

EXHIBIT 2

**BEFORE THE WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION**

Eligible Telecommunications Carriers (ETC)
Rulemaking, WAC 480-120-311

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Docket No. UT-053021

**COMMENTS OF THE
WASHINGTON INDEPENDENT TELEPHONE ASSOCIATION**

The Washington Independent Telephone Association (WITA) files these Initial Comments for consideration in this docket. The Commission opened this docket in order to receive comments on the most appropriate response to the Federal Communications Commission's (FCC) order in *In re Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45; FCC 05-46; 2005 WL 646635 (rel'd March 17, 2005) (*ETC Designation Order*). These Initial Comments focus primarily on the issues raised in the *ETC Designation Order* related to potential changes in the manner in which state commissions designate applicants for eligible telecommunications carrier (ETC) status for receipt of federal Universal Service support.¹ The FCC's new requirements for ETC applicants are a step in the right direction.

I. BACKGROUND

Each of WITA's members is a "rural telephone company"² as that term is defined by the Telecommunications Act of 1996 (Act). Each of the rural companies have constructed telecommunications networks throughout their individual service areas that for the most part are

¹The Initial Comments will also briefly discuss the annual certification process.

²The WITA members will be referred to as "rural companies" in these Initial Comments.

ready to serve any customer that requests service. These networks have been built over time. Today, those networks have the capability of providing advanced telecommunication services as well as basic telecommunication services.

Under the Federal Universal Service Fund (FUSF) procedures, rural companies must build their network before they can receive reimbursement. Once the network is built, rural companies file cost studies reflecting the actual cost to build the networks. Based on these cost studies, the rural companies receive FUSF on what is generally a two-year lag basis. The cost studies that are filed are subject to outside audit.

This process for the rural companies, of having first put the facilities in the ground, then justifying the costs of the facilities through cost studies which are subject to outside audit, contrasts with how competitive ETCs (CETCs) receive support. A CETC receives support based upon the incumbent ETC's costs. The CETC does not have to prove that the supported facilities have already been constructed. The CETC does not provide a cost study. Since the CETC does not provide cost studies, there is no outside audit.

Issues related to the designation of ETCs are of critical importance to rural companies. Rural companies face substantial economic challenges. These challenges stem from the relatively sparse population density in rural areas, and small proportion of large business customers.³ Additionally, on average, rural consumers have lower income than non-rural consumers and can least afford to pay higher telephone bills.⁴ Therefore, the continued existence of Universal Service support is of critical importance to the rural companies that serve rural areas.

³ In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Rural Task Force Recommendation to the Federal-State Joint Board on Universal Service (Rel. September 29, 2000) ("RTF Recommendation") beginning at p. 17.

⁴ *Id.*

II. INTRODUCTION

The *ETC Designation Order* adopted new requirements for carriers seeking designation as an ETC (*ETC Designation Order*, ¶ 1). Additionally, the FCC added new requirements for those ETCs that have received their designation from the FCC, obligating them to provide certain information as part of their annual certifications (*ETC Designation Order*, ¶ 4). Although the FCC's new requirements do not apply to state commission proceedings, the FCC has encouraged state commissions to consider adopting its new requirements for their own ETC proceedings.

The principle of Universal Service is straightforward—to ensure that “all Americans have access to affordable, quality telecommunications services.” *In re Federal-State Joint Board on Universal Services, Multi-Association Group Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers, Fourteenth Report and Order*, CC Docket Nos. 96-45, 00-256, FCC 01-157, ¶ 2 (rel'd May 23, 2001). In furtherance of this goal, rural companies have constructed throughout their service areas the infrastructure that provides ubiquitous, high-quality local service to remote and difficult to serve areas. Universal Service support has been an important factor in allowing rural companies to provide service in high cost areas, and as such Universal Service support is a precious resource.

The continued availability of affordable, high-quality service to rural consumers is at risk because of creamskimming behavior and substantial and ever-increasing demands on the Universal Service fund from new carriers, particularly from wireless carriers. Wireless carriers have been particularly aggressive in seeking ETC status nationwide. This has been especially true in Washington.

Also of concern is the fact that this Commission generally does not regulate wireless carriers.⁵ Consequently, wireless carriers that become ETCs are able to obtain funding without regard to their actual cost to provide service, and without having to comply with, or bear the economic burden of, the Commission's consumer protection regulations. Thus, wireless carriers are able to compete with the rural companies, and receive funding without having to prove their costs and this Commission does not provide any protection for Washington consumers who have disputes with those wireless carriers.

WITA supports this Commission's adoption of new requirements for carriers that seek ETC designation from the Commission. These new requirements are essential to ensure that only fully qualified and committed carriers receive Universal Service support. WITA has given a great deal of thought to the ETC designation process. The basic premise advanced in these Comments is one of equivalency. Incumbent and competitive ETCs alike should be accountable in the ETC process and the use of FUSF monies. However, differences in funding rules (incumbents must first build networks and then file cost studies which are subject to outside audits) and technology (wireless and wireline) dictate that different approaches are needed. However, the end result should be "equivalent" standards of ETC service and oversight in the use of FUSF support.

