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Clearinghouse Rule 08-067

DATCP Docket No. 08-R-03
Rules Clearinghouse No. _____

Proposed Hearing Draft
June 11, 2008

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

3 The Wisconsin department of agriculture, trade and consumer protection proposes the
4 following rule *to repeal* ch. ATCP 123(note); *to amend* ATCP 123.12(1)(intro.) and (2);
5 and *to create* ch. ATCP 123 subch. I(title), subch. II(title) and (note), and subch. III;
6 *relating to* customer access to subscription video services and discriminatory practices by
7 video service providers.

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

2007 Wisconsin Act 42 regulates providers of subscription video services. Among other things, the act regulates customer access to video services, and prohibits discrimination in the provision of video services based on race or income. This rule interprets and clarifies those regulations.

Statutes Interpreted

Statutes Interpreted: s. 66.0420(8), Stats.

Statutory Authority

Statutory Authority: ss. 66.0420(13)(a) and 93.07(1), Stats.

Explanation of Statutory Authority

2007 Wisconsin Act 42 eliminates municipal franchising of cable television services and creates a new state system for franchising and regulating “video service providers” (including but not limited to cable television service providers). The act regulates subscription video services provided, under a state franchise, via cable or local telephone lines. Among other things, the act does all of the following (see s. 66.0420(8), Stats.):

- Prohibits a state-franchised video service provider from denying access to a “group” of potential customers based on race or income. A provider has a defense against a claim of discrimination based on income if, within 3 years after the provider first offered video services, at least 30% of the households with access to the provider’s video service are “low-income households.” The Department of Agriculture, Trade and Consumer Protection (“DATCP”) may extend the applicable time period, at the request of a video service provider.
- Requires a state-franchised “large telecommunications video service provider” to do all of the following, unless DATCP grants a waiver or extension:
 - Provide video service access to at least 35 percent of the households in each of the provider’s basic local exchange service areas within the state franchise area no later than 3 years after the provider first offers video service.
 - Provide video service access to at least 50 percent of the households within each basic local exchange service area not more than 5 years after the provider first offers video service in that area, or not more than 2 years after at least 30 percent of the households with access have subscribed for at least 6 consecutive months, whichever occurs later.
- Requires a state-franchised “large telecommunications service provider” to file an annual report with DATCP regarding the provider’s progress in complying with minimum access requirements.
- Allows a video service provider to satisfy access requirements with an alternative technology (other than satellite service) that offers the same basic service, function and content features offered by the provider’s normal video service network.
- Provides that a telecommunications video service provider is not required to provide video service outside its basic local exchange service area.
- Provides that an incumbent cable service provider is not required to provide video service outside the area in which it provided cable television service when it first received a state franchise.

Act 42, as passed by the Legislature, gave DATCP very limited authority to adopt rules interpreting the access and anti-discrimination provisions of the new video services law. The Governor’s partial veto effectively expanded DATCP’s rulemaking authority to interpret those provisions. In his veto message, the Governor stated: “It is imperative that the state agencies responsible for ...enforcing the anti-discrimination provisions have the ability to interpret these statutes through administrative rule.”

Rule Content

This rule incorporates and clarifies certain video service access and anti-discrimination provisions contained in Act 42. This rule does all of the following:

- Clarifies that a “group” means 2 or more households. A video service provider denies access to a “group” if it denies access to all of the households comprising that “group.”
- Defines “household” consistent with current statutes.
- Defines “low-income household” as a household with a combined annual income equal to less than 200% of the federal poverty level for a family of 3.
- Clarifies that a video service provider provides video service “access” to a household if the provider is able to provide video service to that household using the provider’s normal service network or an equivalent alternative technology, regardless of whether any customer has ordered the service.
- Spells out the procedure by which a video service provider may ask DATCP to waive or extend the deadline for complying with a minimum access requirement:
 - A provider must submit a request in writing, in hard-copy and electronic form. The request must justify the proposed waiver or extension, based on statutory criteria, and must include facts and evidence supporting the justification. DATCP may request relevant supplementary information.
 - Within 30 business days after DATCP receives a written request, it must issue a proposed order granting the request, denying the request, or granting the request in modified form. DATCP must issue a press release announcing the proposed order and inviting public comment. DATCP may hold one or more public hearings on the proposed order.
 - Within 60 business days after DATCP issues a proposed order, DATCP must issue a final order. If the final order differs from the proposed order, DATCP must explain the reasons for difference.
- Clarifies that a “large telecommunications service provider” must file its required annual progress report with DATCP by January 31 of each calendar year, beginning with the first calendar year after the provider first provides video service under a state franchise. The provider must provide annual progress reports for at least 5 years, unless DATCP makes an earlier written determination that the provider has met applicable minimum access requirements.

