



ATTORNEY GENERAL OF WASHINGTON

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December 20, 2013

SENT VIA E-MAIL & ABC/LEGAL MESSENGER

Steven V. King
Executive Director and Secretary
Washington Utilities & Transportation Commission
1300 S. Evergreen Pk. Dr. S.W.
P.O. Box 47250
Olympia, WA 98504-7250

Re: Rulemaking to Consider Amending and Adopting Rules in WAC 480-120,
Telephone Companies, and WAC 480-123, Universal Service, to Implement
Legislation Establishing a State Universal Communications Service Program;
Docket UT-131239

Dear Mr. King:

Pursuant to the Commission's December 3, 2013, Notice of Opportunity to File Written
Comments, enclosed please find Second Comments of Public Counsel for filing in the above-
entitled docket. A copy was also sent via e-mail on December 20, 2013.

Sincerely,

Simon J. Fitch
Senior Assistant Attorney General
Public Counsel Division
(206) 389-2055

SJf:ar
Enclosures

STATE OF WASH.
UTIL. AND TRANSP.
COMMISSION

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**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of

Rulemaking to consider amending and adopting rules in WAC 480-120, telephone companies, and WAC 480-123, universal service, to implement legislation establishing a state universal communications service program.

DOCKET UT-131239

STATE OF WASH.
UTIL. AND TRANSP.
COMMISSION

2013 DEC 23 AM 9:46

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**SECOND COMMENTS OF PUBLIC COUNSEL
DECEMBER 20, 2013**

I. INTRODUCTION

1. On December 3, 2013, the Commission issued a second set of draft rules to implement Second Engrossed Second Substitute House Bill 1971 (hereafter HB 1971), and asked for comment by December 20, 2013. Once again, Public Counsel appreciates the opportunity to comment on the proposed rules.¹
2. Public Counsel's initial (October 10, 2013) comments should be deemed incorporated herein by reference.² In those comments, Public Counsel tracked the statutory language, and noted that the first draft proposed rules largely met the statutory directives. Public Counsel had some concerns, which were explained in detail in the comments. The second draft rules improve

¹ These comments were prepared with the assistance of David C. Bergmann of Telecom Policy Consulting for Consumers, Columbus, Ohio.

² Thus not all background issues are re-discussed here.

on the first. Key items are rearranged and clarified. But the second draft rules also raise some concerns.

3. As Public Counsel's initial comments stated, the State of Washington has created what appears to be the only universal service support program in the Nation that is funded by general revenue funds rather than by assessments on carriers and their customers. The program is limited in time and funding. In adopting rules to implement this unique Universal Communications Service Program (UCSP), the statutory language should govern.

Fundamentally, the UCSP must not be used for purposes not germane to the statutory provisions. The central need is to further the public interest in universal communications service, consistent with the directive of the Legislature. As a threshold matter, the UCSP only provides for support to incumbent local exchange carriers with fewer than 40,000 access lines (referred to here as "SLECs" (i.e. "small local exchange carriers")) that are at risk of rate instability or service interruptions or cessation (RISIC) absent the support.³

4. The second set of draft rules addresses some of the problems identified in Public Counsel's (and others') comments on the first set. The following concerns remain, however:

- The new draft defines the rate benchmark as the federal urban rate floor (URF) in "Proposed Rule (I) WAC 480-123-____. Prerequisites for requesting program support (1)(d)."⁴ This is in contrast to the first draft, which set the rate floor at "*XX percent above* the local urban rate floor established by the Federal Communications Commission pursuant to 47 C.F.R. § 54.318 prior to July 1 of the year in which the provider files a petition for support." (Emphasis added.) The new draft rules thus lower the threshold at which SLECs can receive support. To paraphrase Public Counsel's earlier comments, this use of the federal urban rate floor as a surrogate for "a reasonable amount customers should pay for basic residential service provided over

³ Public Counsel Comments at 1.

⁴ Further reference to, e.g. this rule, will be to PR (I)(1)(d).

the incumbent public network” (referred to here as “BRS”)⁵ is problematic.

- The second draft rule (PR (I)(d)) now forbids SLECs from using UCSP funds to reduce BRS rates. This directive, if based on a view that BRS rates are destined for increases, misses the point of the network transformations that are occurring: Services other than BRS services are increasingly being offered over the network, and thus BRS should bear less – not more – responsibility for the costs of the network.⁶
- The draft rules⁷ calculate the amount of support as the sum of lost Washington USF funding and access revenue lost due to the FCC’s revamp of intercarrier compensation.⁸ It is unclear, however, how this amount of support has a necessary connection to eliminating the “risk of RISIC” required by the statute.

These issues will be discussed further below.

II. COMMENTS

A. Use of the FCC Urban Rate Floor.

5. As discussed in Public Counsel’s initial comments, the FCC urban rate floor does not equate to a reasonable amount customers should pay for BRS provided over the incumbent public network, as directed by the statute.⁹ Under the FCC rules, which are still being

⁵ § 20(4).

