Date Mailed
May 16, 2011

CR 10-143

BEFORE THE

PUBLIC SERVICE COMMISSION OF WISCONSIN

Rule Modifications to Wis. Admin. Code ch. PSC 168 1-AC-235
Related to Certification of Resellers

Clearinghouse Rule 10-143

ORDER ADOPTING FINAL RULES

The Public Service Commission of Wisconsin proposes an order to renumber PSC 168.06 (5); to renumber and amend PSC 168.13 (2) (a); to amend PSC 168.09 (2); and create PSC 168.06 (5) (b) and 168.13 (2) (b) and (c) in Wis. Admin. Code ch. PSC 168, relating to the certification and operation of alternative telecommunications utility resellers.

REPORT TO THE LEGISLATURE

Set forth as Attachment A.

FISCAL ESTIMATE

There are no additional costs to state or local government as a result of these changes. A completed Fiscal Estimate form is included as Attachment B. There is also no quantitative financial impact on the private sector. The proposed changes will produce greater clarity in certain certification and revocation procedures that will make them more streamlined and easier for resellers to understand.

EFFECTIVE DATE

Theses rule amendments shall take effect on the first day of the month following publication in the *Wisconsin Administrative Register* as provided in s. 227.22 (2) (intro.), Stats.

CONTACT PERSON

Questions from the media may be directed to Matt Pagel, Interim Director of Public Affairs, at (608) 266-9600. Other questions regarding this matter should be directed to docket coordinator and Telecommunications Division Administrator, Gary A. Evenson, at (608) 266-6744. Hearing- or speech-impaired individuals may use the Commission's TTY number. If calling from within Wisconsin, use (800) 251-8345; if from outside Wisconsin, use (608) 267-1479.

The Commission does not discriminate on the basis of disability in the provision of programs, services, or employment. Anyone who needs to obtain this document in a different format should contact the docket coordinator listed above.

Dated at Madison, Wisconsin, May 12, 2011

By the Commission:

/s/ Sandra J. Paske

Sandra J. Paske
Secretary to the Commission

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Attachments

REPORT TO THE LEGISLATURE

A. NEED FOR THE RULE

The current ch. PSC 168 needs clarification and amendment in three subject matter areas. As to certification of resellers that operate without authority, lose certification, and then re-apply, the Commission currently requires in PSC 168.06 (1) that the applicant reseller refund all revenues from Wisconsin customers collected while operating without proper Commission certification. The proposed amendment to PSC 168.06 (5) would afford the Commission more flexibility to judge the individual circumstances of the applying reseller and make the refund of revenues less of a barrier to seeking re-certification, especially where the loss of certification was a "paperwork" error and where customer service was without material complaint.

The proposed amendment to PSC 168.09 (2) inserts s. 196.859, Stats., in the list of assessment statutes applicable to larger resellers. Section 196.859, Stats., obliges the Commission to assess telecommunications providers for the budgeted costs of telecommunications trade practices enforcement by the Department of Agriculture, Trade and Consumer Protection. The amendment better informs large resellers of their statutory responsibilities and codifies the Commission's decision in docket 5-TI-1990 in November 2009.

Finally, the proposed amendment of the revocation procedure under PSC 168.13 (2) clarifies the steps within a revocation docket. The current language tends to suggest that an objecting respondent reseller should petition for a hearing, when in fact the opportunity for a hearing is already underway by the Commission's noticing an intention to revoke certification. The proposed amendment clarifies that during the initial 30-day window, the reseller can choose either to object and proceed to hearing or to elect to cure deficiencies to avoid the sanction of revocation.

B. PLAIN LANGUAGE ANALYSIS

The analysis is set forth as Attachment A1.

C. TEXT OF THE RULE

The text of the Final Rule is set forth as Attachment A2.

D. PUBLIC HEARING ATTENDEES AND COMMENTS

There were no public hearing attendees, and no comments were filed by any person during or within the filing period following the public hearing.

