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Details:

(FORM UPDATED: 07/12/2010)

WISCONSIN STATE LEGISLATURE ... PUBLIC HEARING - COMMITTEE RECORDS

2007-08

(session year)

Senate

(Assembly, Senate or Joint)

Committee on ... Commerce, Utilities and Rail (SC-CUR)

COMMITTEE NOTICES ...

- Committee Reports ... CR
- Executive Sessions ... ES
- Public Hearings ... PH
- Record of Comm. Proceedings ... RCP

INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL

- Appointments ... Appt
- Clearinghouse Rules ... CRule
- Hearing Records ... bills and resolutions
(ab = Assembly Bill) (ar = Assembly Resolution) (ajr = Assembly Joint Resolution)
(sb = Senate Bill) (sr = Senate Resolution) (sfr = Senate Joint Resolution)
- Miscellaneous ... Misc

Clearinghouse Rule 08-027

DATCP Docket No. 08-R-04
Rules Clearinghouse No. ____

Proposed Hearing Draft
March 19, 2008

**PROPOSED ORDER
OF THE WISCONSIN DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION
ADOPTING RULES**

1 The Wisconsin department of agriculture, trade and consumer protection hereby adopts
2 the following rule *to repeal and recreate* ATCP 123 (title) and 123.01; *to repeal* ATCP
3 123.14; *to amend* ch. ATCP 123(note), 123.02(1)(a)(note) and (5)(title) and (intro.),
4 123.04(1)(note) and (2)(f), 123.10(1), (3), (6) and (8), and 123.12(1)(b); *relating to*
5 electronic communication services offered to consumers.

**Analysis Prepared by the Department of Agriculture,
Trade and Consumer Protection**

The Department of Agriculture, Trade and Consumer Protection (DATCP) administers rules to protect consumers against unfair sales and billing practices related to telecommunications services, cable television services and satellite television services. Current rules are contained in ch. ATCP 123, Wis. Adm. Code.

This rule updates current rule coverage to reflect new service delivery methods and “bundling” practices, and to conform to law changes enacted in 2007 Wis. Act 42. This rule maintains current protection for video service subscribers, regardless of the method used to deliver the video service.

Statutes Interpreted

Statutes Interpreted: ss. 100.20 and 100.207, Wis. Stats.

Statutory Authority

Statutory Authority: ss. 93.07(1), 100.20(2), 100.207(6)(e) and 100.209(3), Wis. Stats.

Explanation of Statutory Authority

DATCP has general authority, under s. 93.07(1), Stats., to interpret laws under its jurisdiction. DATCP has authority, under s. 100.207, Stats., to regulate sales and billing practices related to telecommunications. DATCP also has broad authority, under s. 100.20, Stats., to regulate methods of competition and trade practices in business.

Related Rules or Statutes

The Wisconsin public service commission (PSC) regulates telecommunications service providers to the extent provided under chapter 196, Stats. The department of financial institutions (DFI) and local municipalities regulate video service providers to the extent provided in ch. 66, Stats.

2007 Wisconsin Act 42 changed the way that Wisconsin regulates cable television and other video services. The act provided for state, rather than local, franchising of video service providers. The act also changed prior definitions, and added a new definition of “video services.” This rule incorporates new statutory definitions, in order to maintain the coverage of current rules.

Rule Background

Current DATCP rules regulate unfair sales and billing practices related to telecommunications, cable television and satellite television provided to consumers on a subscription basis. The current rules do all of the following:

- Require providers to disclose subscription terms and conditions.
- Prohibit billing for unordered services.
- Prohibit the imposition of price increases without prior notice and opportunity to cancel.
- Prohibit unfair “negative option” billing practices.

Since DATCP adopted the current rules, business practices and technology have changed. For example, video services can now be delivered over telephone lines. Providers now offer “bundled” service packages that may include local telephone, long-distance telephone, wireless telephone, video, internet and other services. Consumers may receive a number of these services on one electronic device, and may receive one bill for all of the “bundled” services.

This rule updates current rule coverage to ensure that protection is afforded to video service consumers on an equal basis, regardless of the technology or method used to deliver the service. This rule does not make major changes in rule content, but does make minor content adjustments to address new service delivery methods and “bundling” practices.