III. THE COMMISSION SHOULD ADOPT THE FCC'S NEW REQUIREMENTS FOR ETC APPLICANTS

In its *ETC Designation Order*, the FCC determined that an applicant seeking ETC designation from the FCC must demonstrate:

- (1) a commitment and ability to provide services, including providing service to all customers within its proposed service area;

⁵ This does not mean that the Commission is prevented from putting conditions on the ETC designation of a wireless carrier requiring that carrier to comply with certain aspects of the Commission's regulations, such as consumer protection rules.

- (2) how it will remain functional in emergency situations;
- (3) that it will satisfy consumer protection and service quality standards;
- (4) that it offers local usage comparable to that offered by the incumbent LEC; and
- (5) an understanding that it may be required to provide equal access if all other ETCs in the designated service area relinquish their designations pursuant to section 214(e)(4) of the Act. [*ETC Designation Order*, ¶ 20.]

The FCC “encourage[d] state commissions to apply these requirements to all ETC applicants over which they exercise jurisdiction.” *Id.*

(A) Commitment and Ability to Provide the Supported Services

(1) Commitment to Serve Customers

The FCC stated that an ETC applicant will satisfy this requirement by providing services to all requesting customers within its requested service area (*ETC Designation Order*, ¶ 22). The FCC elaborated that if the ETC’s network already passes or covers a potential customer’s premises, it should provide service immediately. Otherwise, the ETC must undertake additional measures to provide service to the requesting customer within a reasonable period if it can do so at a reasonable cost (*Id.*). The FCC suggested that the ETC could do so by: “(1) modifying or replacing the requesting customer’s equipment; (2) deploying a roof-mounted antenna or other equipment; (3) adjusting the nearest cell tower; (4) adjusting network or customer facilities; (5) reselling services from another carrier’s facilities to provide service; or (6) employing, leasing, or constructing an additional cell site, cell extender, repeater, or other similar equipment” (*Id.*). If an ETC applicant determines that it cannot serve the customer using one or more of these methods, then it must report the unfulfilled request to the FCC within 30 days of the determination (*Id.*). One way this standard could be met on an equivalency basis is to require the ETC applicant to

meet the same held order and service installation standards as rural companies. See, WAC 480-120-105 (discussed below).

(2) Commitment on Use of Funds

The FCC further determined that an ETC applicant should submit a formal network improvement plan that demonstrates how Universal Service funds will be used to improve coverage, signal strength, or capacity, that would not otherwise occur absent the receipt of high-cost support (*ETC Designation Order*, ¶ 21). The FCC adopted the requirement that an ETC applicant must submit a five-year plan describing with specificity its proposed network improvements or upgrades throughout its proposed designated service area (*ETC Designation Order*, ¶ 23). The five-year plan must demonstrate in detail how high-cost support will be used for service improvements that would not occur absent receipt of such support, including:

- (1) how signal quality, coverage, or capacity will improve due to the receipt of high-cost support throughout the area for which the ETC seeks designation;
- (2) the projected start date and completion date for each improvement and the estimated amount of investment for each project that is funded by high-cost support;
- (3) the specific geographic areas where the improvements will be made; and
- (4) the estimated population that will be served as a result of the improvements.

[*Id.*]

Applicants must either provide this information for each wire center in each service area for which they expect to receive Universal Service support, or explain why service improvements in a particular wire center are not needed and how funding will otherwise be used to further the provision of supported services (*Id.*).

WITA views these newly-adopted requirements as very important, and it strongly urges this Commission to adopt them for future ETC applicants. If a carrier seeks ETC designation, it

must show that it is willing to provide services throughout its designated service area and to use USF monies to improve its network.

When consideration is given to how incumbent ETCs (the rural companies) receive FUSF support based upon past, actual investment on a two year lag supported by cost studies subject to outside audit, requiring CETC applicants to provide a five year build-out plan of how they will use the FUSF that they receive, which is based upon the incumbent ETC's level of support per line, makes sense. If the FUSF system evolves to where CETCs receive support based upon their own historical costs for networks that they have constructed in the rural service areas for which they seek designation, those costs are supported by adequate support, and the support is subject to outside audit, then a five year build-out plan would not be needed. Under the second scenario, when it evolves, CETCs would be treated on the same basis as incumbent ETCs. Until then, the five year build-out plan provides the equivalent accountability to what the incumbent ETCs provide through their actual investment and cost study process.

Typically, a wireless carrier seeks ETC designation from the Commission after it has already constructed its network and begun providing service. Thus, the wireless carrier is already providing service to the public without relying on Universal Service funding. If the wireless carrier subsequently attains ETC status from the Commission, it can boost its revenues without doing anything to further the goals of Universal Service—it may obtain funding for its entire service area upon certification as an ETC, regardless of whether it has captured any new customers or expanded its service into new areas. This happens because the ETC is entitled to the same level of Universal Service support as the ILEC. 47 CFR 54.307.

