PROPOSED RULE MAKING

CR-102 (June 2012)
(Implements RCW 34.05.320)
Do **NOT** use for expedited rule making

Agency: Department of Revenue

☒ **Preproposal Statement of Inquiry was filed as WSR 14-02-108; or**
☐ **Expedited Rule Making--Proposed notice was filed as WSR ; or**
☐ **Proposal is exempt under RCW 34.05.310(4) or 34.05.330(1).**

☒ **Original Notice**
☐ **Supplemental Notice to WSR**
☐ **Continuance of WSR**

Title of rule and other identifying information: The rule-making effort is to amend WAC 458-20-245, presently entitled: "Telephone business, telephone service" and to update it to present technology with the new title of: "Taxation of competitive telephone service, telecommunications service, and ancillary service." This updating of the rule will also incorporate the legislative changes from Chapter 8, Laws of 2013, 63rd Legislature 2013 2nd Special Session.

Hearing location(s):
Capitol Plaza Building
Fourth Floor Executive Conference Room
1025 Union Avenue SE
Olympia, Washington 98501

Copies of draft rules are available for viewing and printing on our website at Rules Agenda

Call in option can be provided upon request no later than 3 days before the hearing date.

Date: **April 3, 2014** Time: **1:30 PM**

Date of intended adoption: April 18, 2014
(Note: This is **NOT** the **effective** date)

Submit written comments to:
Name: Mark E. Bohe
Address: Post Office Box 47453
Olympia, Washington 98504-7453

E-mail: markbohe@dor.wa.gov

By: April 3, 2014

Assistance for persons with disabilities: Contact Mary Carol LaPalm (360) 725-7499 or Renee Cosare (360) 725-7514 no later than 10 days before the hearing date. For Hearing Impaired please contact us via the Washington Relay Operator at (800) 833-6384.

Purpose of the proposal and its anticipated effects, including any changes in existing rules: This rulemaking will identify what constitutes competitive telephone services, telecommunications services, and ancillary services; how these products are taxed; and the statutes that apply for determining if the sales of these products are subject to taxation in Washington state, including issues of sourcing and apportionment. The rule applies to tax periods commencing on or after July 1, 2008.

Reasons supporting proposal: This proposal will update this rule to present technology and all legislative changes, including incorporation of the most recent legislative changes from Chapter 8, Laws of 2013, 63rd Legislature 2013 2nd Special Session.

Statutory authority for adoption: RCW 82.32.300 and 82.01.060(2).

Statute being implemented: RCW 82.04.065 and 82.08.190

Is rule necessary because of a:

Federal Law?	☐ Yes	☒ No
Federal Court Decision?	☐ Yes	☒ No
State Court Decision?	☐ Yes	☒ No

If yes, CITATION:

DATE **February 14, 2014**

NAME Dylan Waits

SIGNATURE

TITLE Rules Coordinator

CODE REVISER USE ONLY

OFFICE OF THE CODE REVISER
STATE OF WASHINGTON
FILED

DATE: February 14, 2014
TIME: 1:36 PM

WSR 14-05-052

(COMPLETE REVERSE SIDE)

Agency comments or recommendations, if any, as to statutory language, implementation, enforcement, and fiscal matters:

Name of proponent:

☐ Private
☐ Public
☒ Governmental

Name of agency personnel responsible for:

	Name	Office Location	Phone
Drafting.....	Mark Bohe	1025 Union Ave. SE. Ste #544, Olympia ,WA	(360) 534-1574
Implementation....	Dylan Waits	1025 Union Ave. SE. Ste #544, Olympia ,WA	(360) 534-1583
Enforcement.....	Alan Lynn	1025 Union Ave. SE. Ste #544, Olympia ,WA	(360) 534-1599

Has a small business economic impact statement been prepared under chapter 19.85 RCW or has a school district fiscal impact statement been prepared under section 1, chapter 210, Laws of 2012?