Rule Content

This rule does all of the following:

- Retitles ch. ATCP 123 from “Telecommunications and Cable Television Services” to “Electronic Communication Services.”
- Defines “electronic communication service” to include telecommunications service, video service, broadband internet service and satellite television service provided on to consumers on a subscription basis. “Electronic communication service” also includes any good or service that a subscriber is required to purchase from the service provider in order to obtain the electronic communication service.
- Defines “video programming” and “video service,” consistent with current statutes.
- Changes “telecommunications service or cable television service” where it appears in the main body of the rule to “electronic communication service.”
- Changes other words in the rule text to reflect recent statutory definition changes (2007 Wisconsin Act 42).

Fiscal Impact

This rule will have no significant fiscal impact on DATCP or local units of government. A complete fiscal estimate is attached.

Business Impact

This rule will have few, if any, negative impacts on business. This rule simply updates the definitions and coverage of current rules to prevent the erosion of current consumer protection regulations. Some video service providers now use new electronic delivery methods that are not covered by current rules. This rule applies existing consumer protection standards to those new delivery methods, so that consumers will continue to enjoy protection. This rule will help maintain fair competition between video service providers, regardless of the delivery method used. None of the video service providers using the new electronic delivery methods are small businesses.

Federal and Surrounding State Regulations

Federal Regulations

Congress and the federal communications commission have significantly reduced federal regulation of telecommunications service and video services. The federal government has left, to state governments, much of the responsibility for regulating the business

1 and 100.207(6)(a), Stats.

2
3 Federal law recognizes that state administrative rules may under certain
4 circumstances be preempted by federal law or administrative action. It is
5 the position of the department that any provision of this rule which
6 specifically conflicts with any federal law which now exists, or is later
7 enacted or amended, would be superseded by the federal law.
8

9 **SECTION 3.** ATCP 123.01 is repealed and recreated to read:

10 **ATCP 123.01 Definitions.** In this chapter:

11 (1) “Appointed provider of long distance telecommunications services” means a
12 provider selected for a consumer according to procedures prescribed by the federal
13 communications commission after the consumer fails to select a provider.

14 (2) “Bill” means to represent to a consumer, directly or by implication, that the
15 consumer is obligated to pay a stated amount for electronic communication service
16 pursuant to an existing contract with the provider of that service.

17 (3) “Consumer” means any individual to whom a provider sells, leases, or offers
18 to sell or lease an electronic communication service primarily for personal, family or
19 household purposes.

20 (4) “Disclose” means to make a clear and conspicuous statement that is designed
21 to be readily noticed and understood by the consumer and, if the disclosure is made in
22 writing, which is designed to be retained by the consumer.

23 (5) “Electronic communication service” means telecommunications service,
24 video service, broadband internet service, service provided by a multichannel video
25 programming distributor as defined under 47 USC 522(13), or other service that allows a
26 subscriber to send or receive voice, data, video programming or other information over
27 the electromagnetic spectrum. “Electronic communication service” includes the

1 collection, storage, forwarding, switching and delivery of information incidental to the
2 electronic communication service, and includes final stage receiving devices, equipment,
3 goods or services provided for any of those purposes as part of the electronic
4 communication service. "Electronic communication service" also includes goods or
5 services of any kind that a subscriber is required to purchase or lease from the electronic
6 communication service provider in order to receive the electronic communication service.

7 "Electronic communication service" does not include any of the following:

8 (a) Broadcast service as defined in s. 196.01(1m), Stats.

9 (b) An internet service, such as a dial-up internet service, that includes collection,
10 storage, forwarding or switching services but does not include electronic transmission of
11 information.

12 (c) Transmission of information by means of non-electronic media such as hard-
13 copy newspapers or magazines.

14 **(6)** "Final stage receiving device" means a device that transforms an electronic
15 signal into a user-recognizable service used by a consumer. "Final stage receiving
16 device" includes a telephone, cellular phone, computer, television, and any combination
17 of these devices, regardless of size or shape.

18 **(7)** "Individual" means a human being.

19 **(8)** "Long distance telecommunications service" means a long distance toll
20 service provided on a direct-dialed, single message, dial-1 basis between local exchanges.

21 **(9)** "Person" means an individual, corporation, cooperative, partnership, limited
22 liability company, business trust, or business association or entity.