In a separate rule-making proceeding (*Clearinghouse Rule No. 08-027*), DATCP has proposed a definition of “video service” that would also apply to this rule. That definition is identical to the definition in s. 66.0420(1)(y), Stats.

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

2007 Act 42 will have a major impact on video service providers in Wisconsin. This rule interprets and clarifies portions of Act 42 related to customer access to video services, and discrimination in providing access. This rule does not add any substantive requirements or prohibitions, beyond what is already contained in Act 42.

None of the video service providers affected by Act 42 or this rule are small businesses, so this rule will have no impact on small business. For the most part, this rule will have a positive impact on video service providers, because it will clarify requirements and procedures under Act 42. A complete *Business Impact Analysis* is attached.

Federal and Surrounding State Regulation

Federal Regulation

Federal law regulates cable television service, including cable ownership, use of cable channels, and cable franchising. Federal law also regulates video services provided by telephone companies.

State and local governments may regulate video services, as long as the regulations do not conflict with federal law. Federal law imposes consumer protection and customer service obligations on cable television service providers, but does not prevent states from imposing more stringent requirements.

Federal law does not establish minimum access requirements. Federal law does prohibit discrimination against a “group” of customers based on the income of residents of the “local area” in which the “group” resides. Federal law does not define “group” or “local area.”

Surrounding State Regulation

During 2007, Illinois, Michigan and Iowa enacted laws that create a new state system for franchising and regulating video service providers. Minnesota has yet to adopt such a law. The laws adopted by Illinois, Michigan and Iowa are similar in relevant respects to the Wisconsin law, but are not identical to the Wisconsin law.

Illinois

The Illinois law does the following:

- Prohibits a video service provider from denying access to any potential residential providers because of race or income of the residents in the local area in which the potential subscribers reside; and does *not* provide the video service provider with an affirmative defense to an allegation of discrimination.
- Requires a large video service provider to provide access to 25% of the households in its telecommunication service area within 3 years after it began providing video service, and 35% within 5 years after it began providing video service. The provider is not required to meet the 35% requirement until 2 years after at least 15% of the households with access to the provider's video service subscribe to the service for at least 6 months.
- Requires, within 3 years after the video service provider is granted a franchise, that 30% of the households with access to the video service shall be low-income.
- Requires the video service provider to file with the state an annual report describing factors related to the access requirements.
- Allows the video service provider to assert as a defense to a violation of the access requirements a need for an extension of the time requirements based on stated factors.
- Defines "low-income household" as those residential households within the video service provider's existing local exchange area where the average annual household income is less than \$35,000 based on United States Census Bureau estimates adjusted annually.
- Defines "access" to mean that the video service provider is capable of providing broadband Internet capability and video programming at the household address using any technology except satellite television regardless of whether any customer has ordered the service.

Michigan

The Michigan law does the following:

- Prohibits a video service provider from denying access to service to any group of potential residential subscribers because of the race or income of the residents in the local area in which the group resides.
- Provides the video service provider with a defense to an allegation of discrimination where it can show either of the following:

- Within 3 years after it began providing video service at least 25% of the households with access to the provider's video service are low-income households.
- Within 5 years after it began providing video service and from that point forward at least 30% of the households with access to the provider's video service are low-income households.
- Requires a large video service provider to provide access to 25% of households in its telecommunication service area within 3 years after it began providing video service, and 50% within 6 years after it began providing video service. The provider is not required to meet the 50% requirement until 2 years after at least 30% of the households with access to the provider's video service subscribe to the service for at least 6 months.
- Allows the video service provider to apply for a waiver or extension of time of the access requirements based on stated factors.
- Requires the video service provider to submit to the Michigan public service commission any information necessary for the commission to prepare an annual report.
- Defines "low-income household" as a household with an average annual household income of less than \$35,000.00 as determined by the most recent decennial census.
- Does *not* define "access."

Iowa

The Iowa law does the following:

- Prohibits a video service provider from denying access to any group of potential residential providers because of the income of the residents in the local area in which the potential subscribers reside. This law does *not* prohibit denying access based on race, and does *not* provide the video service provider with an affirmative defense to an allegation that it violated this law.
- Requires a large video service provider to extend its system to a potential subscriber located within its authorized service area if all of the following occur:
 - At least 250 dwelling units are located within 2,500 feet of a remote terminal.
 - The dwelling units do not have cable service or video service available from another provider.

- The video service provider is providing cable service and video service to over 50% of all cable service or video service subscribers in the potential subscribers franchise area.
- Does *not* specify any reporting requirements for the video service providers.

