MILLER | NASH LLP
ATTORNEYS AT LAW

3400 U.S. Bancorp Tower
111 S.W. Fifth Avenue
Portland, OR 97204-3699
(503) 224-5858
(503) 224-0155 fax

500 E. Broadway, Suite 400
Post Office Box 694
Vancouver, WA 98666-0694
(360) 699-4771
(360) 694-6413 fax

Brooks E. Harlow
brooks.harlow@millernash.com
(206) 777-7406 direct line

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VIA E-MAIL & U.S. MAIL

Ms. Carole J. Washburn
Executive Secretary
Washington Utilities and Transportation Commission
Post Office Box 47250
1300 S. Evergreen Park Dr. SW
Olympia, Washington 98504-7250

Subject: Comments of RCC and U.S. Cellular Re Draft Proposed Rules
Docket No. UT-053021

Dear Ms. Washburn:

INTRODUCTION

We submit these comments on behalf of Rural Cellular Corporation ("RCC") and United States Cellular Corporation ("USCC") in response to the notice and draft proposed rules issued by the Commission on October 21, 2005. The Staff recommended that the Commission open this rulemaking docket in response to an order issued by the Federal Communications Commission ("FCC") earlier this year. See *In the Matter of Federal-State Joint Board on Universal Service*, Report and Order, CC Docket No. 96-45, FCC 05-46 (released March 17, 2005) ("Report and Order"). In the Report and Order, the FCC encouraged states to adopt approaches similar to those of the FCC in making initial ETC designations as well as additional requirements for annual certifications by ETCs.

Overall, RCC and USCC believe that the Commission has done an excellent job in undertaking independent review and analysis of the FCC's suggested approaches, consistent with protecting the public interest in Washington. As the FCC recognizes, the Report and Order serves as guidance to the states, but the states are empowered to make their own determinations. *See, e.g.*, Report and Order, ¶ 1. For the most part, this Commission has followed FCC guidance where clear public interest benefits will result in the state of Washington.

Because the draft rules craft such a good balance of competing interests and succeed in promoting the public interest, these comments largely suggest only technical

corrections. With two exceptions, RCC and USCC support the substance of the draft rules and encourage the Commission not to make major substantive changes to the draft.

DISCUSSION OF DRAFT PROVISIONS

RCC and USCC submit the follow section-by-sections comments:

WAC 480-123-0010: For the most part, the draft seems to incorporate definitions from the Report and Order. As an overarching comment, consistency with the FCC's rules with respect to service quality increases efficiencies for carriers operating in multiple states, and promotes a consistent and stable regulatory environment that minimizes controversies, carrier errors, and ambiguity. RCC and USCC further support the provisions in the rules that maps be filed digitally, as this approach is more efficient. The .shp format is one that carriers should be able to readily provide and is consistent with what the Commission has already required.

The one area where the Commission has tracked an FCC definition where RCC and USCC would suggest a change is "service outage." RCC and USCC suggest that "voice" be inserted before the word "communications" to make it clear that the reporting requirements only apply to the supported services, i.e., voice grade network access. Data services are not supported by the Universal Service Fund and, accordingly, should not be encompassed in the proposed rules.

The definition of the term "substantive" appears to have originated with the Commission. Although the draft seems generally consistent with the intent of the Report and Order, RCC and USCC suggest a clarification. The definition seems to contemplate that the only benefits that count are those that come from improvements in the network, while potentially excluding otherwise appropriate expenditures used to maintain the existing level of service. The statute and the FCC's rules require federal high cost support to be used "for the provision, maintenance, and upgrading of facilities and services for which the support is intended,"[1] RCC and USCC believe that focusing the annual review solely on the upgrading or improvement of services is too narrow.

Certainly for new entrants, the Commission can and should expect to see expansion and improvements of services. However, as networks mature, support can be expected to be used more for provision and maintenance of services and less for expansion and improvements. For example, in the wireless industry, expenditures for tower leases, interconnection facilities, and recurring infrastructure costs will increase as new facilities are constructed in high-cost areas, all of which are expenditures contemplated by federal law. Perhaps the Commission can make it clear in its order of adoption that the examples listed are

[1] *E.g.*, 47 U.S.C. § 254(e); 47 C.F.R. § 54.7.

not intended to exclude the provision and maintenance of facilities and services. Alternatively, the definition could be revised to clarify that the definition is intended to be consistent with the federal statute and rule.