1 **(10)** “Provider” means a person that sells, resells, leases, or offers to sell, resell or
2 lease an electronic communication service to consumers. “Provider” includes an
3 employee or agent that is authorized to act on behalf of and in the name of a provider.

4 *NOTE:* For example, “provider” includes a telemarketer or other person who sells
5 electronic communication service on behalf of and in the name of a
6 provider.
7

8 **(11)** “Service offering” means an electronic communication service that is
9 offered under a single name or at a single price. A “service offering” includes a category
10 of electronic communication service for which a separate rate is charged by the provider.

11 **(12)** “Subscribe” means to enter into a subscription.

12 **(13)** “Subscription” means a contract between a provider and a consumer for an
13 electronic communication service that is provided or billed to the consumer on a
14 continuing or periodic basis. “Subscription” includes an oral, written or electronically
15 recorded contract, and includes any material amendment to an existing contract.

16 **(14)** “Telecommunications service” has the meaning given in s. 196.01(9m),
17 Stats.

18 **(15)** “Video programming” has the meaning given in s. 66.0420(1)(x), Stats.

19 **(16)** “Video service” has the meaning given in s. 66.0420(1)(y), Stats.

20 **(17)** “Written” or “in writing” means legibly printed on a tangible non-electronic
21 medium, such as paper, which is delivered to a consumer, or legibly printed in electronic
22 form on a television screen or computer monitor if the consumer can readily retrieve,
23 store or print the video image for future reference. “Written” or “in writing” does not
24 include presentation on a medium, such as a billboard, which cannot be conveniently
25 retained by a consumer.

1 **SECTION 4.** ATCP 123.02(1)(a)(note) is amended to read:

2 **NOTE:** For example, the identification of a ~~cable television~~ video service tier
3 offering should identify the channels ~~which that~~ comprise that tier the
4 offering.

5
6 **SECTION 5.** ATCP 123.02(5)(title) and (intro.) are amended to read:

7 ATCP 123.02(5)(title) ~~PAY-PER-VIEW CABLE TELEVISION~~ VIDEO PROGRAMMING
8 CHARGES; EXEMPTION. A provider of pay-per-view ~~cable television service need~~ video
9 programming is not required to disclose per-view charges under sub. (1) if all of the
10 following apply:

11 **SECTION 6.** ATCP 123.04(1)(note) and (2)(f) are amended to read:

12 **NOTE:** Section ~~134.42(2)~~ 100.209(2)(c), Stats., requires a ~~cable television~~
13 multichannel video provider to give a consumer at least 30 days ~~advanced~~
14 advance written notice before deleting a service or instituting a rate
15 increase. ~~47 USC 76.309 (3) (i) (B) requires a cable television provider to~~
16 ~~give consumers a 30-day advance notice of any changes in rates or~~
17 ~~services regulated under 47 USC 543.~~

18
19 (2)(f) The subscription change is limited to a change in pay-per-view ~~cable~~
20 ~~television~~ video programming charges that are exempt from disclosure under s. ATCP
21 123.02(5).

22 **SECTION 8.** ATCP 123.10(1), (3), (6) and (8) are amended to read:

23 ATCP 123.10(1) Offer to a consumer any prize, prize opportunity, or free or
24 reduced price goods or services whose receipt is conditioned upon an agreement to
25 purchase or lease ~~telecommunications services or cable television services~~ an electronic
26 communication service unless the provider discloses that a purchase ~~is required~~ or lease
27 requirement in connection with every public announcement or advertisement of the prize,
28 prize opportunity, or free or reduced price goods or services.

1 (3) Misrepresent that a consumer has subscribed to or received a
2 ~~telecommunications service or cable television service~~ an electronic communication
3 service.

4 (6) Fail to honor, on a timely basis, a consumer's request to cancel a
5 ~~telecommunications service or cable television service~~ an electronic communication
6 service according to this chapter and the terms of the subscription for that service.

7 (8) Bill a consumer for ~~telecommunications services or cable television services~~
8 an electronic communication service in violation of this chapter.

9 **SECTION 12.** ATCP 123.12(1)(b) is amended to read:

10 ATCP 123.12(1)(b) A subscription change ~~which~~ that a provider of
11 telecommunications provider service implements by means of a tariff under ch. 196,
12 Stats., other than a tariff change under s. 196.196(3) or 196.499(2), Stats.