Therefore, granting an ETC designation to a CETC without requiring the applicant to commit to serve customers and undertake network improvement, is likely to result in an unearned

windfall, without any benefit to Washington consumers. Simply put, if a prospective ETC cannot explain with specificity how it would use the Universal Service support it receives, the Commission should not approve its application. Therefore, the Commission should mandate that ETC applicants provide service to requesting customers and submit network improvement plans as specified by the FCC.

Additionally, WITA notes that ETCs are required to offer Lifeline and Link Up programs to qualifying low-income customers under 47 CFR 54.405 and 54.411. Also, under 47 CFR 54.201(d)(2), ETCs receiving federal universal service support must publicize the availability of the supported services and Lifeline/Link Up and the corresponding charges, using media of general distribution throughout the service areas for which designation is requested. The Commission should require ETC applicants to acknowledge these obligations.

(B) Ability to Remain Functional in Emergency Situations

The FCC now requires ETC applicants to demonstrate that they have a reasonable amount of back-up power to ensure functionality without an external power source, that they can reroute traffic around damaged facilities, and that they are capable of managing traffic spikes resulting from emergency situations (*ETC Designation Order*, ¶ 25). WITA agrees with the FCC that functionality during emergency situations is an important consideration for the public interest. The Commission should require ETC applicants to explain how they will remain functional in emergency situations. What is difficult to determine from the FCC order is exactly how an ETC applicant will provide this explanation. One way to approach it is to require that the ETC applicant be subject to the existing rules on back-up power and major outages. See, WAC 480-120-411(3).

(C) Consumer Protection

The FCC found that applicants for an ETC designation must make specific commitments to objective measures to protect consumers (*ETC Designation Order*, ¶ 28). To satisfy this requirement, the FCC determined that a wireless carrier could commit, at a minimum, to comply with the Cellular Telecommunications and Internet Association's (CTIA) Consumer Code for Wireless Service (*Id.*). The FCC further stated that state commissions may impose other requirements consistent with federal law to ensure that the supported services are offered in a manner that protects consumers (*ETC Designation Order*, ¶ 30).

WITA urges this Commission to require wireless ETC applicants commit to consumer protection measures. At minimum, the Commission should require wireless carriers to commit to comply with the CTIA Consumer Code for Wireless Service.

WITA's position is that equivalent standards should apply to all ETCs. This means that under the consumer protection standards, either the Commission's rules should apply to all ETCs or the Commission's rules should not apply if an incumbent ETC faces competition from a competitive ETC in its service area to whom the Commission declines to apply those standards. It may be helpful to look at some of the requirements that are currently placed on incumbent ETCs. This can help place in perspective what the equivalent standards should be for the competitive ETC.

- WAC 480-120-104 - "Welcome" Letters. Within fifteen days of installation of service, or within fifteen days of a material change in service, a company must provide a confirming notice or welcome letter that provides contact information for the appropriate business office, a description of the service ordered (or for a change in

service, the new service) and the rates for such service. Is there any reason a CETC should not provide this information?

- WAC 480-120-105 – Performance Standards for Installation or Activation of Service. A company must complete an order for service within five business days after the order date for ninety percent of all orders up to the initial five lines (this would be hand sets for wireless companies). Ninety-nine percent of the orders must be completed within ninety days after the order date. One hundred percent of all orders must be completed within one hundred eighty days after the order date. Penalties apply for failure to meet these standards.
- WAC 480-120-122 – Establishing Credit/Residential Service. This rule establishes the standards under which a deposit may be requested. Given the duties of ETCs, including CETCs, to serve those that apply for service, it appears appropriate that this rule apply to all ETCs or none.
- WAC 480-120-123 – Establishing Credit/Business Services. This is the equivalent credit standard rule for business service. Again, given the service obligations that an ETC should undertake, it appears appropriate to apply this rule to all ETCs or none.
- WAC 480-120-124 – Guarantee in Lieu of Deposit. As part of the consumer protection practices related to service, the same standards should apply to all ETCs.
- WAC 480-120-128 – Deposit Administration. This rule is also part of the overall Commission rules on the handling of consumer deposits and customer service.
- WAC 480-120-132 – Business Offices. This rule establishes the criteria for a business office. If an ETC applicant is going to assert that it is available to provide service

throughout the area for which it seeks designation, it should be unquestionably willing to meet the Commission's business office standards.

- WAC 480-120-133 – Response Time for Calls to Business Office or Repair Centers. Again, basic service operation standards should not be an issue for any applicant that desires ETC status. This rule requires specific standards for responding to customer calls to business offices.⁶
- WAC 480-120-161 – Bill Information. This rule establishes the standards for the relationship between the carrier and the customer for bill payment intervals and the information that must be included on a customer's bill. This includes a requirement that the Internet address for the provider's service offerings must be disclosed on the bill so the customer has access to verify what they are being billed is accurate. There are additional requirements set forth in the rule. This is a customer information requirement. It seems reasonable that if the wireline ETC has to provide this information to customers, the wireless ETC should do so as well. As with most of these requirements, the costs for complying with the Commission's rules are built into the incumbent ETCs' per line FUSF support that is the basis upon which the wireless provider will receive compensation. That means that the competitive ETC is being reimbursed up front, at least in part, the cost of complying with these types of requirements up front.
- WAC 480-120-162 – Cash and Urgent Payments. This rule requires that the local exchange company establish payment agencies for the receipt of cash and urgent payments. Should a CETC be subject to any lesser standard?