E. RESPONSE TO THE LEGISLATIVE COUNCIL REPORT

The Commission accepts the Legislative Council comments, Attachment A3, in their entirety. The first comment was as to form and style of drafting and does not affect the substance of the rulemaking. The second comment noted a proper correction of the references to related statutes. Implementation of both comments is reflected in Attachment A2 setting forth the text of the Final Rule.

F. FINAL REGULATORY FLEXIBILITY ANALYSIS

The Final Rule is not expected to adversely affect small business as defined in ss. 227.114 (1) and 196.216, Stats. Although the costs to small business are not subject to quantification, the process improvements in the amendments proposed here should reduce costs in re-certification situations and in revocation proceedings.

PLAIN LANGUAGE ANALYSIS

A. Statutory Authority and Explanation of Authority

The proposed rule amendments are authorized under ss. 196.01 (1d), 196.02 (1) and (3), 196.03 (1) and (6), 196.203 (2) and (3), 196.44, 196.859, and 227.11 (2), Stats.

Section 227.11, Stats., authorizes agencies to promulgate administrative rules. Section 196.02 (1), Stats., authorizes the Commission to do all things necessary and convenient to its jurisdiction. Section 196.02 (3), Stats., grants the Commission specific authority to promulgate rules. Sections 196.01 (1d) and 196.203 (2), Stats., define resellers and require their certification to provide telecommunications services in Wisconsin. Section 196.859, Stats., requires the Commission to assess telecommunications providers to recover the budgeted costs of the enforcement of the telecommunications trade practices regulations under the jurisdiction of the department of agriculture, trade and consumer protection. Pursuant to its authority in ss. 196.44 and 196.02 (3), Stats., the Commission may promulgate a rule interpreting and applying s. 196.859, Stats., to reseller telecommunications providers.

B. Statutes Interpreted

The proposed regulations interpret ss. 196.203 (3), 196.03 (1) and (6), and 196.44, Stats. Sections 196.203 (3) and 196.03 (1) and (6), Stats., require that a telecommunications utility, which includes resellers in the alternative telecommunications utility category, provide reasonably adequate services and that such services be priced at just and reasonable rates. For a telecommunications provider, whether a service is reasonably adequate or a rate or charge is just and reasonable is determined by a multi-factor test in ss. 196.03 (1) and (6), Stats. The multi-factor test applies when evaluating what is in the public interest, convenience and necessity with respect to the services, rates and charges of a telecommunications provider. Certification of a reseller is effected under s. 196.203, Stats., which includes in the certification process the Commission's right and opportunity to impose provisions of ch. 196, Stats., that the Commission believes are necessary for protection of the public interest.

Protection of the public interest is effected by ensuring that only properly certified resellers are doing business in Wisconsin. A streamlined revocation process as proposed aids the elimination from the market of resellers that are unable or unwilling to comply with the law. In addition, the mechanism of voiding of reseller arrangements, contracts, and billings for operations without proper certification is an administrative device to compel resellers to properly obtain and maintain certification at the risk of repaying their Wisconsin-generated revenues gained during unauthorized operations. This device is a means of enforcing provisions of ch. 196, Stats., under s. 196.44, Stats. However, an amendment is proposed here to better calibrate the refund obligation to the nature of the deficiency causing the loss of certification. If a reseller lost certification and then re-applied, the criteria proposed to evaluate the applicant reseller's ability to comply with regulations would strike a better balance between the refund

obligation and the cause of the loss of certification. Greater flexibility will aid a speedier return of the applicant reseller to full certification.

Section 196.44, Stats., permits the appropriate enforcement of s. 196.859, Stats., as a provision in ch. 196, Stats., subject to Commission enforcement. The proposed rule to make larger resellers subject to assessment is consistent with the Commission's discretion and duty to engage in practical and economical enforcement of a legislative direction for the recovery of budgeted costs of the enforcement of the telecommunications trade practices regulations of the department of agriculture, trade and consumer protection.