☐ Yes. Attach copy of small business economic impact statement or school district fiscal impact statement.

A copy of the statement may be obtained by contacting:
Name:
Address:

phone ()
fax ()
e-mail

☒ No. Explain why no statement was prepared.

The revised rule, as proposed, does not impose performance requirements or administrative burdens on any small business not required by statute or the state and/or federal constitution.

Is a cost-benefit analysis required under RCW 34.05.328?

☐ Yes A preliminary cost-benefit analysis may be obtained by contacting:
Name:
Address:

phone ()
fax ()
e-mail

☒ No: Please explain: The proposed rule is not a significant legislative rule as defined by RCW 34.05.328.

THIS PROPOSED RULE IS SUBMITTED FOR PUBLIC COMMENTS AFTER INPUT FROM INTERESTED PARTIES AND IS TO BE USED SOLELY FOR DISCUSSION PURPOSES AT THE PUBLIC HEARING ON THE PROPOSED RULE. UNDER NO CIRCUMSTANCES IS THIS PROPOSED RULE TO BE USED TO DETERMINE TAX LIABILITY AND OR EXEMPTIONS.

AMENDATORY SECTION (Amending WSR 83-17-099, filed 8/23/83)

WAC 458-20-245 ((~~Telephone business, telephone service.~~)) Taxation of competitive telephone service, telecommunications service, and ancillary service. ((~~Under the provisions of various sections of chapter 3, Laws of 1983 2nd ex. sess., the retail sales tax is extended to "telephone service." The effective date is July 1, 1983 and the tax applies to all sales of "telephone service" billed on or after that date, whether or not such service was rendered before that date.~~

~~Persons engaged in the "telephone business" or rendering "telephone service" are taxable under the retailing of wholesaling classification of the business and occupation tax, whichever is applicable, on total gross revenues, as described herein. Such persons who are taxable under retailing must also collect retail sales tax from consumers, subject to certain exemptions explained more fully herein.~~

~~Definitions~~

~~As used herein: The term "telephone service" includes competitive telephone service and network telephone service.~~

~~The term "telephone business" means the business of providing network telephone service and includes cooperative or farmers line telephone companies or associations operating an exchange.~~

~~The term "competitive telephone service" means the providing by any person of telecommunications equipment or apparatus, or service related to that equipment or apparatus such as installation, repair, or maintenance services, if the equipment or apparatus is of a type which can be provided by persons that are not subject to regulation as telephone companies under Title 80 RCW.~~

~~The term "network telephone service" means the providing by any person of access to a local telephone network, switching service, toll service, or coin telephone services, or the providing of telephonic, video, data, or similar communication or transmission for hire, over a local telephone network, toll line or channel, cable, microwave, or similar communication or transmission system. "Network telephone service" includes interstate service, including toll service, originating from or received on telecommunications equipment or apparatus in this state if the charge for the service is billed to a person in this state. "Network telephone service" does not include the providing of competitive telephone service, the providing of cable television service, nor the providing of broadcast services by radio or television stations.~~

~~The term "residential customer" means an individual subscribing to a residential class of telephone service.~~

~~The term "toll service" means the charge for services outside the local telephone network except customer access line charges for access to a toll calling network.~~

~~The term "telephone company" means a person engaged in the telephone business or rendering telephone service.~~

~~Business and Occupation Tax~~

~~Retailing and wholesaling.~~ ~~Persons making retail sales of telephone service to consumers are taxable upon the gross proceeds of sales under the retailing classification. Persons making sales of telephone services for resale in the regular course of business are taxable upon the gross proceeds of sales under the wholesaling classification. The tax shall apply to the gross income from all sales of com-~~

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~~petitive telephone service and network telephone service, as described more fully below.~~

~~For purposes of applying the business and occupation tax to telephone service, a sale takes place in Washington when a call originates from or is received on any telephone or other telecommunications equipment, instrument, or apparatus in Washington and the cost for the telephone service is charged to that equipment, instrument, or apparatus, regardless of where the actual billing invoice is sent.~~