⁶ Rather than repeat the "apply to all or none" equivalency concept, please consider it as an integral part of the consideration of each rule.

- WAC 480-120-163 – Refunding of Overcharges. A LEC is responsible for refunding overcharges up to a maximum of two years in the past. Why should a wireless or other CETC be subject to any lesser standard?
- WAC 480-120-164 – Pro rata Credits. This rule requires prorata credits if service is not up to standard. Since the entire purpose of FUSF is to ensure that adequate service is available to all consumers in rural and high cost areas on a comparable basis to urban areas, it is unassailable that CETCs should provide the same level of service credits for poor service that incumbent ETCs are required to provide.
- WAC 480-120-165 – Customer Complaints. This rule requires that the company meet certain standards to address customer complaints. What can be more basic to the need to provide universal service than to provide an avenue and standards for customer complaints? Again, WITA is not asking that CETCs do more than what incumbent ETCs are required to do. If the Commission believes that the presence of competition in an area where that competition is supported by the FUSF is sufficient protection for the customer, then both the incumbent ETC and the CETC should not have to comply with a rule such as this. If the Commission believes that consumer protection must be stated at a basic level, then all carriers receiving FUSF support for the provision of basic service, which is at the core of the universal service program, should be required to conform to the same standards.
- WAC 480-120-166 – Commission – Referred Complaints. The same rationale for this rule is stated for WAC 480-120-165. Every ETC should be responsible for responding to Commission complaints at the same level and time intervals.

- WAC 480-120-171 – Discontinuing Service – Customer Requested. Under this rule, the Commission has established the basic requirements for responding to customer requests to discontinue service. This rule should either apply or not apply across the board. As a corollary, WITA notes with some concern that the practice in the wireless industry is to lock customers into one or two year contracts with severe penalties for discontinuing service. There is an important public policy issue that those contracts present when a wireless carrier receives FUSF. Is it appropriate to lock customers into service for a year or longer and receive universal service support for that customer while delivering inferior service? It is WITA's position that the Commission should adopt a standard that requires wireless ETCs to allow customers to discontinue service on the same basis that they can discontinue service from an incumbent ETC. This would allow customers the ability to change service without the fear of incurring huge penalties. Is that not the hallmark of a competitive environment? More importantly, the ability to change service is one of the controls ensuring that an ETC lives up to its promise of delivering the service for which it is receiving universal service support.
- WAC 480-120-172 – Discontinuing Service – Company Initiated. Again, the idea is to provide a basic level of consumer protection. Either this rule is not needed when there are multiple ETCs or all ETCs should be held to this standard.
- WAC 480-120-173 – Restoring Service After Discontinuation. This is part of the discreet set of Commission rules related to discontinuation of service. They should all apply to all ETCs, or they should not apply to any of the ETCs.
- WAC 480-120-174 – Payment Arrangements. Again, this is part of the basic program related to the discontinuance or continuation of service.

- WAC 480-120-196 – Customer Notice Requirements. This rule applies to competitively classified companies. This seems to be analogous to CETC status. What this rule requires is a basic customer notice as to changes in rates and terms. Although this rule provides a lesser requirement than that placed on incumbent ETCs operating under tariffs, it appears to be the equivalent standard that should apply for CETCs. If a CETC is enjoying the benefits of support from the FUSF, it should at least agree to provide the basic notice for change in terms and conditions that the Commission applies to competitive companies.
- WAC 480-120-401 – Network Performance Standards. Under this rule, it would appear that CETCs, focusing on wireless service, should be able to comply with WAC 480-120-401(2)(a) that requires dial tone to be provided within three seconds on at least ninety-eight percent of the calls placed and that ninety-eight percent of the calls placed must not encounter intra-switch blocking conditions. The other service standards contained in the rule do not seem to have applicability to the technology deployed in wireless networks.
- WAC 480-120-402 – Safety. This rule establishes a basic safety requirement. It would appear that any CETC should be able to comply with this rule.
- WAC 480-120-411 – Network Maintenance. This rule establishes some very basic conditions for network maintenance. It contains within it the back-up power requirements to provide service under emergency conditions. See, WAC 480-120-411(3). This is one of the standards that should be at the core of CETC applications.
- WAC 480-120-412 – Major Outages. This rule establishes the standards that companies must meet when faced with major outages. It includes the conditions to

provide service for E-911 standards. Again, this seems to be a basic standard that all ETCs should meet.

