are an estimated 250,000 business lines served by companies in this sector (non-ILEC companies), the potential for disruption is considerable.

¹ http://www.thestreet.com/_yahoo/comment/riskarb/1413588.html; See also, <http://www.washingtonpost.com/wp-dyn/articles/A34927-2001May2.html>

While it stands to reason that sudden and unexpected loss of one's telephone service could be disruptive in many ways, Staff is most concerned with the possibility of customers suddenly losing the ability to contact emergency services via 911. This was the position of staff on April 25, 2001. The concern voiced at that time has been increased by two specific, recent events since the last Open Meeting.²

On April 27, 2001, Broadband Office Communications (BBOC), through its in-house counsel, contacted Staff to ask what, if anything, the company needed to do in advance of ceasing service to customers in Washington. BBOC has customers in Washington for both voice and data services. BBOC stated there was a possibility that it would cease providing service very soon.

On May 1, 2001, a staff member was contacted by an attorney with the firm of Cole, Raywid, and Braverman, Washington, D.C., on behalf of a telecommunications company providing voice and data services to "hundreds of customers" in Washington State. Once again, like the previous contacts made by Davis, Wright, Tremaine and BBOC, the request was for information about requirements to inform the Commission or take other actions before ceasing service.

These inquiries also indicate that at least some companies intending to cease service make an effort to determine which states require actions prior to cessation, and which states do not. As Staff stated at the April 25, 2001 Open Meeting, preservation of the public health, safety, and welfare would be aided by the existence of a notice requirement as proposed in the emergency rule.

Staff's Open Meeting memo for the April 25, 2001, Open Meeting listed several instances of service cessation affecting Washington customers, and reports related to bankruptcy and winding down that have the potential to affect customers here. The only change in that list relates to Avista Communications. We concluded from our contact with the company that Avista is in satisfactory financial shape. The parent company of Avista Communications has changed its business plan but it will not be ceasing telecommunications service.

Finally, as staff stated in the April 25th Open Meeting memo, we think it is as likely that a company may cease operations in one or more markets as it is that a company will simply close abruptly as NorthPoint did. A company attempting to shed the expense of a particular market would typically attempt to sell its customer base to another company,

² Staff first began preparing a new WAC section concerning cessation of service in February, 2001, prompted by the experience with Verizon Select's exit from the market in January, 2001. That draft rule was prepared as part of Docket UT-990146, the telecommunications general rulemaking begun in response to Executive Order 97-02, that required all agencies to review and revise rules in accordance with the Governor's order. Subsequent events, described in Staff's April 25, 2001, Open Meeting memo, and the events described in this memo, led staff to the conclusion that what had been perceived in February as only a problem, is now an emergency.

but that result cannot be guaranteed. Absent a notice rule, a company might cease its service without notifying its customers.

The Administrator of the Enhanced 911 Program has written that the prospect of companies ceasing service and leaving customers without access to 911, and leaving PSAPs without access to customer information from a company ceasing service is a critical concern.

When a company suddenly ceases to do business in Washington, customer lives can be endangered in two ways. If service ceases, the caller simply may not have 9-1-1 access. If the data services are endangered, either by loss of connectivity in some part of the data networks or by the update of customer records being discontinued, the caller may be able to dial 9-1-1 but the call may be misrouted or the data delivered to the PSAP may be incorrect. Both are conditions that obviously cannot be tolerated. They are both conditions where an operating company would take extraordinary steps to avoid and to remedy expeditiously if they should occur.

A telephone company ceasing to do business in Washington may not be able to continue the anticipated level of Enhanced 911 service. This is of critical concern to the State E-911 Program and we encourage the Commission to take steps as appropriate to assure that customers are not left without E-911 capability should regulated carriers discontinue service, either suddenly or on a deliberate basis. This includes both 9-1-1 dialing capability and the capability to assure that customer information and the data systems that support the data continue on a non-interruptible basis.

Letter from Robert G. Oening, Enhanced 911 Administrator, in support of the Emergency Rule, April 24, 2001.

Statutory Requirement for Adoption of an Emergency Rule

Adoption of an emergency rule permits the Commission to dispense with the usual notice and comment requirements, and results in a rule that becomes effective at the time it is filed with the Code Reviser. Such rules may be in effect for no more than 120 days after filing and may not be readopted unless conditions have changed or the Commission has filed a CR-101 notice and is actively undertaking procedures for permanent adoption of the rule.

An emergency rule may be adopted if the Commission finds for “good cause”:

That immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest[.]

RCW 34.05.350. The Commission, in its order of adoption, must concisely set out the facts that explain why an emergency exists.

The Washington APA's "contrary to the public interest" exemption from notice and comment procedures for rule making mirrors language found in the Federal Administrative Procedure Act,³ and other state administrative procedure acts. *See* A.E. Bonfield, *State Administrative Rule Making* § 6.8 (1986 and Supp. 1993). Bonfield discusses a number of cases in which state and federal courts have upheld emergency rule making in "situations in which the ability to act promptly is necessary for an agency to fulfill its lawful responsibilities." *Id.* at 6.8.3, p. 253. While there is but one reported case from the Washington Court of Appeals interpreting RCW 34.05.350,⁴ there are examples from other jurisdictions bearing out that an agency should be free to enact rules immediately when the delay occasioned by notice and comment procedures would prevent the rules from becoming effective as promptly as necessary to meet some kind of exigency, whether the threat be related to safety,⁵ as here, or even to less obviously compelling economic interests.⁶ The key to the appropriate use of an emergency rule would appear to be not so much in the gravity of the possible harm, as in the existence of

³ 5 U.S.C. § 553(b)(3)(B)(2000).