~~The business and occupation tax shall apply to the gross proceeds of sales of competitive telephone service to customers. The tax shall be measured by total gross billings to such customers. The business and occupation tax shall also apply to the gross proceeds of sales of network telephone service, other than interstate and intrastate toll service, measured by total gross billings to customers. The tax as applied to interstate and intrastate service, including toll service, shall be determined under the apportionment guidelines set forth in the following paragraph.~~

~~With respect to interstate and intrastate toll service, the business and occupation tax shall apply to the income received from the interstate or intrastate division of revenue pool. The income subject to tax shall include amounts received for expenses incurred in furnishing the interstate or intrastate services plus any amounts received as return. Persons who are not members of the interstate or intrastate division of revenue pool but who receive shared interstate or intrastate revenues through a member of the division of revenue pool, are liable for business and occupation tax on the income received.~~

~~Persons engaged in the telephone business or rendering telephone service shall report on the combined excise tax return their total gross income received from billings to customers under column 2 of the appropriate classification line on the return (wholesaling or retailing). An adjustment may be made under column 3 of the excise tax return for revenues received from providing interstate and intrastate toll service, as described in the previous paragraph. On the reverse side of the return it should be explained that such adjustment was the result of income received from the interstate or intrastate division of revenue pool. The reported gross income under column 2 shall be the same under the retailing business and occupation tax and retail sales tax classifications, with appropriate adjustments and deductions noted under column 3.~~

~~**Service.** Persons engaged in the telephone business or rendering telephone service are taxable under the service and other activities classification on their income from services which are not included within the definition of the terms "sale at retail" in RCW 82.04.050 or "competitive telephone service" and "network telephone service," as defined herein. Included under this classification are, among others, gross income from the sale of advertising in telephone directories, gross income from charges made for processing NSF checks, and any other miscellaneous income.~~

~~Retail Sales Tax~~

~~The retail sales tax applies to all sales of competitive telephone service provided to both residential and business (nonresidential) customers. The retail sales tax also applies to all sales of network telephone service provided to business (nonresidential) customers.~~

~~The retail sales tax applies upon sales to a telephone company of all tangible personal property used as a consumer in providing tele-~~

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~~phone service. A consumer is liable for retail sales tax on all telephone service, as described herein, in situations where the tax was not paid to a telephone company as a result of a billing or other invoice rendered by that company.~~

~~The retail sales tax must be collected and accounted for in every case where retailing business and occupation tax is due as outlined herein, except for the following. The retail sales tax shall not apply to sales of network telephone service, other than toll service, provided to residential customers nor to sales of network telephone service paid for by inserting coins in coin-operated telephones.~~

~~The retail sales tax does not apply to sales of network telephone service, other than toll service, provided to residential customers.~~

~~The retail sales tax does not apply to sales of network telephone service which is paid for by inserting coins in coin-operated telephones. However, the retail sales tax does apply if the network telephone service is provided through a coin-operated telephone, the service originates from or is received on equipment in this state, and the charge for the service is billed to a telephone or other telecommunications equipment, instrument, or apparatus which is located in Washington.~~

~~The sales tax does not apply to network telephone service which is merely billed to a telephone or other telecommunications equipment, instrument, or apparatus whose situs is in Washington if the service neither originated from nor was received on equipment in this state.~~

~~Use Tax~~

~~The use tax applies to telephone or other telecommunications equipment, instrument, or apparatus purchased at retail and upon which the sales tax has not been paid. (See WAC 458-20-178.) A telephone company is liable for use tax on all tangible personal property purchased at retail and upon which the sales tax has not been paid. A telephone company is not liable for use tax on its own use as a consumer of its own network telephone service.~~

~~Special Situations~~

~~Persons making sales of telephone service for resale in the regular course of business must follow the provisions of WAC 458-20-102 concerning resale certificates.~~