- WAC 480-120-414 – Emergency Operations. Again, this is a very basic standard to meet for demonstrating how an ETC applicant can continue to function under emergency conditions.
- WAC 480-120-438 – Trouble Report Standard. This rule establishes the standards for consumer complaints. While a slight adjustment to the standard needs to be made for wireless ETCs, the basic concept is that there should be a minimum standard for operation that all entities that say that they can provide universal service should meet.
- WAC 480-120-439 – Service Quality Performance Reports. These are the standard requirements for service quality reporting. CETCs should be subject to the same level as the equivalent sized incumbent. If a CETC falls under Class A limits, it should meet the Class A standards. If a CETC falls under Class B size limits, then it should meet those standards. There is no attempt to apply anything onerous to an ETC. If these standards are onerous, then they are onerous for the wireline or incumbent ETCs as well. Just as a reminder, the difference between Class A and Class B companies for purposes of this rule is that Class A companies must actually file reports with the Commission. Class B companies must maintain the records necessary to substantiate the standards, but do not have to file the reports. The information is available for Commission review. WITA is not suggesting that a CETC should be subject to any

different standard. If it falls within the appropriate classification, then it either reports or maintains the records as appropriate for its classification.⁷

- WAC 480-120-440 – Repair Standards for Service Interruptions and Impairments. This rule establishes the standards for repairing facilities for service interruptions and impairments. This rule should either apply to all ETCs or it should not apply to any ETC if there is more than one ETC in an area.

In past ETC designation orders, the Commission has relied, at least in major part, on the purpose of promoting competition. If the Commission is promoting competition through the designation of the ability to draw FUSF, then the Commission should recognize that competition means operating under the same rules. There are some things that this Commission cannot affect. These include such items as the FCC's grant to wireless companies of a "local" calling area which consists of the Major Trading Area, an area much broader than the incumbent wireline company can enjoy. However, when it comes to consumer protection standards, the Commission has a choice. It can determine that for the purposes of promoting competition, when it designates a CETC in an area, competition will determine consumer benefits and the Commission's rules do not apply to any of the ETCs. Or, the Commission can decide that there is a basic level of service that needs to be provided by any entity that is designated as an ETC and apply its ETC standards to all of those carriers.

In taking this position, WITA desires to emphasize to the Commission that it is not simply saying that every rule that applies to an incumbent LEC must apply to a CETC. There are several of the Commission's rules that WITA has omitted as either technologically inappropriate or

⁷ In order to establish a level of classification, WITA recommends that for CETCs that are wireless carriers, they report their number of "supported lines" and that these be included in the denominator for the calculation of which companies qualify as a Class A or Class B company.

seemingly unrelated to ETC status. It is only those rules that relate to the provision of the basic services that are required to be provided by any ETC that WITA includes in the approach suggested in these Comments.

(D) Local Usage

The FCC's Order encouraged state commissions to consider whether the applicant for ETC status offers a local usage plan comparable to those offered by the ILEC. The FCC noted that "there is nothing in the Act, Commission's rules, or orders that would limit state commissions from prescribing some amount of local usage as a condition of ETC status." *ETC Designation Order*, ¶ 34.

The Commission should consider whether the prospective ETC's local usage plan is comparable to the ILEC's. The Commission should at minimum review wireless carriers' calling plans for whether they make available sufficient minutes to allow a level of local calling that is practical for consumers' everyday needs.

(E) Equal Access

The FCC declined to impose a general equal access requirement on ETC applicants. However, it concluded that it should require ETC applicants to "acknowledge that we may require them to provide equal access to long distance carriers in their designated service area in the event that no other ETC is providing equal access within the service area." *ETC Designation Order*, ¶ 35.

WITA's view is that the Commission should require ETC applicants to acknowledge that they may be required to provide equal access to long distance carriers in their designated service area in the event that no other ETC is providing equal access within the service area. Under 47 U.S.C. §214(e)(4), if a provider relinquishes its ETC designation, this Commission must examine

whether it should require the remaining ETC(s) to provide equal access, and it may, under 47 U.S.C. §251(h)(2), treat another carrier as an ILEC. Thus, requiring ETC applicants to acknowledge that they may be required to provide equal access is consistent with statutory requirements, and is advisable. If other ETCs relinquish their designation, Washington consumers may need to rely on the applicant's ability to route long distance calls so that they may have a choice of long distance providers.

IV. The Commission, Like the FCC, Should Conduct a Careful "Public Interest" Analysis

In the *ETC Designation Order*, the FCC provided clarification that a public interest showing is required in all ETC proceedings, both rural and non-rural. The Order is clear in this regard:

Section 214(e)(2) of the Act gives states the primary responsibility to designate ETCs and prescribes that all state designation decisions must be consistent with the public interest, convenience, and necessity. [*ETC Designation Order*, ¶ 61.]

The statute on point is equally clear:

Upon request and consistent with the public interest, convenience, and necessity, the State commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission. 47 USC §214(e)(2).

In the case of all ETC applications, if the applicant is unable to show that granting it ETC status will further the public interest, the Commission must deny the application.