WAC 48-123-0020: As noted in the introduction, RCC and USCC strongly support the substance of this rule. In particular, RCC and USCC applaud the decision to draft sub-section (d), which requires a two year investment plan, rather than five years as in the Report and Order. The draft rightfully recognizes that network plans for all telecommunications carriers beyond two years are meaningless and useless because carriers cannot predict market conditions, demands, and the competitive environment much beyond one year. Accordingly, plans longer than two years are so imprecise and subject to change that preparing, submitting, and reviewing them is a waste of time, both for the companies and the Commission.

The requirement of draft sub-section (f) of a "general description of the area where a carrier has customers, plant and equipment," appears to only apply to wireline carriers and that wireless carriers are required to provide a coverage map. RCC and USCC believe this is appropriate, as wireless technology is such that the location of plant and equipment is not linked to customers, but coverage is. We recommend the Commission clarify its intent in this section.

RCC and USCC support the Commission's incorporation of the Cellular Telecommunications and Internet Association's ("CTIA") consumer code for wireless service to protect consumers and supply service quality standards for wireless ETCs.

WAC 480-123-0030: In a policy reversal, the FCC has recently ruled that the federal statute requires a public interest demonstration when a carrier files an application with the FCC for ETC status in areas served by a non-rural company.[2] RCC and USCC feel very strongly that the FCC's previous interpretation of the statute was correct and that its new reading is not. The matter remains on appeal and will eventually be decided with finality as to the FCC. In the meantime, this Commission is not bound by the FCC's interpretation of the statute, especially when the FCC has now decided the question twice, definitively, in diametrically opposed rulings.

Accordingly, RCC and USCC ask the Commission to read the statute so as to give it plain meaning, that, consistent with the public interest, convenience and necessity, in areas served by a non-rural company, an ETC shall be designated if it meets the requirements of Section 214(e)(1). The statute could not be more clear that it is in the public interest to grant additional ETCs in areas served by non-rural companies, but that there must be a separate public

[2] Report and Order, *supra; see also, In the matter of Highland Cellular, Inc., Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, CC Docket No. 96-45, FCC 04-37 (April 12, 2004).

interest determination before an additional ETC can be designated in areas served by rural telephone companies.

WAC 480-123-0040: RCC and USCC suggest that this section be clarified by revising the text to provide as follows:

> Revocation Of Eligible Telecommunications Carrier Designation. The Commission on complaint on its own motion, after notice and hearing may modify, suspend, or revoke the designation of an ETC is materially not in compliance with its designation order, or is [] operating in a manner that is not consistent with the public interest.[3]

A grant of ETC status would be considered to be a "license" under the provisions of the Administrative Procedure Act ("APA"). See RCW 34.05.010(9)(a).[4] Thus, under the APA, the WUTC may not revoke that license, "unless the agency gives notice of an opportunity for an appropriate adjudicative proceeding . . . ." RCW 34.05.422(1). Accordingly, the Commission should ensure that revocation of ETC be conducted pursuant to the Commission's rules on complaints and that all the protections of an adjudicative proceeding should apply. The suggested revisions accomplish this.

Additionally, the revisions would make it clear that only the Commission would be allowed to seek revocation of ETC status, not the ETC's competitors. Finally, an ETC designation should not be revoked merely because it could be difficult for the ETC to prove it is operating in a manner that is consistent with the public interest. For revocation, the bar should be set higher. The ETC should have to be shown to be operating in a manner that is inconsistent with the public interest. The suggested revisions also accomplish this.

WAC 480-123-0050: RCC and USCC note that the certification language contained in this section follows the language of 47 C.F.R. § 54.314(a). Accordingly, RCC and USCC support the proposed rule.

WAC 480-123-0060: With the exception of two provisions that go beyond the FCC's rules, RCC and USCC support this section, which requires an annual certification regarding proper use of federal high cost funds, consistent with FCC regulations. Additionally, the proposed new rule would expand the reporting requirements to include most, but not all, of the information suggested by the FCC in its Report and Order. RCC and USCC believe it is appropriate that all ETCs be held accountable for their use of high cost funds. The reporting

[3] Deletions from the original draft are indicated by "[]" and insertions are underlined.

[4] "License" means a franchise, permit, certification, approval, registration, charter, or similar form of authorization required by law . . . ."

requirements in the draft rule do a good job of ensuring accountability. Additionally, RCC and USCC note that the Commission proposes to impose the reporting requirements on a competitively neutral basis. Incumbent, LECs and competitive ETCs alike will be subject to the same certification requirements.