13 **SECTION 13.** ATCP 123.14 is repealed.

SECTION 14. EFFECTIVE DATE: This rule takes effect on the first day of the
month following publication in the Wisconsin administrative register, as provided in s.
227.22 (2) (intro.), Stats.

Dated this _____ day of _____, _____.

STATE OF WISCONSIN
DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION

By _____
Rodney J. Nilsestuen, Secretary

Wisconsin Department of Agriculture, Trade and Consumer Protection

Business Impact Analysis

Rule Subject: **Electronic Communication Service**
Adm. Code Reference: **ATCP 123**
Rules Clearinghouse #: **Not yet assigned**
DATCP Docket #: **08-R-04**

Background

The Department of Agriculture, Trade and Consumer Protection (DATCP) currently regulates sales and billing practices related to telecommunications, cable television and satellite television provided to consumers on a subscription basis. Current rules are contained in ch. ATCP 123, Wis. Adm. Code. The current rules do all of the following:

- Require providers to disclose subscription terms and conditions.
- Prohibit billing for unordered services.
- Prohibit the imposition of price increases without prior notice and opportunity to cancel.
- Prohibit unfair “negative option” billing practices.

Since DATCP adopted the current rules, business practices and technology have changed. For example, video services can now be delivered over telephone lines. Providers now offer “bundled” service packages that may include local telephone, long-distance telephone, wireless telephone, video, internet and other services. Consumers may receive a number of these services on one electronic device, and may receive one bill for all of the “bundled” services.

This rule updates current rule coverage to ensure that protection is afforded to video service consumers on an equal basis, regardless of the technology or method used to deliver the service. This rule does not make major changes in rule content, but does make minor content adjustments to address new service delivery methods and “bundling” practices. This rule also incorporates new statutory definitions created by 2007 Wis. Act 42.

Rule Content

This rule does all of the following:

- Retitles ch. ATCP 123 from “Telecommunications and Cable Television Services” to “Electronic Communication Services.”

- Defines “electronic communication service” to include telecommunications service, video service, broadband internet service and satellite television service provided to consumers on a subscription basis. “Electronic communication service” also includes any good or service that a subscriber is required to purchase from the service provider in order to obtain the electronic communication service.
- Defines “video programming” and “video service,” consistent with current statutes.
- Changes “telecommunications service or cable television service” where it appears in the main body of the rule to “electronic communication service.”
- Changes other words in the rule text to reflect recent statutory definition changes (2007 Wisconsin Act 42).

Business Impact

This rule will have few, if any, negative impacts on business. This rule simply updates the definitions and coverage of current rules to prevent the erosion of current consumer protection regulations. Some video service providers now use new electronic delivery methods that are not covered by current rules. This rule applies existing consumer protection standards to those new delivery methods, so that consumers will continue to enjoy protection. This rule will help maintain fair competition between video service providers, regardless of the delivery method used. None of the video service providers using the new electronic delivery methods are small businesses.

Steps to Assist Small Business

None of the businesses affected by this rule are “small businesses.” This rule does not make special exceptions for “small businesses.”

Conclusion

This rule will help maintain fair competition between competing businesses and will have few, if any, negative effects on business. This rule will have no effect on “small business,” and is not subject to the delayed “small business” effective date provided in s. 227.22(2)(e), Stats.

Dated this _____ day of _____, 2008

STATE OF WISCONSIN
DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION

By _____
Janet Jenkins, Administrator,
Division of Trade & Consumer Protection



State of Wisconsin
Jim Doyle, Governor

Department of Agriculture, Trade and Consumer Protection
Rod Nilsestuen, Secretary

DATE: April 9, 2008

TO: Wisconsin Legislative Council
Rules Clearinghouse
1 East Main Street, Room 401
Madison, WI 53702

FROM: James Matson
Office of Legal Counsel
(608)224-5022

SUBJECT: **Electronic Communication Services; Hearing Draft Rule**

The Department of Agriculture, Trade and Consumer Protection is referring the above rule for Rules Clearinghouse review, pursuant to s. 227.15, Stats. The Board of Agriculture, Trade and Consumer Protection has approved this rule for public hearing, but the department will not hold any hearing until the Rules Clearinghouse completes its review. The proposed rule, plain language analysis including small business analysis, and a fiscal estimate are attached.