The "public interest" requirement properly reflects the fact that in some rural areas the benefit of supporting multiple carriers will exceed the cost of supporting multiple networks. ILECs serving rural customers use relatively long loops, and tend to have far higher common line and per-customer central office costs than carriers serving in non-rural areas. At the same time,

lower disposable income levels mean increases in local rates are more likely to adversely impact customers in rural areas than in urban areas. Moreover, relatively attractive multi-line business customers are rare in most rural areas.⁸

In the *ETC Designation Order*, the FCC adopted a public interest analysis, and encouraged state commissions to apply its analysis in determining whether an ETC designation would be in the “public interest.” *ETC Designation Order*, ¶¶ 3, 19. In making its “public interest” determination, the FCC primarily considers:

- (1) the benefits of increased consumer choice;
- (2) the impact of the designation on the Universal Service fund;
- (3) the unique advantages and disadvantages of the competitor’s service offering.
[*ETC Designation Order*, ¶ 18.]

Additionally, where the ETC applicant requests designation below the study area level of the rural ILEC, the FCC conducts a creamskimming analysis (*ETC Designation Order*, ¶¶ 41-42, 48). The burden of proof is on the ETC applicant to show that its application meets the public interest requirement (*ETC Designation Order*, ¶ 44).

The FCC has noted that, in regard to factor (1) above (benefits of increased consumer choice), the value of increased competition alone is unlikely to satisfy the public interest test. Therefore, this Commission should require that the ETC applicant show that it will provide some benefit beyond mere competition.

In reviewing factor (2) (the impact of the designation on the Universal Service fund), Washington must recognize that additional ETC designations do materially increase the size of the universal service fund. The *ETC Designation Order* notes that collectively, state decisions regarding ETC status “have national implications that affect the dynamics of competition, the

⁸ Rural Task Force White Paper No. 2: The Rural Difference.

national strategies of new entrants, and the overall size of the federal universal service fund” (*ETC Designation Order*, ¶ 60). The continued reliance on the concept that any one designation does not materially burden the fund ignores the collective effects of “just one more” designation. When does it become the proverbial straw that breaks the camel’s back? WITA’s advocacy has been and continues to be that there are some areas where the densities are so low and the support per line so high, that it does not make good sense to designate more than one ETC. And, in any event, it is WITA’s position that no more than one wireless CETC should be designated for any rural company’s service area.⁹

In reviewing factor (3) (the competitor’s service offering), the FCC has noted that a disadvantage of a service offering would include dropped calls and poor coverage (*Id.*). Thus, if the applicant’s service offering has the disadvantages of dropped calls and poor coverage, these deficiencies discount the value of the applicant’s service.

In order to prevent the burdens on the Universal Service fund (and ultimately the Washington consumer through a higher USF contribution factor), WITA supports the Commission’s adoption of these standards in making its own public interest determination, and that it thoroughly review any application for whether granting it would be in the “public interest.” Not only should the Commission require ETC applicants to meet their burden of proof to show the benefits of increased consumer choice (factor (1) above), and the unique advantages and disadvantages of the competitor’s service offering (factor (3) above), it must also pay particular attention to the potential creamskimming effect of granting the application, as well as the impact of the designation on the Universal Service fund (factor (2) above).

⁹ This does present an awkward position for the Commission since in some areas there are three or perhaps even four wireless ETCs already designated. WITA’s suggestion is that in those areas, the Commission conduct comparative hearings and allow each wireless ETC to describe to the Commission the benefits it will bring to that area. There is ample precedent for following this approach where limited public resources are available.

The FCC paid particular attention to the issue of creamskimming with respect to applications for ETC status that affect a rural carrier. The FCC has noted:

In order to avoid disproportionately burdening the Universal Service fund and ensure that incumbent LECs are not harmed by the effects of creamskimming, the Commission strongly encourages states to examine the potential for creamskimming in wire centers served by rural incumbent LECs. This would include examining the degree of population density disparities among wire centers within rural service areas, the extent to which an ETC applicant would be serving only the most densely concentrated areas within a rural service area, and whether the incumbent LEC has disaggregated its support at a smaller level than the service area (e.g., at the wire center level). [*ETC Designation Order*, ¶ 49].

The FCC “urge[s]” state commissions to use its creamskimming analysis in determining whether to designate an ETC in a rural service area (*ETC Designation Order*, ¶ 53). The FCC took care to note that “the public interest analysis for ETC applications for areas served by rural carriers should be more rigorous than the analysis of applications for areas served by non-rural carriers” (*ETC Designation Order*, ¶ 59, emphasis added). The FCC found that for rural company service areas, an ETC applicant could not apply to serve less than an entire wire center. The purpose for this limitation is to address creamskimming (*ETC Designation Order*, ¶ 77). In the past, this Commission has relied upon disaggregation capability as a sufficient basis for addressing creamskimming. The FCC rejected that concept. The FCC specifically found that disaggregation was an inadequate response to creamskimming in rural company service areas (*ETC Designation Order*, ¶ 51).