⁶ This is the condition that would prevail in a competitive market. Yet maintaining BRS rates that are greater than a reasonable amount that customers should pay is classic Ramsay pricing (see <http://www.businessdictionary.com/definition/Ramsay-pricing.html>) and unreasonable.

⁷ PR III(2). The draft rule says that support “shall not exceed “this sum, but it appears that the amount of support will equal that sum.

⁸ See *Connect America Fund*, 26 F.C.C.R. 17663 (2011).

⁹ Public Counsel Comments at 4-5.

litigated,¹⁰ an eligible telecommunications carrier (ETC) with rates below the URF will have its support reduced, not eliminated, as the second draft rule proposes.¹¹

6. Conceptually, the use of the URF – which represents the rates paid nationwide in low-cost urban areas – does not tie to “a reasonable amount customers should pay for” BRS provided over the network of high-cost rural local providers in Washington.

7. The URF is thus a blunt instrument, which contrasts with the granular discretion the Commission has allowed itself elsewhere in the rules. The draft rule does say that the determination will be “based on” the URF,¹² but it designates the benchmark required by the statute¹³ as the “local urban rate floor.”¹⁴

8. The draft rule as submitted risks giving support to SLECs whose current rates do not meet the statutory condition, thereby putting greater strain on the limited UCSP funds. The Commission should allow itself similar discretion for the rate benchmark.¹⁵

B. Reducing BRS rates.

9. The first draft rules was silent on whether UCSP support could be used to reduce BRS rates, where the SLEC’s BRS rates are substantially above the rate benchmark. The new draft affirmatively forbids such uses, albeit in a proviso to prerequisites for support.¹⁶ Public Counsel proposes eliminating this limitation.¹⁷ No such restriction is required by the statute. There is

¹⁰ *Connect America Fund*, FCC 11-161, ¶764. Opposing the FCC’s preemptive action is one of the key aspects of the 10th Circuit appeal *In re: FCC 11-161*. As this Commission knows, the National Association of Regulatory Utility Commissioners is a Petitioner on this issue.

¹¹ PR I(1)(d).

¹² *Id.* (emphasis added).

¹³ Sec. 203(4).

¹⁴ PR I(1)(d).

¹⁵ See Public Counsel proposed rule I(1)(d).

¹⁶ PR I(1)(d).

¹⁷ See Public Counsel proposed rule I(1)(d).

little reason to adopt one, particularly since much of the concern around rate levels has focused on carriers who maintain single digit rates well below the URF (or other representative average) while receiving USF or other subsidy flows.

10. This restriction boils down to a presumption that BRS rates above the urban rate floor (currently \$14) are *per se* reasonable,¹⁸ and should not be reduced, despite the fact that they are high enough to qualify the SLEC for UCSP support. As alluded to in Public Counsel's initial comments,¹⁹ a necessary part of the network revolution should be recognition that the cost responsibility of BRS for supporting the network ought to be reduced. Even before the dominance of the Internet, BRS was only one (albeit the most important) of the services offered over the network, so should not not have had disproportionate responsibility for supporting that network. In today's telecommunications and information technology environment, however, BRS is only one of the many services that ride over the IP-enabled network. Its cost responsibility and consequently its price should be declining.²⁰

11. Thus Public Counsel submits that SLECs receiving UCSP support should be allowed to allocate that support so as to lower BRS rates. No other rate is so limited. On the other hand, SLECs should not be *required* to use the support in this fashion. The SLEC's individual situation – as in the Commission's consideration of SLEC eligibility²¹ – will dictate that choice.

¹⁸ It appears from information provided by Staff that more than 20% of likely-eligible exchanges have BRS rates above \$17.00.

¹⁹ Public Counsel Comments at 5.

²⁰ See NASUCA ex parte in FCC Docket No. 10-90, et al (September 10, 2013) at 1-2, <http://apps.fcc.gov/ecfs/document/view?id=7520952034> ; see also id., Massachusetts Department of Telecommunications and Cable ex parte (June 17, 2013), <http://apps.fcc.gov/ecfs/document/view?id=7022426539>.

²¹ PR III(1).

C. Calculating The Amount Of Support.

12. The second draft rules rely on a rough justice approach to calculate support. Although the purpose of UCSP support is to reduce the risk of RISIC, the second draft rules appear to award funds with no direct connection to the required risk-reduction evaluation.²² The second draft says that support shall be *no more* than the sum of lost Washington USF Fund support and annual access revenue reduced by the FCC's CAF factor.²³ This could result in insufficient funding: A SLEC whose problems are broader than lost USF and access revenues²⁴ might receive less from the UCSP than needed to avoid the risk of RISIC. On the other hand, the funding could be more than needed to alleviate a SLEC's risk of RISIC. This would be especially true if the SLEC had already expanded into non-BRS (telecom and non-telecom) services, as many expect them to.²⁵

13. Thus Public Counsel urges the Commission to include, in its consideration of the amount of support awarded, the determination of the risk of RISIC that it has already addressed, per PR III(1). If the Commission desires to place a USF/access-based limit on a SLEC's take from the fund, which could also be accomplished.