If you have any questions, you may contact Michelle Reinen, Division of Trade and Consumer Protection at (608)224-5160.

Enclosures

Cc: Michelle Reinen
David Ghilardi
File

Agriculture generates \$51.5 billion for Wisconsin





TO: WSTA Regulatory and Accounting Committee Members
FROM: Brian Rybarik, WSTA
DATE: August 8, 2008
RE: DATCP Board Action on ATCP 123 Rules

SUMMARY

On August 6th, the Department of Agriculture, Trade and Consumer Protection Board voted to approve a set of proposed rules relating to specific consumer protections for telecommunications service and video service customers. Over the objections of the industry, the approved rules specifically cover (for the first time) “internet access services” as well as “telecommunications” and “video” services.

This change is unlikely to establish any major practical concerns (i.e., compliance with the rule requirements do not appear to be significantly burdensome). However, there is a major concern with the Department taking jurisdiction over services without legislative authority. WSTA is in the process of identifying a strategy to bring these issues to light at the legislature before the rules go into effect.

BACKGROUND

In the wake of 2007 Wisconsin Act 42 (the video franchise reform legislation), the Wisconsin Department of Agriculture, Trade and Consumer Protection (“DATCP”) undertook at rulemaking docket to update the rules found in Wis. Admin. Code ch. ATCP 123. Prior to Act 42, these rules established specific consumer protection standards for the provision of “telecommunications and cable television services.” Act 42 modified some definitions, creating the term “video service provider” to encompass all types of video providers, including traditional cable television systems and IPTV systems.

As the rulemaking process moved forward, however, it became clear that the revisions to ATCP 123 would not be limited to the ministerial definition changes required by the new law. The early drafts of the rules sought to include the provision of “broadband internet service” within the requirements of ATCP 123. This proposed change would require that companies providing “broadband internet access services” provide specific disclosures and notices to their customers. As is

noted below, the practical impacts of this change may not be great, but there is a major concern about DATCP's desire to include these services without a specific directive from the Legislature to do so.

DATCP's proposed expansion of its own jurisdiction received significant attention from the telecommunications/video/internet access industry. Given these concerns, the following parties filed comments on this issue:

- **WSTA**: WSTA's comments identified concerns with the inclusion of "broadband internet access" because it is outside the scope of the agency's jurisdiction, which only includes "telecommunications services." Since internet access services (particularly broadband) are "information services" under FCC precedent, the agency was acting outside of its jurisdictional limits.

WSTA also asked that the definition of "final stage receiving device" be removed from the definition of "electronic communication service" because it appeared to mix the provision of goods and services into one definition.

- **VERIZON**: Verizon also identified concerns with the inclusion of "broadband internet access service" in the rule because those services have been definitively declared to be "information services" by the FCC. Verizon requested that this definition be deleted from the rule.

- **SENATOR PLALE AND REPRESENTATIVE MONTGOMERY**: WSTA worked with the two authors of Act 42 and encouraged them to file comments on this rule. They co-signed a letter that stated that DATCP's jurisdiction over broadband service "needs to come from the legislature if it is determined to be in the best interest of Wisconsin citizens."

- **AT&T**: AT&T argued that the changes in the rule went well beyond the ministerial changes required by Act 42. Including internet access services in their view is a "significant policy shift that...deserves to be vetted through the full legislative process."

Also, AT&T believed that the inclusion of "final stage receiving device" in the definition of "electronic communication service" caused significant ambiguity as to what the rule was intended to cover.

- **WISCONSIN CABLE COMMUNICATIONS ASSOCIATION ("WCCA")**: The WCCA also "filed" comments addressing similar concerns on the broadband internet access issue. However, apparently based on some technical glitch, those comments were not received by the June 13th comment deadline.

Subsequent to the comment filing deadline, DATCP contacted the WSTA asking us to participate in an "advisory committee" on this rule. Under Wisconsin statutes, an advisory group is *required* before the Department may promulgate a rule relating to telecommunications or video services. Wis. Stat. § 100.207(6)(em). The statute requires the following:

“Before preparing any proposed rule under this section [note this is Wis. Stat. § 100.207, relating to telecommunications], the department shall form an advisory group to suggest recommendations regarding the content and the scope of the proposed rule. The advisory group shall consist of one or more persons who may be affected by the proposed rule, a representative from the department of Justice and a representative from the public service commission.”