The scope of an ETC’s service area, and potential creamskimming effect, is very important because Universal Service support is related to the average costs of specific areas, and different areas need different levels of support. Any time a second ETC does not provide service to the entire service area over which an incumbent’s costs and rates are averaged, the opportunity exists for the second ETC to creamskim—in other words—to provide service to the lowest cost

customers and thereby receive the same level of Universal Service support as it would for serving a high cost customer, but without the attendant higher cost. Consequently, ILEC service areas, and particularly rural ILECs, are vulnerable to cream-skimming of the lower cost customers. The second ETC, however, can serve only the below average cost customers, yet receive the average per line support. Thus, the second ETC, if it engages in cream skimming, receives a windfall at others' expense, and burdens the Universal Service fund (and ultimately the Washington consumer).

The Commission should reject a carrier's representation that it seeks ETC designation in only part of a rural ILEC's wire center because it is not licensed to provide service in the areas it seeks to exclude. Such ETC applicants must bear the burden of demonstrating why they cannot obtain a license or service agreement with another wireless carrier to serve a rural, or even non-rural LEC's entire wire center. If the applicant cannot do so, the Commission should require it to expand its facilities to cover the rural ILECs' entire wire center in true furtherance of the goal of Universal Service—to ensure that consumers in high-cost and rural areas have access to the services supported by Universal Service.¹⁰

As the FCC has pointed out, “[e]ven if a carrier seeks to serve both high and low density wire centers, the potential for creamskimming still exists if the vast majority of customers that the carrier is proposing to serve are located in the low-cost, high-density wire centers” (§ 50).

¹⁰ As the FCC has pointed out, “although disaggregation may alleviate some concerns regarding creamskimming by ETCs, because an incumbent's service area may include wire centers with widely disparate population densities, and therefore highly disparate cost characteristics, disaggregation may be a less viable alternative for reducing creamskimming opportunities” (*ETC Designation Order*, ¶ 51). Moreover, the FCC's regulations offer different Paths by which an ILEC may disaggregate its service area for Universal Service support purposes. Some ILECs have disaggregated their service areas by zones in accordance with Path 3 (47 CFR 54.315(d)), but even within zones the costs to provide service can vary greatly. Consequently, even if rural ILECs disaggregate their service areas, cream-skimming opportunities will continue if the competitive ETC provides service in only part of a zone.

Therefore, the Commission must closely review all ETC applications, and allow affected ILECs the opportunity to comment and participate in any proceeding involving ETC designation.

Consequently, the Commission must carefully consider whether granting ETC designation to a competitive ETC would serve the public interest. Only the strongest applications—those that meet the burden of showing the benefit of increased customer choice (something beyond mere competition) and that do not involve a service offering with disadvantages (such as poor signal coverage), should be considered. The applicant must likewise meet its burden to show that the granting of its application would not result in creamskimming. If the applicant cannot do so, its request for ETC status is not in the public interest, and should be denied.

V. REQUIREMENTS FOR EXISTING ETCs

The FCC also adopted new standards for existing ETCs as part of their annual certifications for continued receipt of Universal Service support. The FCC's new annual certification rules require that an FCC-designated ETC file the following with the FCC:

(1) progress reports on the ETC's five-year service quality improvement plan, including maps detailing progress towards meeting its plan targets, an explanation of how much Universal Service support was received and how the support was used to improve signal quality, coverage, or capacity; and an explanation regarding any network improvement targets that have not been fulfilled. The information should be submitted at the wire center level;

(2) detailed information on any outage lasting at least 30 minutes, for any service area in which an ETC is designated for any facilities it owns, operates, leases, or otherwise utilizes that potentially affect at least ten percent of the end users served in a designated service area, or that potentially affect a 911 special facility;

(3) the number of requests for service from potential customers within its service areas that were unfulfilled for the past year, including how the ETC attempted to provide service to those potential customers;

(4) the number of complaints per 1,000 handsets or lines;

- (5) certification that the ETC is complying with applicable service quality standards and consumer protection rules;
- (6) certification that the ETC is able to function in emergency situations;
- (7) certification that the ETC is offering a local usage plan comparable to that offered by the incumbent LEC in the relevant service areas; and
- (8) certification that the carrier acknowledges that the Commission may require it to provide equal access to long distance carriers in the event that no other eligible telecommunications carrier is providing equal access within the service area. [*ETC Designation Order*, ¶ 69.]

As discussed below, the Commission should apply these requirements to competitive ETCs. However, for some of these requirements there are already "equivalent" levels of accountability in place and may not be needed for the incumbent.

(A) Progress Reports

Requiring progress reports on the ETC's five-year service quality improvement plan would serve no purpose for ILECs. ILECs receive support based on their past expenditures, i.e, their investment on facilities that they already use to provide service. ILECs generally receive their Universal Service support on a two-year lag basis, which is based on annual cost studies filed with the National Exchange Carriers Association (NECA), which are subject to audit. These NECA cost studies include investment expenditure information, and are used to determine the amount of loop support ILECs receive.

Competitive ETCs, on the other hand, receive Universal Service support independent of their past investment in a rural service area. The level of Universal Service support they receive is based on the ILEC's costs, not their own costs. Therefore, given that competitive ETCs, particularly wireless ETCs, receive Universal Service support that is not based on their costs, logically, it is appropriate to require competitive ETCs to explain how they are using their support.