C. Related Statutes or Rules

Related rules consist of the other provisions of ch. PSC 168 dealing with resale of telecommunications services and the certification of resellers. That chapter identifies telecommunications services that are legally available for resale, providers that are subject to reseller certification, the application for certification, and how certification is continued through annual report filings. Once an entity is certified as a reseller, the related rules identify the permissible activities in which a reseller may engage and the statutes with which the reseller must comply. Annual reports on such activities are required, which, if not filed, may trigger the revocation of certification. Other activities are identified that may also justify opening a revocation proceeding. Finally, a reseller may also voluntarily surrender its certificate to cease Wisconsin intrastate operations, but subject to compliance with any outstanding Commission orders.

D. Summary and Analysis of the Rule Amendments

The proposed amendment to PSC 168.06 (5) establishes five criteria that the Commission may use to evaluate the amount of revenues that need to be refunded due to operations without certification, as required to enforce PSC 168.06 (1). The proposed criteria afford the Commission flexibility to judge each reseller re-applying for certification according to its individual circumstances, taking into account the reason for loss of certification, the cooperation of the applicant, past conduct while operating without authority, the number and type of consumer complaints, and the impact of a proposed refund upon the financial viability of the applicant. This benefits the applicant by informing it as to the requisites for re-certification and by better accommodating equitable arguments that a full refund might be disproportionate to the nature of the failure that resulted in the prior de-certification.

The proposed amendment to PSC 168.09 (2) to insert s. 196.859, Stats., in the list of assessment statutes applicable to larger resellers better informs them of their statutory responsibilities. This treatment accords with the Commission's decision in docket 5-TI-1990 in November 2009, to impose the statute on larger resellers by exercise of the reserved power to amend any reseller's existing certificate. Resellers having intrastate Wisconsin gross operating revenues in a calendar year that did not exceed $200,000 were excluded in that order and remain excluded in this proposed rule amendment. Commission experience fairly suggests that it would

be burdensome to require payment of an assessment by smaller providers where the costs of Commission processing and provider compliance would likely exceed the few dollars of liability that would accrue to the reseller but for the exemption.

Finally, the proposed amendment of the revocation procedure under PSC 168.13 (2) clarifies and streamlines the revocation process by clearly stating the opportunity to cure non-compliance within the timeline of a revocation proceeding, but before the revocation process proceeds to a formal trial-type hearing. The current language tends to suggest that an objecting respondent reseller should petition for a hearing when in fact a proceeding with an opportunity for hearing is already underway by the Commission's noticing an intention to revoke certification. The proposed amendment clarifies that during the initial 30-day window, the reseller can choose either to object and proceed to hearing or to elect to cure deficiencies to avoid the sanction of revocation.

E. Comparison with Existing or Proposed Federal Regulations

There are no known comparable rules at the federal level under the jurisdiction of the Federal Communications Commission.

F. Comparison with Similar Rules in Adjacent States

Section 196.859, Stats., relates to an assessment by the Commission for telecommunications utility trade practices. Such an assessment is apparently unique to Wisconsin. There is no similar rule in any of the neighboring states of Illinois, Iowa, Michigan and Minnesota.

The neighboring states do not have regulations comparable to the proposed rule amendments to provide flexibility in granting re-certification and streamlining the revocation process. Michigan does not certify resellers at all. While the other three states do have reseller certification procedures, if a reseller lost its certification and then re-applied, each of those states would treat the applicant reseller as if it were seeking an original certification. However, such an applicant would be subject to limited additional staff scrutiny as to whether the cause for the termination of the prior certification had been remedied. Such additional scrutiny is not codified in any rules, however. None of the three states has Wisconsin's refund obligation for revenues obtained during unauthorized operations. The criteria in proposed PSC 168.06 (5) (b) would be unique to Wisconsin.

G. Data, Methodology, and Effect on Small Business

No specific factual or analytical studies were conducted as to the proposed changes, or with respect to the effects on small businesses. The proposed amendment to PSC 168.09 (2) is intended to avoid costs to smaller reselling entities, especially as the administrative costs for both the Commission and the provider would likely exceed the annual assessment liability, which in many cases, based on other assessment statutes administered by the Commission, could be quite small.