Data and Analytical Methodologies

This rule does not depend on any complex analysis of data. The definition of “low-income household” is based on the official poverty line defined by the federal Office of Management and Budget based on the most recent data available from the United States Bureau of the Census. The definition of “access” is based on industry practices and consumer experience.

DATCP Contact

Questions and comments related to this rule may be directed to:

Michelle Reinen, Program & Planning Analyst
 Department of Agriculture, trade and Consumer Protection
 P.O. Box 8911
 Madison, WI 53708-8911
 Telephone (608) 224-5160
 E-Mail: hearingcomments@datcp.state.wi.us

1 **SECTION 1.** Chapter ATCP 123(note) is repealed.

2 **SECTION 2.** Chapter ATCP 123 subchapter I(title), inserted before ATCP 123.01,
 3 is created to read:

**Subchapter I
 Definitions and General Provisions**

7 **SECTION 3.** Chapter ATCP 123 subchapter II(title), inserted after ATCP 123.01,
 8 is created to read:

**Subchapter II
 Subscription and Billing Practices**

11 **SECTION 4.** Chapter ATCP 123 subchapter II (note), inserted after subchapter
 12 II(title), is created to read.
 13

1 **NOTE:** This subchapter regulates subscription and billing practices related to
2 telecommunications services and cable television services provided to
3 consumers.
4

5 This subchapter is adopted under authority of ss. 100.20(2) and
6 100.207(6)(e), Stats. Violations of this chapter may be subject to
7 prosecution under ss. 100.20 (6), 100.26 (3), (6) and, in the case of
8 telecommunications services, s. 100.207 (6) (b) and (c), Stats. Persons
9 damaged by violations of this subchapter may bring private actions against
10 the violators under ss. 100.20(5) and 100.207(6)(a), Stats.
11

12 State administrative rules may, under certain circumstances, be preempted
13 by federal law or administrative action. A provision of this subchapter
14 that conflicts with federal law may be preempted.
15

16 **SECTION 5.** ATPC 123.12(1)(intro.) is amended to read:

17 ATPC 123.12(1)(intro.) This ~~chapter~~ subchapter does not apply to any of the
18 following:

19 **SECTION 6.** ATPC 123.12(2) is amended to read:

20 ATPC 123.12(2) This ~~chapter~~ subchapter does not authorize any activity
21 prohibited by ch. 196, Stats., or by the state of Wisconsin public service commission
22 under ch. 196, Stats.

23 **SECTION 7.** Chapter ATPC 123 subchapter III, inserted after s. ATPC 123.12, is
24 created to read:

25 **Subchapter III**
26 **Customer Access to Video Services**
27

28 **NOTE:** Pursuant to 2007 Wisconsin Act 42, as modified by the governor's
29 partial veto, this subchapter interprets s. 66.0420(8), Stats., which
30 regulates customer access to video services and prohibits discriminatory
31 practices by video service providers. Act 42 does not authorize the
32 department to take enforcement action against video service providers
33 who violate s. 66.0420(8), Stats., or this subchapter. However, affected
34 individuals, municipalities, interim cable operators, or video service
35 providers adversely affected by violations of s. 66.0420(8), Stats., or this
36 subchapter may initiate legal action against the violator to the extent
37 authorized by law.

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ATCP 123.20 Definitions. In this subchapter:

(1) “Alternative technology” means a technology, other than satellite service, which is not part of the provider’s normal video service network but which does all of the following:

(a) Offers service, functionality, and content demonstrably similar to the service, functionality, and content provided through the provider’s normal video service network.

(b) Provides access to PEG channels and messages broadcast over the emergency alert system.

(2) “Basic local exchange service area” has the meaning given in s. 66.0420(2)(b), Stats.

(3) “Cable service” has the meaning given in s. 66.0420(2)(e), Stats.

(4) “Franchise area” means the geographic area covered by a state franchise.

(5) “Group” means 2 or more households, all of which are located in the same franchise area.

(6) “Household” has the meaning given in s. 66.0420(2)(k), Stats.

(7) “Incumbent cable operator” has the meaning given in s. 66.0420(2)(L), Stats.

(8) “Large telecommunications video service provider” has the meaning given in s. 66.0420(2)(p), Stats.

(9) “Low-income household” means a household with a combined annual income that is not more than 200% of the poverty level for a family of 3 as defined by 42 USC 9902(2).

(10) “State franchise” means a video service franchise issued by the Wisconsin department of financial institutions under s. 66.0420, Stats.

1 (11) “Telecommunications video service provider” has the meaning given in s.
2 66.0420(1)(v), Stats.

3 (12) “Video service provider” means a person who provides video service under
4 a state franchise.

5 (13) “Video service network” has the meaning given in s. 66.0420(2)(zb), Wis.
6 Stats..