In choosing which of the FCC's suggested reporting requirements to adopt, the Washington Commission has struck a good balance that serves the public interest well, without unduly burdening carriers with unnecessary recordkeeping and reporting requirements. However, in two areas that go beyond the FCC requirements, the draft would create significant burdens and problems for carriers.

Sub-section (1) of the proposed rule speaks broadly of "all materials supplied to NECA" and reports regarding investments and expenses "paid with federal support." Although the context of the rule and the Commission's jurisdiction imply that such reports are limited to support received for the state of Washington, the language of the rule is much broader than that. RCC and USCC suggest that the sub-section be modified to make it clear that the scope of the report is limited to information related to federal support received for services being provided the state of Washington.

Sub-section (2) uses the defined term "service outage" in the short title. In the text of the rule, however, it only refers to "every outage." For consistency with the definition, the term "service" should be inserted before the word "outage". Also, the phrase "potentially affect" is unduly vague and open-ended. For example, if an outage curtails the service of 5% of end users, but could have affected 100% of users if it had been worse, does the reporting requirement apply? Because the term is vague, RCC and USCC are not certain what the intent of the drafters was. Perhaps the word "potentially" simply be eliminated. Under the definition of "service outage" contained in proposed WAC 480-123-0010, if the ability of an end user to maintain and establish a channel of communications is significantly degraded, then that customer is affected, regardless of whether or not the customer has attempted to establish a channel of communication. The qualification of "potentially" makes the rule confusing. Also, there is some ambiguity in the phrase "a designated service area." It would be helpful to clarify that the rule applies to outages affecting 10% of end users in the designated service area of the ETC within the state of Washington. An outage that affects fewer than 10% of end users within the state should not have to be reported to the Washington commission, regardless of the number of customers affected in some other state or states.

Finally, sub-section (2)(f) should be revised to request the "estimated" number of customers affected. All ETCs may, with some outages, face difficulty in knowing precisely how

many customers are affected.[5] Wireless carriers have an even harder time in knowing how many customers are affected because if a cell tower goes down, other cell towers may be able to provide coverage to most or all of the customers in the area near the failed cell tower. Moreover, due to the mobile nature of wireless services, it is not possible to know how many customers are actually in an affected coverage area at any given time of an outage.

Sub-section (4) is the most troublesome provision of the draft rules. In going beyond the rules the FCC adopted in the Report and Order, the draft would begin to create a patchwork of different and conflicting state tracking and reporting requirements. There will be a substantial cost to RCC and USCC to comply with this requirement, as it is unique. Even if Washington were the only state to adopt its own unique tracking and reporting requirements for complaints, compliance with this draft as it stands would be expensive and difficult. For carriers that operate in multiple states, having multiple compliance and reporting requirements is extraordinarily burdensome.

In order to understand the practical difficulties of complying with the draft as it stands, some background is needed. Both RCC and USCC have consolidated their customer service functions to better serve customers by maintaining customer service representatives in fewer locations so that systems, training, and quality control can be managed more efficiently. Both use regional call centers. Thus, the call center nearest to the state of Washington will likely serve several states. However, in some cases, calls from Washington may be routed to any of the call centers anywhere in the country. For example, if the closest call center is experiencing a long wait time for calls to be answered, the call will be automatically routed to a different call center with shorter wait times. Likewise, calls may be routed to a different call center depending on the type of inquiry. Service inquiries may be better handled at a different call center than billing inquiries. Thus, in the case of RCC any of its call centers may receive calls from any of its 16 states. Likewise, in the case of USCC, personnel at its call centers may be called upon to handle calls from any of 26 different states. Unfortunately, because every call to a call center is potentially a "complaint" this would mean that each and every call received by one of RCC's or USCC's call centers might have to be handled and tracked in accordance with the draft rule.

The practical problems that RCC and USCC would face from the draft rule cannot be overstated. In order to be able to comply with the rule, a call center employee would have to make a determination at the outset or the conclusion of the call first, whether the call constitutes a "complaint" under the Washington rule. If the call is deemed to be a reportable complaint, then the call center employee will have to categorize the call in accordance with the Washington rule and ensure that it is reported somehow. The difficulty of training all employees of all call

[5] If the intent of the drafters in using the term "potentially" was to address this issue, then using the term "estimated" could resolve that ambiguity as well.

centers to comply with recording and reporting requirements for as many as 26 states would be enormous.[6]

On top of the training issues, compliance with the rule will also require systems that are capable of recording and tracking complaints and categories. Currently, neither RCC nor USCC have systems that are capable of tracking complaints in anything close to the requirements of the draft rule. Both RCC and USCC purchase "off the shelf" tracking systems from third party vendors which either cannot be revised or can only be revised at great expense. They would have to attempt to replace their existing systems with new systems that had additional capabilities. Whether such systems exist or could be developed as a custom application is not known. The cost, however, could be several hundreds of thousands of dollars or more. Moreover, the complexity of developing or acquiring a system to comply with requirements of a single state are dwarfed in comparison with the challenge of developing a system that will enable compliance with different requirements of up to 26 states.