~~The local retail sales tax applies to sales of telephone services as described herein. (See WAC 458-20-145.)~~

~~Persons engaged in telephone business or rendering telephone service are not taxable under the public utility tax, except with respect to gross income from engaging in telegraph or any other public service business as defined in WAC 458-20-179.~~

~~All retail telephone services including sales of equipment are taxable at the same state retail sales tax rate of 6.5 percent, regardless that such sales may be made in a border county. (See WAC 458-20-237.)~~)) This rule identifies what constitutes competitive telephone services, telecommunications services, and ancillary services; how these products are taxed; and the statutes that apply for determining if the sale of these products are subject to taxation in Washington (sourcing and apportionment). The rule applies to tax periods commencing on or after July 1, 2008. This rule is divided into three parts as follows:

• Part I: What are competitive telephone services, telecommunications services, and ancillary services?

• Part II: How are competitive telephone services, telecommunications services, and ancillary services taxed in Washington?

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• Part III: When is the sale of competitive telephone services, telecommunications services, or ancillary services subject to taxation in Washington (sourcing and apportionment)?

Part I: What are competitive telephone services, telecommunications services, and ancillary services?

(101) **Introduction.** Washington law imposes tax on the three following distinct products: Competitive telephone service, telecommunications service, and ancillary service. Subsections (102), (103), and (104) of this section describe these three services.

(102) **What is a competitive telephone service?** A "competitive telephone service" means the providing by any person of telecommunications equipment or apparatus, or service related to that equipment or apparatus such as installation, repair, or maintenance services, if the equipment or apparatus is of a type that can be provided by persons that are not subject to regulation as telephone companies under Title 80 RCW. See RCW 82.04.065.

(103) **What is a telecommunications service?** A "telecommunications service" means the electronic transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals to a point, or between or among points. Telecommunications service includes such transmission, conveyance, or routing in which computer processing applications are used to act on the form, code, or protocol of the content for purposes of transmission, conveyance, or routing without regard to whether such service is referred to as voice over internet protocol services or is classified by the federal communications commission as enhanced or value added. See RCW 82.04.065.

(a) **What services are included within the definition of telecommunications service?** Table A below provides a nonexclusive list of services considered to be telecommunications services in Washington.

Table A

Type of Service	Description
800 Service	A service that allows a caller to dial a toll-free number without incurring a charge for the call. The service is typically marketed under the name "800," "855," "866," "877," and "888" toll-free calling, and any subsequent numbers designated by the federal communications commission.
900 Service	An inbound toll service purchased by a subscriber that allows the subscriber's customers to call in to the subscriber's prerecorded announcement or live service. "900 service" does not include the charge for: Collection services provided by the seller of the telecommunications services to the subscriber or services or products sold by the subscriber to the subscriber's customer. The service is typically marketed under the name "900 service," and any subsequent numbers designated by the federal communications commission.
Fixed wireless service	A service that provides radio communication between fixed points.
Mobile telecommunications service	A commercial mobile radio service, as defined in Title 47 C.F.R., Section 20.3 as in effect on June 1, 1999.
Mobile wireless service	A service that is transmitted, conveyed, or routed regardless of the technology used, whereby the origination and/or termination points of the transmission, conveyance, or routing are not fixed including, by way of example only, telecommunications services that are provided by a commercial mobile radio service provider.
Paging service	A service that provides transmission of coded radio signals, which may include messages or sounds, for the purpose of activating specific pagers.
Private communications service	A service that entitles the customer to exclusive or priority use of a communications channel or group of channels between or among termination points, regardless of the manner in which the channel or channels are connected, and includes switching capacity, extension lines, stations, and any other associated services that are provided in connection with the use of the channel or channels.