Anecdotal experience from prior Commission applications and proceedings support the amendment of PSC 168.13 (2) and PSC 168.06 (5) (b) as simplifying procedures, thereby creating savings and efficiencies in administrative operations for both the reseller and the Commission.

H. Accommodation

The Commission does not discriminate on the basis of disability in the provision of programs, services, or employment. Any person with a disability who needs accommodations to participate in this proceeding or who needs to receive this document in a different format should contact the Docket Coordinator, as indicated in the following paragraph, as soon as possible.

I. Agency Contacts

Questions regarding this matter should be directed to the Docket Coordinator, Gary A. Evenson, at (608) 266-6744. Small business questions may be directed to Gary A. Evenson at the foregoing telephone number, or gary.evenson@wisconsin.gov. Media questions should be directed to Matt Pagel, Interim Director of Public Affairs, at (608) 266-9600. Hearing- or speech-impaired individuals may also use the Commission's TTY number; if calling from Wisconsin, dial (800) 251-8345; if calling from outside Wisconsin, dial (608) 267-1479.

TEXT OF THE RULES

SECTION 1. PSC 168.06 (5) is renumbered 168.06 (5) (a).

SECTION 2. PSC 168.06 (5) (b) is created to read:

PSC 168.06 (5) (b) If a reseller is seeking recertification after a prior certification under this chapter expired or was revoked by the commission and it had operated in Wisconsin without certification, the commission may consider the following factors in determining any repayment, refund, or credit respecting the reseller's void arrangements, contracts, and billings under sub. (1):

1. The reason for the failure to obtain certification of its operations under this chapter.

2. The cooperation of the reseller in resolving past deficiencies in conjunction with the application for re-certification.

3. The past conduct of the reseller during the period in which it operated without valid certification under this chapter.

4. The number and type of prior and pending consumer complaints against the reseller based upon violations of this chapter or regulations of any other governmental unit.

5. The impact of repayment, refund, or credit upon the financial viability of the reseller.

SECTION 3. PSC 168.09 (2) is amended to read:

PSC 168.09 (2) Alternative telecommunications utility resellers having gross operating revenues derived from Wisconsin intrastate operations of $200,000 or more in a calendar year shall comply with and be subject to assessment as provided in ss. 196.85, ~~and~~ 196.858, and 196.859, Stats.

SECTION 4. PSC 168.13 (2) is amended to read:

PSC 168.13 (2) (a) If the commission has determined that grounds for revocation exist, the commission may commence a revocation proceeding by mailing to the affected reseller, at its last known address on file with the commission, a written notice of the reasons for the proposed revocation of certification under this section.

(b) Within 30 days of the mailing date of ~~said~~ the notice under par. (a), a reseller may file a written ~~petition for continued certification. The petition shall contain a statement of any corrective action taken and state whether a hearing is requested or waived.~~ response that may contain one or more of the following:

1. A showing that one or more of the commission's reasons for revocation have been resolved or cured.

2. A showing that one or more of the commission's reasons may be resolved in a remedial compliance plan for which the reseller requests commission acceptance and deferral of certificate revocation.

3. An objection to the commission's reasons for revocation and a request for hearing.

SECTION 5. PSC 168.13 (2) (c) is created to read:

(c) Depending upon the information received in the reseller's response, the commission may determine that the grounds for revocation have been remedied, proceed to revoke the reseller's certificate, or take other action as may be appropriate in the circumstances. Failure of a reseller to respond under this subsection shall result in revocation of certification without hearing.

SECTION 6. **Effective Date.** This rule shall take effect on the first day of the month following publication in the Wisconsin administrative register as provided in s. 227.22 (2), Stats.