RCC and USCC submit that the easiest way to resolve these significant problems with the draft rule is for the WUTC to follow the FCC's example as set forth in the Report and Order and *Virginia Cellular*[7] and *Highland Cellular*[8] orders. A number of other states have either adopted rules or have placed in orders granting ETC status consumer complaint reporting requirements that track the FCC, including: Kansas, Kentucky Mississippi, Nebraska, and New Mexico.

The FCC's rule requires a report on "the number of complaints per 1,000 handsets or lines . . . ." 47 C.F.R. § 54.209(a)(4). The FCC has interpreted a "complaint" only to encompass a formal or informal complaint to the FCC or the state commission. In the context of a state rule, RCC suggests that the "complaints" that should be covered are formal or informal complaints to the FCC, the WUTC, or the Washington Attorney General.[9]

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[6] It is particularly problematic given the lack of definition as to what constitutes a "complaint." For example, suppose a call center employee receives a call from a customer complaining about the inability to make or receive a call, but it turns out the customer was in a "roaming" mode and failed to take proper steps to authorize additional charges of a roaming call. Should the call center employee categorize this as a "complaint" or merely a customer education issue?

[7] *Virginia Cellular, LCC Petition for Designation as an Eligible Telecommunications Carrier*, CC Docket No. 96-45, FCC 03-338 (January 22, 2004).

[8] Note 2, *supra*.

[9] If the rule is limited to complaints of this type, then RCC and USCC would be able to categorize them as provided in the draft rule. The process would be manual, but the number of complaints to review and categorize would be relatively small, making the task feasible.

Alternatively, if the Commission concludes it must broaden the definition of "complaint" to include complaints to the ETC, RCC and USCC request that the rule be limited to calls that are escalated to a supervisor. Using this approach, the routine calls that are often the result of user error or confusion and other minor, quickly resolved problems would not need to be tracked and reported. Only more serious or difficult problems that require intervention and assistance of a supervisor would be deemed complaints.

Finally, if the Commission feels it must have information about all "complaints" no matter how minor or short lived, RCC and USCC strongly urge the Commission not to require any specific categorization of complaints. Moreover, the rule should cover only complaints regarding voice services, not data, text messaging, or other services. RCC and USCC are just two of the many carriers covered by this rule and even they have different systems and tracking capabilities. If the coverage of the rule as it is drafted is to be retained, carriers should be allowed to categorize or list the complaints consistent with the capabilities of their existing automated systems. In the case of USCC, this would mean a report that lists every trouble call to call center based on the location of the originating switch that from which a call is received. In the case of RCC, this would mean a similar report, but based on the telephone number of the originating call to the call center.

Sub-section (7), the "safe harbor"[10] provisions proposed in of the draft rule are also of concern to RCC and USCC. For both companies, the new requirements could mean a substantial increase in their advertising budgets for lifeline services in the state of Washington or a diversion of dollars from advertising for lifeline programs in other states. Moreover, RCC and USCC may not be able to comply with some of the requirements.

First, there is no evidence that a significant number of potential lifeline customers are not taking advantage of the programs because of a lack of awareness. Second, this is not an area where a regulatory mandate is needed, particularly for wireless ETCs. The wireless business is very competitive not only generally, but also as to lifeline customers. Although this may not be intuitive to the Commission, lifeline customers actually generate a very low percentage of bad debt. Because of the significant subsidies that are available to the service, they generate significant and reliable revenues. Accordingly, RCC and USCC value lifeline customers and aggressively pursue them.

Because carriers are motivated to sign up lifeline customers, the extent and nature of advertising should be left up to the carriers. In the experience of RCC and USCC, they simply do not need to engage in the scope and frequency of advertising that the new rule would mandate to attract nearly all of the qualified customers to at least one carrier offering lifeline service.