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Type of Service	Description
Value-added nonvoice data service	A service that otherwise meets the definition of telecommunications services in which computer processing applications are used to act on the form, content, code, or protocol of the information or data primarily for a purpose other than transmission, conveyance, or routing.
Prepaid calling service	Means the right to access exclusively telecommunications services, which must be paid for in advance and which enable the origination of calls using an access number or authorization code, whether manually or electronically dialed, and that is sold in predetermined units or dollars of which the number declines with use in a known amount.
Prepaid telephone calling service	Means the right to purchase exclusively telecommunications services that must be paid for in advance, that enables the origination of calls using an access number, authorization code, or both, whether manually or electronically dialed, if the remaining amount of units of service that have been prepaid is known by the provider of the prepaid service on a continuous basis.
Prepaid wireless calling service	Means a service that provides the right to use mobile wireless service as well as other nontelecommunications services including the download of digital products delivered electronically, content, and ancillary services, which must be paid for in advance and that is sold in predetermined units or dollars of which the number declines with use in a known amount.

(b) **What services or items are excluded from the definition of telecommunications service?** Table B below provides a list of services or items not considered to be telecommunications services in Washington.

Table B

Item	Description
Data processing and information services	Data processing and information services that allow data to be generated, acquired, stored, processed, or retrieved and delivered by an electronic transmission to a purchaser where such purchaser's primary purpose for the underlying transaction is the processed data or information.
Tangible personal property	Tangible personal property.
Advertising	Advertising services including, but not limited to, directory advertising.
Billing and collection	Billing and collection services provided to third parties.
Internet access	Internet access. See RCW 82.04.297.
Audio and video programming	Radio and television audio and video programming services, regardless of the medium, including furnishing of transmission, conveyance, and routing of such services by the programming service provider. Radio and television audio and video programming services include, but are not limited to, cable service as defined in 47 U.S.C. Section 522(6) and audio and video programming services delivered by commercial mobile radio service providers, as defined in Title 47 C.F.R., Section 20.3.
Ancillary services	Ancillary services. See subsection (104) of this section.
Digital products	Digital products delivered electronically including, but not limited to, music, video, reading materials, or ring tones.
Software	Software delivered electronically.

(104) **What is an ancillary service?** An ancillary service is a service associated with or incidental to the provision of a telecommunications service.

What services are considered to be ancillary services? Table C below provides a nonexclusive list of services considered to be ancillary services in Washington.

Table C

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Type of Ancillary Service	Description
Conference bridging	A service that links two or more participants of an audio or video conference call and may include the provision of a telephone number. "Conference bridging service" does not include the telecommunications services used to reach the conference bridge.
Detailed telecommunications billing	A service of separately stating information pertaining to individual calls on a customer's billing statement.
Directory assistance	A service of providing telephone number information and/or address information.
Vertical service	A service that is offered in connection with one or more telecommunications services that offers advanced calling features allowing customers to identify callers and to manage multiple calls and call connections, including conference bridging services.
Voice mail	A service that enables the customer to store, send, or receive recorded messages. Voice mail service does not include any vertical services that the customer may be required to have in order to use the voice mail service.

Part II: How are competitive telephone services, telecommunications services, and ancillary services taxed in Washington?

(201) **Introduction.** Washington law imposes tax on the three following distinct products: Competitive telephone service, telecommunications service, and ancillary service.

(202) **Are competitive telephone services, telecommunications services, and ancillary services taxable in Washington?** Yes. The sale of a competitive telephone service, telecommunications service, and ancillary service to a consumer is a retail sale. See RCW 82.04.050. A sale of these same services that is not a retail sale constitutes a wholesale sale (a sale for resale). See RCW 82.04.060. Washington imposes taxes on retail and wholesale sales of these services as follows:

(a) **Retail sales tax:** The retail sale of any of these services is subject to the retail sales tax unless an exemption applies. See RCW 82.04.050, 82.04.190, and 82.08.020. Generally, the retail sales tax is paid by the consumer and collected and remitted by the seller.