Wis. Stat. § 100.207(6)(em). Importantly, the Department formed this advisory group *after* the proposed rule was made available for comment and *after* the parties had filed comments. The major content and scope of the rule was already determined. Additionally, WSTA learned that we were the only party invited to the table, and other companies that filed comments (AT&T, Verizon and the WCCA) would not be allowed to participate. The action taken by DATCP staff is not consistent with the letter nor the spirit of the law.

Along with the invitation to participate in the advisory group, DATCP staff provided a new version of the rule that incorporated revisions based on the filed comments. The new version of the rule removed the definition of “broadband internet access,” and replaced it with the more generic term “internet access services.” While this was framed as a response to our concerns, it actually made the problem worse because the definition was even more expansive. Additionally, the redrafted rules continued to include the term “final stage receiving device” within the definition of “electronic communication service.”

On July 17th, I participated in the advisory group meeting. Representatives from Verizon, AT&T and the WCCA were present, but were not allowed to participate. I reiterated our concerns with the rule, however DATCP staff insisted that they had general jurisdiction to include “internet access” in the rule. It was clear that they would not waiver from this position.

At the conclusion of the advisory group meeting, DATCP staff informed me that there would be an opportunity to address our issues before the DATCP Board, which would be taking the proposed rules up at its August 6th meeting. DATCP staff sent materials to the DATCP Board on July 23rd. The information include a third version of the rules, which continued to include references to “internet access services,” However this version removed the references to “final stage receiving device” in the definition of “electronic communications service.”

DATCP BORAD ACTION 8/6/08

DATCP Board Information

DATCP’s policy-making procedures are a little different than other agencies. The official policy-making power is placed in a nine-person board of citizen appointees. The Board members are appointed by the Governor and approved by the Legislature. Board members serve six-year terms.

The board membership is fairly broad, ranging from farmers to a former state Senator. The agenda before the board is also very diverse. Aside from the telecommunications rules in ATCP 123,

the Board also addressed rules relating to agriculture safety, animal health and disease control and invasive species.

Telecommunication Provider Participation Before the Board

WSTA, Verizon, AT&T and the WCCA all appeared at August 6th DATCP Board meeting to make another appeal on the internet access issue. Each of us took turns identifying our concerns with the process and the content of the rule. Specifically, we each reiterated¹ that DATCP's jurisdiction is over "telecommunications services," which, under established precedent does not include internet access services. We each stated that a policy shift of this nature needs to be initiated by the Legislature, not by the agency.

Finally, WSTA, Verizon and WCCA each identified serious concerns with the process the agency used. WCCA even noted that when ATCP 123 was initially created, there was significant outreach by the agency to obtain input from a variety of parties. AT&T did not address the process issue, since they had been part of "informal" meetings with DATCP staff.

During our presentations we each had to admit that the practical impact of the rules was not overwhelming. The disclosures and notices required by the rule do not impose major burdens on companies providing internet access services. Further, because many WSTA members provide internet access services as part of a bundle of services that include "telecommunications services" or "video services," the practical reality is that our members already abide by the requirements of the rule.

These relatively modest practical concerns should not overshadow the philosophical concerns. Specifically, there is concern that the agency has little regard for industry concerns, its own processes or legislative input. This appears to be a classic case of agency staff taking policy positions based on their own political desires rather than operating within the framework established by the Legislature. Each of us stressed that major policy shifts like these are even more suspect when the DACTP staff try to keep people out of the process, rather than encouraging more participation and comment on their proposals.

DATCP Staff Participation Before the Board

After a break for lunch, the DATCP Board reconvened to discuss the ATCP 123 rules. DATCP staff had the opportunity to address the concerns raised with the rule and the process. They identified that the controversial components of the proposed rule were drafted under the jurisdiction provided by 1993 Wisconsin Act 496, not the more recent video legislation. This appears to be a revisionist history of the process, since the original notice in the proceeding identified that changes were made in reaction to Act 42 along with other definitional updates.