[10] Although the provisions of sub-section (7)(a) are deemed a "safe harbor," in practice, it appears that the intent is to establish a minimum requirement for frequency and types of advertising.

Households with low income may have limited means financially, but they are very resourceful otherwise. People with low incomes understand that phone service is valuable and that subsidy programs are available. Thus, when the need for subsidy arises, low income families are proactive in seeking out lifeline programs by contacting carriers. Although no data is available statewide, a good example can be found on the Yakima reservation. There, USCC already provides lifeline service to nearly all households on the reservation. Further advertising expenditures there would just be a waste of dollars that could be spent building cell towers.

RCC and USCC suggest the following specific revisions to sub-section (7). First, they would agree with sub-section (7)(a)(i) provided that it is revised to require a "bill message" rather than a "bill insert." The reason for this is that bill inserts require a separate piece of paper when a prominent bill message would be just as effective at conveying the information without requiring significant additional paper. Requiring a bill insert is harmful to the environment as it consumes more paper and generates more waste. It also adds costs for additional paper, printing, and postage.

RCC and USCC support sub-section (7)(a)(ii), as it is consistent with current practice, is a good way to get the message to the public, and is not unduly burdensome or costly to do.

Wireless carriers cannot comply with sub-section (7)(a)(iii) in practice. RCC and USCC are not aware of any wireless carriers in Washington that publish telephone books or have telephone books published on their behalf. Wireless carriers are not required to obtain directory listings or publish telephone books under either state or federal law. Publishing a directory is not one of the nine supported services, nor are ETCs required to provide directories or listings in order to qualify to receive federal universal service funds. ILECs who publish their own telephone directories can easily comply with the rule at the cost of additional paper and ink. Similarly, ILECs that have outsourced their telephone directories typically have agreements that allow them to place notices required by regulations in the front of the phone books at a modest or zero cost. Wireless ETCs have no such arrangements. Wireless carriers would first have to secure agreement from the ILEC or its publisher to place the required notice in the information section in the front of the directory. Moreover, they would likely have to pay unregulated advertising rates to obtain such access. Accordingly, RCC and USCC suggest that this requirement be eliminated or made optional. Making it mandatory will be discriminatory in practice, even though the requirement would apply equally to ILECs and wireless carriers, because only ILECs have relationships with directory publishers that allow them to easily place notices at relatively low cost.

Sub-section (7)(a)(iv) should be revised to provide as follows:

> Advertises its services and charges available to low income consumers by placing ads with two or more distinct media channels, with at least ten ads per calendar quarter in the ETC designated service area in the state.

The provisions of the existing draft will discourage carriers from being resourceful and innovative in allocating their advertising dollars among various media channels. Radio and TV advertising is relatively expensive, but not necessarily the most effective way to reach the largest number of potential lifeline customers. The revision RCC and USCC suggest will still give a performance metric for safe harbor purposes, but not stifle innovation.

Finally, sub-section (7)(a)(v) assumes that every Indian tribe publishes a tribal newsletter or newspaper at least twice per quarter and accepts advertising. This is not always the case. The rule should be revised to include the phrase, "unless the tribal publication is published less frequently than twice per calendar quarter or will not accept the number of ads required by this sub-section from the ETC.

WAC 480-123-0070: RCC and USCC support this section. As noted above, the federal requirement for recertification differs from the proposed state rule. In particular, the FCC requires an annual progress report on the ETC's five-year service quality improvement plan. *E.g.*, Report and Order, ¶ 69. As noted above, RCC and USCC believe that five-year planning is not in the public interest. In a much more realistic and beneficial approach, this Commission's proposed rule requires reporting on the expected use of federal support that will be received from October 1 of the reporting year through the following September. Thus, the rule as drafted only requires an ETC to forecast its use of funds for up to five quarters in the future from the date of filing. This is a reasonable forecasting requirement. Forecasts pursuant to this rule should be reasonably reliable and accurate. Thus, they will provide a realistic and meaningful ability for the Commission to review whether the projected uses of funds are in the public interest and will also provide the Commission with a meaningful opportunity to review progress each year compared to the prior year's forecast.

CONCLUSION

With a few clarifications and amendments as noted in these comments, RCC and USCC believe that the draft rules, as proposed, will improve accountability for use of federal

Universal Service Funds and promote the public interest without unduly burdening ETCs. RCC and USCC support the Commission's adoption of the proposed rules with the foregoing changes.

Very truly yours,

Brooks E. Harlow

cc: Robert Shirley

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