14. This, rather than a strict formulaic approach like that in the second draft rules,²⁶ will better meet the statutory goals. Public Counsel has proposed amendments to accomplish this goal.

²² PR III(2).

²³ Id. (emphasis added).

²⁴ I.e., one with verifiably high costs.

²⁵ See Public Counsel Initial Comments at 8.

²⁶ First draft PR III(2).

D. Public Process.

15. As noted above, the second draft rules give the Commission far more discretion than did the first draft. Under such circumstances, it is important for the Commission to hear from a broad spectrum of interests before exercising that discretion.

16. To that end, Public Counsel recommends a public process that would enhance the Commission's decision-making, as follows:

- SLEC files application, per PR II(1)²⁷
- Within 30 days, a recommended decision is issued on whether SLEC has shown PR III(1) to have been met, and an interim finding on the amount of support, per PR III(2)
- Within 20 days, interested parties (including SLEC) file comments on recommended decision²⁸
- Final decision within 90 days

Under this timeline, the Commission would have 40 days to review the comments. This proposal is consistent with the proposed 90-day timeline in the draft rules.²⁹ The Commission would have the discretion to set the request for hearing if necessary, upon request of a petitioning company or other interested person.

17. Public Counsel proposes draft rules in Attachment A.

²⁷ See Public Counsel Initial Comments at 3, n.9.

²⁸ Under this tight timeline.

²⁹ See PR II(4) and III(5).

E. Additional Comments.

18. The new draft rules again contemplate the elimination of the fund established in Docket U 85-12.³⁰ As pointed out in Public Counsel's earlier comments, HB 1971 did not require any such elimination.³¹ Especially given the FCC's decision (currently under challenge) that IXCs need not contribute to local networks,³² it is entirely appropriate that the State of Washington take a more enlightened position.³³
19. The draft rules allow only "affected provider[s]" to petition to resolve disputes; the Commission may refer such disputes to the Advisory Board.³⁴ The rule should allow any interested party (including Public Counsel) to bring disputes to the Commission's attention.³⁵

II. CONCLUSION

20. It appears that, in contrast to the first set of draft rules, this set affords the Commission considerably more discretion to weigh a number of key factors, rather than dictating specific thresholds to determine support.³⁶ But there should be an effective public process to ensure that interested parties (including Public Counsel as a representative of consumers) have adequate input into the spending of these scarce general revenue fund dollars.
21. Again, apart from the issues addressed in these comments, the changes from the first draft rules represent mostly improvements and clarifications. Public Counsel has no comment on issues that were not raised in the initial round of comments.

³⁰ See PR III(2)(a).

³¹ Public Counsel Comments at 10-11.

³² *Connect America Fund*, FCC 11-161, ¶¶ 763-786. Opposing the FCC's preemptive action is one of the key aspects of the 10th Circuit appeal *In re: FCC 11-161*. As this Commission knows, the National Association of Regulatory Utility Commissioners is a Petitioner on this issue. Oral argument was held on November 19, 2013.

³³ This would require elimination of PR III.(2)(a).

³⁴ PR VII.

³⁵ See proposed amendment below.

³⁶ See, e.g., PR III(1).

ATTACHMENT A

III. PUBLIC COUNSEL'S RULE PROPOSALS

I.

(1) Wireline communications providers. A wireline communications provider may seek support from the program if the provider satisfies all of the following requirements:

(d): The provider's rates for residential local exchange service, plus mandatory exchange area service charges, are no lower than the benchmark local-urban rate floor established by the commission based on the Federal Communications Commission's most current calculation of a national local urban rate floor pursuant to 47 C.F.R. § 54.318 in the year in which the provider files a petition for support; ~~PROVIDED that if the provider's rates exceed the benchmark, the provider may not seek support from the program for the purpose of reducing those rates to the benchmark;~~ and

III.

(2) Calculation of support amount. The Commission shall determine ~~T~~The amount that a wireline communications provider eligible to receive support from the program may receive in a calendar year, based on its determination in (1) of this rule. Support shall ~~receive~~ not exceed the sum of the following:

...

(6) Unless another date is established by the Commission, a recommended decision will be issued no later than 30 days after the filing of each application. Interested parties may file comments on the recommended decision no later than 20 days after the issuance of the recommended decision.

VIII

Any interested person ~~An affected provider~~ may petition the commission to resolve any disputed matter concerning the program, including, but not necessarily limited to, the provider's eligibility to receive program support, the amount or timing of any distribution of support, and calculations of the provider's revenues and earnings levels. The commission may refer such requests to the advisory board as the initial point of review and consideration of the matter for which a carrier seeks resolution. The commission will make the final determination on any petition.