¹ I use the term "reiterated" because I believed that the Board was privy to all of our filed comments, which spelled these issues out in detail. A later conversation with one of the Board members suggests that this information was never made available to the Board members.

Staff also addressed concerns with the FCC's orders that cast broadband internet access as "information services" by quoting from then-Chairman Powell's news release that accompanied the Commission's *Vonage Order* in 2004 (the Order determined that the interconnected nomadic VoIP service offered by Vonage is an information service). In that press release, Chairman Powell included the following quote:

"...it is important that I emphasize that the Commission expresses no opinion here on the applicability to Vonage of state's general laws governing entities conducting business within the state, such as laws concerning taxation; fraud; general commercial dealings; marketing and advertising."

DATCP legal staff appear to believe that this quote confirms their power to impose regulations and requirements on internet access service in Wisconsin.

There are many concerns with this. First, the issue in the *Vonage* case was the regulation of an "over the top service" that provides customers with similar functionality as telephone service. The issue raised in this case is the preemptive effect of a variety of FCC orders that relate specifically to broadband internet access services. Using the *Vonage Order* is an apples-to-oranges comparison. Further, it is concerning that a quote from a 2004 press release has as much, if not more authority, than a letter from two Wisconsin Legislators on the specific issue raised in these rules.

Staff then addressed questions from the Board members. One board member asked if they had effectively listened to concerns. Staff answered that they had. They stated that they had allowed everyone to participate and everyone was able to file comments. The process itself shows that they had no intention of including every view point in this process.

Another Board member asked about enforcement – whether these new rules would be enforced equally against all providers [note: the WCCA identified concerns that their complaints against satellite providers were never addressed by DATCP staff]. Staff avoided the question entirely by claiming ignorance of the instances identified by the WCCA. Further, staff stated that business to business complaints are not treated the same as "consumer" complaints.

Staff addressed the process by stating that they adhered to the statutory requirements and that they only wanted associations to participate in the advisory group to avoid a prohibitively large group (note that only 5 entities filed comments in the docket). They also argued that the timing of the advisory committee was proper because it came before the staff proposed a "final rule" to the Board. Finally, they argued that process was not critically important because they were not "substantively" changing the rules.

Also, one Board member asked about the letter sent by Senator Plale and Representative Montgomery. DATCP staff identified that the letter only address issues with Act 42, and that the proposed rules are not based exclusively on Act 42. However, the letter from Senator Plale and Representative Montgomery states:

"Extending DATCP's jurisdiction over broadband internet services is a directive that needs to come from the legislature if it is determined to be in the best

interest of Wisconsin citizens. The change should not be made as a product of this rulemaking.”

DATCP Board Action

After staff's presentation, the Board moved to approve the proposed rules. The movant stated that she did not believe there were major substantive concerns with the rules and that the process did not create any major injustice.

Board members agreed that there were some concerns about the process and the content of the rule, but believed that these were relatively minor consumer protections being added. The more “macro” concerns about regulating internet access services would be addressed by the Legislature since they have oversight over the rules.

The Board approved the rules, as drafted, with one vote opposed.

Post Board Action Discussion

After the vote, Deb Kuhn (Verizon) and I had a conversation with one of the DATCP Board members regarding their action. He asked specifically about the letter from Senator Plale and Montgomery because he had not reviewed or been provided a copy of the letter. Deb gave her copy of the letter to him, and he was surprised by the bluntness of the language the legislators used. This was concerning because it showed that the record of the proceeding was not given to the Board members.

NEXT STEPS

The rule will soon be sent to the Legislature for review before the standing committees with oversight over these issues. WSTA plans to work with Legislative leaders to obtain another opportunity to identify and potentially address our concerns with this rule.





WISCONSIN LEGISLATURE

P.O. BOX 8952 • MADISON, WI 53708

September 8, 2008

Rod Nilsestuen, Secretary
Department of Agriculture, Trade and Consumer Protection
P.O. Box 8911
Madison, WI 53708-8911

Re: Clearinghouse Rule 08-027 Meeting Request

Pursuant to chapter 227.19(4)(b)1.a. statutes we are requesting that the agency meet with us to review DATCP Clearinghouse Rule 08-027.

Thank you for meeting with us and discussing the effect of this proposed rule.