(b) **Retailing business and occupation (B&O) tax classification:** Persons making retail sales of any of these services are subject to the B&O tax on the gross proceeds of these sales under the retailing classification. See RCW 82.04.050, 82.04.190, and 82.04.250.

(c) **Wholesaling B&O tax classification:** Persons making sales of the services for resale in the regular course of business are subject to tax on the gross proceeds of these sales under the wholesaling classification. See RCW 82.04.060 and 82.04.270. See WAC 458-20-102 for information on how sales for resale are administered by the department.

(d) **Deferred retail sales tax:** If the seller does not collect retail sales tax, a buyer who is not reselling the products must pay the retail sales tax (commonly referred to as "deferred retail sales tax"), unless the specific services purchased are exempt under the law.

(e) **Local retail sales tax:** The services are subject to sales tax in local jurisdictions that impose a retail sales tax. See RCW 82.14.030.

(203) **Tangible personal property used in providing competitive telephone service, telecommunications service, and ancillary service.** The retail sales tax applies to sales to a provider of telecommunications service, competitive telephone service, or ancillary service of all tangible personal property used as a consumer in providing these services.

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(204) **How are "bundled transactions" containing telecommunications or ancillary services treated for sales tax purposes?** The taxability of bundled transactions is addressed in RCW 82.08.190 and 82.08.195. This subsection (204)(a), (b), and (c) of this section briefly describe what a bundled transaction is and how these transactions are treated for sales tax purposes.

(a) **What is a "bundled transaction"?** A bundled transaction refers to the retail sale of two or more products, except real property and services to real property, if:

(i) The products are otherwise distinct and identifiable; and

(ii) The products are sold for one nonitemized price.

(b) **What is not a "bundled transaction"?** A bundled transaction does not include the sale of any products in which the sales price varies, or is negotiable, based on the selection by the purchaser of the products included in the transaction. There are a number of specified transactions that otherwise meet the definition of a bundled transaction, but that are not considered to be bundled transactions for Washington state tax purposes. For more information about these exclusions please see RCW 82.08.190(4).

(c) **How are "bundled transactions" taxed?** Under statute, if a transaction contains one or more products that is subject to retail sales tax, the entire bundled transaction will be subject to retail sales tax. Because both telecommunications service and ancillary service are subject to retail sales tax in Washington, a transaction that contains one of these services will generally be fully subject to retail sales tax. However, if the price of a bundled transaction includes charges for telecommunications service or ancillary service and products that are not retail sales taxable:

(i) Then the portion of the price attributable to the nontaxable products is subject to the retail sales tax;

(ii) Unless the seller can identify by reasonable and verifiable standards, the nontaxable portion from its books and records that are kept in the regular course of business for other purposes including, but not limited to, nontax purposes.

Part III: How is the sale of competitive telephone services, telecommunications services or ancillary services sourced?

(301) **Sourcing and apportionment.** This section provides references to the rules for determining if the sale of competitive telephone service, telecommunications service, or ancillary service is deemed to take place (sourced) in Washington and is subject to the retail sales tax and the rules for determining when the gross proceeds from the sale of these services is apportioned to and taxable under Washington's retailing and wholesaling B&O tax classifications.

(a) **Retail sales tax:** RCW 82.32.520 and 82.32.730 provide the rules that must be used for determining when a sale of competitive telephone services, telecommunications services, or ancillary services is sourced to and subject to retail sales tax in Washington.

(b) **Retailing and wholesaling B&O tax:** RCW 82.04.530 and 82.04.535 provide the rules for determining when gross proceeds from the sale of telecommunications service or ancillary service must be apportioned to and subject to Washington wholesaling and retailing B&O tax classifications.

(302) **Does Washington's public utility tax apply?** Persons engaged in providing competitive telephone services, telecommunications services, and ancillary services are not taxable under the public utility tax, except with respect to gross income from engaging in telegraph or

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any other public service business as defined in WAC 458-20-179. See RCW 82.04.310 and 82.16.020.

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