⁴ Mauzy v. Gibbs, 44 Wn. App. 625, 732 P.2d 458 (1968)(adoption of emergency rule did not comply with statutory procedures because agency failed to provide reasons for its finding that an emergency exists in the statement accompanying the rules).

⁵ United States Dep't of Justice, Attorney General's Manual on the Administrative Procedure Act 30-31 (1947) (an agency may learn from an accident investigation that rules related to air safety should be issued or amended without delay and may do so immediately without notice and public rule making procedures); House Committee on Government Operations, 85th Cong., 1st Sess., *Survey and Study of Administrative Organization, Procedure and Practice in the Federal Agencies* pt. 11C, at 1760 (Comm. Print 1957)(U.S. Dep't of Agriculture may modify animal or plant quarantines to prevent spread of disease without notice and comment).

⁶ RCW 34.05.350 itself provides one example of such an economic exigency—an agency is specifically permitted to adopt an emergency rule if it is necessary to do so to meet a deadline for receipt of federal funds; Pioneer Liquor Mart, Inc. v. Alcohol Beverages Control Comm'n, 350 Mass. 1, 9-10, 212 N.E.2d 549 (1965)(commission could promulgate liquor price schedules without notice and comment when necessary to have minimum price schedules in effect for next two months and commission deemed it essential to have minimum prices in effect during that period to meet its legal obligations); Reeves v. Simon, 507 F.2d 455, 457-58 (1974) (when some gas stations reacted to Arab Oil Embargo of 1973 by selling gas only to regular customers, Federal Energy Office was justified in issuing immediate order, without comment, prohibiting such discrimination); Durkin v. Edward S. Wagner Co., 115 F. Supp. 118 (E.D.N.Y. 1953)(Dept. of Labor justified in promulgating rule without notice and comment to include workers within certain wage regulations after a court ruling that had the effect of suddenly excluding such workers from those wage regulations and upsetting their reliance upon them); *Survey and Study of Administrative Organization, Procedure and Practice in the Federal Agencies*, *supra* (U.S. Dep't of Agriculture may order temporary rate schedules to avoid a reversion to rates that are unrealistic in light of existing economic conditions, or may change acreage allotments and marketing quotas so that farmers may be informed of them prior to planting).

facts demonstrating a genuine need for the agency to act quickly to meet a sudden and pressing circumstance within the ambit of the particular agency's jurisdiction.

It is Staff's view that present circumstances meet the standard for determining an emergency exists and that observing the normal statutory notice and comment requirements for a permanent rule would be contrary to the public interest.⁷

The context and circumstances surrounding this proposed emergency rule demonstrate the necessity for taking immediate action to preserve the public safety and to ensure that Washington consumers are afforded at least the opportunity to avoid an unexpected interruption to their basic telephone service. As outlined above, Staff believes that there is an increasing amount of evidence that one or more companies providing local exchange service will cease providing service to Washington customers before the commission is able to adopt a permanent customer notice rule for cessation of service. What companies will do as they wind up operations may depend on state requirements.

Because of the limited nature of the emergency exception to the APA's usual notice and comment procedures, the proposed emergency rule is correspondingly modest in its objective. The objective of the proposed emergency rule is to provide customers and the Commission with minimal information necessary to take actions, if warranted, that would lessen the possibility of an abrupt cessation of service that would leave customers without alternative service.

All telecommunications companies offering local exchange service, private branch exchange service (PBX), Centrex service, and private line service through a price list would come under the ambit of the proposed rule. The rule does not apply to services offered by tariff; termination of services provided for by the terms of a contract; discontinuance of service in compliance with WAC 480-120-081; and cessation of a service when the terminated service is replaced, without interruption, by a comparable service.⁸

A company providing the covered services would be required to:

- Provide service to customers until it complies with notice requirements of this rule.

⁷ At the April 25, 2001 Open Meeting there was considerable discussion about the Commission's choices, acting under the emergency provisions of the APA or the regular process. There is no middle ground in the APA, nevertheless, both before the April 25th Open Meeting and this one, Staff provided notice and opportunities for comment. The proposed rule today differs from that of April 25 in part because of the comments received prior to the April 25th Open Meeting, the comments at that meeting, and subsequent comments.

⁸ Services offered by tariff require a tariff filing to terminate them. Because a tariff cannot go into effect until thirty days have passed from the date of filing, and because the Commission can suspend a filing if necessary to protect the public interest, this emergency rule need not apply to tariffed services in order to be certain that customers and the Commission have notice of a companies intent to cease certain services.

- Provide written notice to customers of its intention to cease service at least 30 days before it ceases to provide service. The notice must include a telephone number customers may call for information that will assist the customer in establishing service with another company, i.e. customer service records and circuit identification information.
- Notify the Commission of intended cessation of service 30 days in advance and provide the number of customers affected and their location by exchange or county and city.
- Provide oral notice of intent to cease service to remaining customers between seven and five business days before ceasing service.
- Notify the Commission within 24 hours after ceasing service of the number of customers and their location for which no service change request was received.

Summary

Staff recommends adoption of the emergency rule, WAC 480-120-083, concerning Cessation of Certain Telecommunications Services, and that the Executive Secretary file it immediately with the Code Reviser.