Respectfully,

Phil Montgomery
State Representative
Energy and Utilities, Chair
4th Assembly District

Jeff Plale
State Senator
Commerce, Utilities and Rail, Chair
7th Senate District

cc: Assembly Chief Clerk
Senate Chief Clerk
Michelle Reinen





State of Wisconsin
Jim Doyle, Governor

Department of Agriculture, Trade and Consumer Protection
Rod Nilsestuen, Secretary

October 6, 2008

Senator Jeff Plale
Wisconsin State Senate
PO Box 7882
Madison, WI 53707-7882

Rep. Phillip Montgomery
Wisconsin State Assembly
PO Box 8953
Madison, WI 53708-8953

Dear Senator Plale and Representative Montgomery,

Thank you again for organizing the meeting with the Department to address concerns about Rule CR 08-027. As we discussed throughout the meeting, concern with the proposed rule involves the department's authority to regulate the unfair trade practices of internet access providers. The Department maintains it has that authority.

As the Department made clear at the meeting, it will not consider any modification to the proposed rule that eliminates or weakens its authority to protect consumers in this area. John Stoltzenberg, Legislative Council staff to Rep. Montgomery's Judiciary and Ethics Committee, indicated near the end of the meeting that he believed there may be a modification to the rule that would satisfy both Rep. Montgomery and Sen. Plale and the Department. Rep. Montgomery asked if the Department would be willing to consider such a modification, and the Department indicated it would be willing to consider a modification if that is the direction the Legislature wished to pursue.

Because the meeting ended in this posture, the Department believes it is most appropriate to proceed under Sec. 227.19(4)(b) 2. Stats., which requires one of the committees to which the rule was assigned to meet and by majority vote, request the department to modify the rule. That would allow a window to consider the suggested modification.

In order to avoid any confusion and delay in moving this rule forward, the Department asks that any request to consider modifications include any suggested changes to the wording of the current rule draft that the committees believe will satisfy their modification request.

Again, thank you for the open discussion of this rule. Please feel free to contact me if you are in need of follow up on this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Randy Romanski".

Randy Romanski
Deputy Secretary

Cc: David Lovell, Legislative Counsel
John Stolzenberg, Legislative Counsel

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State of Wisconsin
Jim Doyle, Governor

Department of Agriculture, Trade and Consumer Protection
Rod Nilsestuen, Secretary

October 20, 2008

Senator Jeff Plale
Wisconsin State Senate
PO Box 7882
Madison, WI 53707-7882

Representative Phil Montgomery
Wisconsin State Assembly
PO Box 8953
Madison WI 53708-8953

Re: Clearinghouse Rule 08-07

Dear Senator Plale and Representative Montgomery:

Thank you for your letter of October 13, 2008, and your continued interest in communicating with the department on this matter.

After careful consideration, the department declines your request to delete the phrase, "internet access services as defined in 47 USC 231(e)(4)." In addition, the department rejects the argument that if these words remain, it is a signal that the department is attempting to expand its jurisdiction. That is not true. The department has the authority to provide consumer protections for internet access purchasers, and the rule's use of more specific words neither increases nor decreases that authority.

The consumer protections that ATCP 123 affords to purchasers of internet access services are basic. They include:

- Notification of all the terms of an internet access subscription agreement before the customer enters into the agreement;
- Notification of price increases or other subscription changes before they become effective;
- Notification that that the customer can cancel the agreement for internet access without any early cancellation charge if the price of the service increases or if there are other material subscription changes;
- Prohibition against negative options, binding a customer to any terms, conditions or additional services that the consumer did not specifically request on the basis that the consumer did not object.

These fundamental consumer protections are also provided to consumers who purchase other electronic communications services such as telephone and video service.

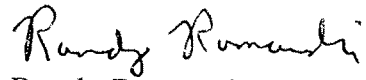
As we stated in our meeting on October 6 and reiterated in our letter of the same date, the department is willing to consider specific language mentioned by John Stoltzenberg

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or others that you believe address your concerns. However, any language should clearly and specifically preserve the department's authority to provide consumer protections to those who purchase internet access service. If your committees decide to object to this rule and request modifications, we would continue to consider additional modifications after the committees' actions.

Again, thank you for the open discussion of this rule.

Sincerely,

A handwritten signature in cursive script that reads "Randy Romanski".

Randy Romanski
Deputy Secretary