7 **ATCP 123.22 Discrimination prohibited.** (1) No video service provider that
8 offers a video service under a state franchise may fail to provide video service access to
9 any group of households in the franchise area because of the race or income of residents
10 in any local area in which all of the households comprising the group are located.

11 (2) For purposes of sub. (1), a video service provider provides video service
12 access to a group of households if it provides access to any of the households comprising
13 that group.

14 (3) In an action alleging discrimination based on income under sub. (1), it is a
15 defense for the video service provider to prove any of the following:

16 (a) The video service provider has provided the video service under the state
17 franchise for less than 3 years, or for less than an extended time period specified by the
18 department under s. ATCP 123.26.

19 (b) At least 30 percent of the households with access to the video service in the
20 franchise area are low-income households.

21 **ATCP 123.24 Large telecommunications video service provider; customer**
22 **access to video service.** (1) ACCESS REQUIREMENTS. A large telecommunications video

1 service provider that offers a video service under a state franchise shall do all of the
2 following:

3 (a) Provide video service access to at least 35 percent of the households in each
4 basic local exchange service area included in the franchise area, beginning within 3 years
5 after the date on which the large telecommunications video service provider first provides
6 video service in that basic local exchange service area under the state franchise.

7 (b) Provide video service access to at least 50 percent of the households in each
8 basic local exchange service area included in the franchise area, beginning by the later of
9 the following dates:

10 1. The 5th anniversary of the date on which the provider first provides video
11 service in that basic local exchange service area under the state franchise.

12 2. The 2nd anniversary of the first date on which at least 30 percent of the
13 households having access to the video service in that basic local exchange service area
14 have subscribed to that service for at least 6 consecutive months.

15 (2) ANNUAL PROGRESS REPORT. A large telecommunications video service
16 provider shall file an annual written report with the department, documenting the
17 provider's progress in complying with sub. (1). The provider shall file the report on or
18 before January 31 of each year, beginning with the first calendar year after the provider
19 first provides video service under a state franchise. The provider shall file an annual
20 report for 5 consecutive years unless the department makes an earlier written
21 determination that the provider has fully complied with sub. (1).

22 **ATCP 123.26 Extension or waiver. (1) DEPARTMENT MAY GRANT EXTENSION**
23 **OR WAIVER.** In response to a request from a video service provider under sub. (2), the

1 department may by order do any of the following:

2 (a) Extend the applicable time period under s. ATCP 123.22(3)(a).

3 (b) Extend the deadline for compliance with an access requirement under s.
4 ATCP 123.24(1).

5 (c) Waive an access requirement under s. ATCP 123.24(1).

6 **(2) REQUEST FOR EXTENSION OR WAIVER.** A video service provider may request
7 an extension or waiver under sub. (1) by filing a written request with the department.

8 The video service provider shall file the request and supporting information with the
9 department in hard copy form, and in an electronic form that is acceptable to the
10 department. The request shall include all of the following information:

11 (a) The nature and scope of the requested extension or waiver.

12 (b) The justification for the extension or waiver under s. 66.0420(8)(c), Stats., the
13 facts supporting that justification, and relevant evidence documenting the facts.

14 (c) The names and addresses of individuals, including expert witnesses if any,
15 who are available to testify regarding the facts or justification under subd. 2.

16 (d) Relevant supplementary information, if any, requested by the department.

17 **(3) PROPOSED ORDER.** Within 30 business days after the department receives a
18 complete request under sub. (2), the department shall issue a proposed order granting the
19 request, denying the request, or granting the request with modifications. The department
20 shall issue a news release announcing the proposed order, and soliciting public comment
21 on the proposed order. The department may schedule one or more public hearings on the
22 proposed order.

1 **(4) FINAL ORDER.** Within 60 business days after the department issues a
2 proposed order under par. (c), the department shall issue a final order. If the final order
3 differs from the proposed order, the department shall explain the reason for the
4 modification.

5 **ATCP 123.28 Access defined.** For purposes of ss. ATCP 123.22 and 123.24, a
6 video service provider provides video service access to a household if the video service
7 provider is capable of providing video service at the household address using the video
8 service provider's video service network or an alternative technology, regardless of
9 whether any customer has ordered the service.

10 **ATCP 123.30 Video service access requirements; limitations. (1)** This
11 subchapter does not require a telecommunications video service provider to provide video
12 service outside the provider's basic local exchange service area.

13 **(2)** This subchapter does not require an incumbent cable operator to provide
14 video service outside the area in which the incumbent cable operator provided cable
15 service when the Wisconsin department of financial institutions first issued a state
16 franchise to the incumbent cable operator.

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

Dated this _____ day of _____, _____.

STATE OF WISCONSIN
DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION

By _____
Rodney J. Nilsestuen, Secretary