(End)

LCRC
FORM 2

WISCONSIN LEGISLATIVE COUNCIL
RULES CLEARINGHOUSE

Ronald Sklansky
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CLEARINGHOUSE REPORT TO AGENCY

[THIS REPORT HAS BEEN PREPARED PURSUANT TO S. 227.15, STATS. THIS IS A REPORT ON A RULE AS ORIGINALLY PROPOSED BY THE AGENCY; THE REPORT MAY NOT REFLECT THE FINAL CONTENT OF THE RULE IN FINAL DRAFT FORM AS IT WILL BE SUBMITTED TO THE LEGISLATURE. THIS REPORT CONSTITUTES A REVIEW OF, BUT NOT APPROVAL OR DISAPPROVAL OF, THE SUBSTANTIVE CONTENT AND TECHNICAL ACCURACY OF THE RULE.]

CLEARINGHOUSE RULE **10-143**

AN ORDER to renumber PSC 168.06 (5); to renumber and amend PSC 168.13 (2) (a); to amend PSC 168.09 (2); and to create PSC 168.06 (5) (b) and 168.13 (2) (b) and (c), relating to certification of resellers.

Submitted by **PUBLIC SERVICE COMMISSION**

12-03-2010 RECEIVED BY LEGISLATIVE COUNCIL.

12-20-2010 REPORT SENT TO AGENCY.

PS:DLL

LEGISLATIVE COUNCIL RULES CLEARINGHOUSE REPORT

This rule has been reviewed by the Rules Clearinghouse. Based on that review, comments are reported as noted below:

1 STATUTORY AUTHORITY [s. 227.15 (2) (a)]

Comment Attached YES ☐ NO ☑

2. FORM, STYLE AND PLACEMENT IN ADMINISTRATIVE CODE [s. 227.15 (2) (c)]

Comment Attached YES ☑ NO ☐

3. CONFLICT WITH OR DUPLICATION OF EXISTING RULES [s. 227.15 (2) (d)]

Comment Attached YES ☐ NO ☑

4. ADEQUACY OF REFERENCES TO RELATED STATUTES, RULES AND FORMS [s. 227.15 (2) (e)]

Comment Attached YES ☑ NO ☐

5. CLARITY, GRAMMAR, PUNCTUATION AND USE OF PLAIN LANGUAGE [s. 227.15 (2) (f)]

Comment Attached YES ☐ NO ☑

6. POTENTIAL CONFLICTS WITH, AND COMPARABILITY TO, RELATED FEDERAL REGULATIONS [s. 227.15 (2) (g)]

Comment Attached YES ☐ NO ☑

7. COMPLIANCE WITH PERMIT ACTION DEADLINE REQUIREMENTS [s. 227.15 (2) (h)]

Comment Attached YES ☐ NO ☑

WISCONSIN LEGISLATIVE COUNCIL
RULES CLEARINGHOUSE

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CLEARINGHOUSE RULE 10-143
Comments

[NOTE: All citations to "Manual" in the comments below are to the Administrative Rules Procedures Manual, prepared by the Legislative Reference Bureau and the Legislative Council Staff, dated September 2008.]

2. Form, Style and Placement in Administrative Code

a. It is suggested that the modifications to s. PSC 168.13 (2) be drafted as follows:

SECTION 4. PSC 168.13 (2) is amended to read:

PSC 168.13 (2) (a) If the commission has determined that grounds for revocation exist, the commission may commence a revocation proceeding by mailing to the affected reseller, at its last known address on file with the commission, a written notice of the reasons for the proposed revocation of certification under this section.

(b) Within 30 days of the mailing date of ~~said~~ the notice under par. (a), a reseller may file a written ~~petition for~~ continued certification. The petition shall contain a ~~statement of any corrective action taken and state whether a hearing is requested or waived.~~ response that may contain one or more of the following:

1. A showing that …
2. A showing that …
3. An objection to …

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SECTION 5. PSC 168.13 (2) (c) is created to read:

(c) Depending upon the information received, the commission may determine that the grounds for revocation have been remedied, proceed to revoke the reseller's certificate, or take other action as may be appropriate in the circumstances. Failure of a reseller to respond under this subsection shall result in revocation of certification without hearing.

b. The effective date language in SECTION 6 should not be underscored.

4. Adequacy of References to Related Statutes, Rules and Forms

It appears that the reference to s. 196.01 (1) (d) in the first paragraph of the first section of the analysis to this rule and the reference to s. 196.01 (1d) (c) in the second paragraph should both be to s. 196.01 (1d).

2009-2010 Session

☒ ORIGINAL ☐ UPDATED

☐ CORRECTED ☐ SUPPLEMENTAL

LRB or Bill No./Adm. Rule No.: PSC 168

Amendment No. if Applicable:

FISCAL ESTIMATE
DOA-2048 N(R10/96)

Subject
Revision to Telecommunications Resellers and Resale PSC 168

Fiscal Effect

State: ☒ No State Fiscal Effect

Check columns below only if bill makes a direct appropriation or affects a sum sufficient appropriation.

☐ Increase Existing Appropriation ☐ Increase Existing Revenues
☐ Decrease Existing Appropriation ☐ Decrease Existing Revenues
☐ Create New Appropriation

☐ Increase Costs - May be possible to Absorb Within Agency's Budget ☐ Yes ☐ No

☐ Decrease Costs

Local: ☒ No local government costs

1. ☐ Increase Costs ☐ Permissive ☐ Mandatory
2. ☐ Decrease Costs ☐ Permissive ☐ Mandatory
3. ☐ Increase Revenues ☐ Permissive ☐ Mandatory
4. ☐ Decrease Revenues ☐ Permissive ☐ Mandatory
5. Types of Local Governmental Units Affected: ☐ Towns ☐ Villages ☐ Cities ☐ Counties ☐ Others _____ ☐ School Districts ☐ WTCS Districts

Fund Sources Affected
☐ GPR ☐ FED ☒ PRO ☐ PRS ☐ SEG ☐ SEG-S

Affected Ch. 20 Appropriations
20.155 (1) (g)

Assumptions Used in Arriving at Fiscal Estimate

State Fiscal Effects

There are no estimated state fiscal effects from the draft revisions to the Telecommunications Resellers and Resale Rule (PSC 168). A state fiscal effect would occur if the revisions increased or decreased state staff workload, but the proposed rule is not anticipated to change workload for state staff.

The Telecommunications Resellers and Resale Rule revision 1) clarifies the process under which the Commission considers the amount of customer refunds required of resellers who operate without certification, 2) clarifies the process under which resellers may file an objection to revocation of certification, and 3) makes administrative rule consistent with Commission order under docket 5-TI-1990 and applies s. 196.859 to resellers with annual gross operating revenues, derived from Wisconsin intrastate operations, of $200,000 or more. The rule change to apply s. 196.859 to resellers with intrastate revenues of $200,000 or more is consistent with current policy and will not change state staff workload. The revisions clarifying the information the Commission will consider in calculating potential refunds to consumers and in finalizing revocation proceedings could streamline state staff work processes. The volume of reseller recertification requests is very small, but can be time-consuming in the one element usually of concern to resellers, the amount of refund due to operations without proper certification. It is anticipated that the flexibility provided in the proposed criteria applicable to establishing and/or reducing required refunds would likely permit much faster resolution of this primary issue of contention. A small, but unquantifiable, increment in staff processing efficiency is expected. Therefore, the proposed rule is estimated to have no state fiscal effect.

Local Fiscal Effects

The revised Telecommunications Resellers and Resale Rule is not estimated to have a local fiscal effect. A local fiscal effect would occur if telecommunication service rates or refunds for customers, which include Local Governments, were affected by this proposed rule. The revisions to the rule are not anticipated to change service rates. In addition, the revisions clarifying process under which the Commission considers the amount of customer refunds required of resellers who operate without certification will not change Commission policy in determining the amount of customer refunds required; so the proposed rule will not affect refund amounts. Therefore, the revised Telecommunications Resellers and Resale Rule is not estimated to have a local fiscal effect.

Long-Range Fiscal Implications
None

Agency/Prepared by: (Name & Phone No.)	Authorized Signature/Telephone No.	Date
Anne Olson 267-9086	Anne Olson 267-9086	11/18/2010