Indeed, the emphasis of the *ETC Designation Order* appears to be on wireless ETCs. In discussing the 5-year plan that must accompany ETC applications filed with the FCC, the FCC stated:

[T]he ETC applicant should provide service within a reasonable period of time if service can be provided at reasonable cost by: (1) modifying or replacing the existing customer's equipment [NB: different wireless CPE have different reception capabilities]; (2) deploying a roof-mounted antennae or other equipment; (3) adjusting the nearest cell tower; (4) adjusting network or customer facilities; (5) reselling services from another carrier's facilities to provide service; or (6) employing, leasing, or constructing an additional cell site, cell extender, repeater, or other similar equipment. [*ETC Designation Order*, ¶ 22 (emphasis added).]

The above requirements appear to be directed mainly at wireless carriers, rather than wireline carriers. The FCC also discussed the five-year building plan requirements in terms of how "signal quality, coverage, or capacity will improve due to receipt of high-cost support for the areas for which the ETC seeks designation" (*ETC Designation Order*, ¶ 23). This statement also appears to be aimed at wireless carriers. It is logical that the focus was on wireless carriers, given that most of the ETC applications the FCC receives are from wireless carriers (*ETC Designation Order*, n 44).

In light of the fact that ILECs' Universal Service support is largely based on past expenditures and is supported by cost analysis, whereas a competitive ETC's support is not, it is appropriate for this Commission to not only scrutinize a competitive ETC's network improvement plans, but also to review how they are progressing on their plans. Therefore, the requirement that an ETC file progress reports on its five-year service quality improvement plan is properly directed to competitive ETCs, particularly to wireless ETCs. The Commission must have information on

how the competitive ETC is progressing on its network improvement plan, and if the carrier is not making satisfactory progress, the Commission may revoke the ETC designation.¹¹

This approach provides the needed equivalency of accountability between incumbent ETCs and CETCs. If the ETC process evolves to a point where CETCs are receiving support based on their own costs for past investment and those costs are supported by appropriate cost support subject to outside audit, then the requirement for a progress report on a five year plan would no longer be needed. At that point, CETCs and incumbent ETCs would be on the same basis. The progress report on the five year plan provides, for the interim, an equivalency basis for accountability similar to what the incumbent ETCs provide.

(B) Certification Items¹²

For the remainder of the eight FCC standards, it is WITA's position that all ETCs, whether incumbent or competitive, should provide a certification, with modifications to meet Washington conditions. For example, for item 2 on the FCC list, to meet Washington standards, the certification should relate to the ability to comply with the Commission's major outage rule. For item 3 on the FCC list, the certification should describe the ETC's ability to meet the Commission's installation of service and held order rules. For item 4 on the FCC list, the certification should be related to compliance with the Commission's consumer complaint rules. For item 6 on the FCC list, the certification should be related to the Commission's performance standards.

¹¹ "[I]f a state commission believes that high-cost support is being used by an ETC in a manner that is inconsistent with section 254 of the Act, the state commission may decline to file an annual certification or may withdraw an ETC's designation, which would ensure that funds are no longer distributed to the ETC." *ETC Designation Order*, ¶ 63. See, also, ¶ 72.

¹² If a company is only receiving Lifeline/Link-up support for low-income customers, further modifications are appropriate.

Items 7 and 8 related to local usage and equal access, apply only to CETCs. They do not apply to incumbent ETCs who already have those duties.

What WITA has attempted to do in this section is to again apply an equivalency standard. Where appropriate, based upon technology and based upon the way in which support is provided, WITA has identified those areas where it would make sense to apply standards to all ETCs. Where there is an accountability standard already in place for the incumbent ETC, WITA has suggested a standard that would provide the equivalent accountability for a CETC.

VI. APPLICATION TO PRIOR ETC DESIGNATIONS

One question that the Commission should address is the application of the standards for a five year plan to the CETCs that have previously been designated by the Commission. Not to go into a great deal of depth at this time, for the reasons expressed for establishing accountability standards for CETCs that are equivalent to those already in place for incumbent ETCs, it is WITA's position that the requirement to provide a five year network improvement plan and annual progress reports on that plan should be imposed on the ETCs that have previously been designated by this Commission. The FCC has taken this approach (*ETC Designation Order*, ¶ 68). Consistent with the FCC's approach, the requirement should be imposed as of October, 2006.

VII. PROCEDURAL ISSUES

In the past, the Commission has considered applications for ETC designation at Commission open meetings. Often this has been a matter of a few days after the application is filed. Such a process is not appropriate where the FCC has pointed out that the consideration of public interest issues must be rigorous when an ETC applicant seeks designation in rural company

service areas. In the past, this Commission has not considered what effect an ETC designation might have in any particular service area. There has been no meaningful creamskimming analysis. There has been no analysis at all of the public interest for designation on a wire center-by-wire center basis. Instead, a macro analysis done in a very short period of time has been employed. WITA believes that the past approach should be abandoned by the Commission in favor of a more detailed, more rigorous approach as recommended by the FCC.

VIII. CONCLUSION

The FCC's new requirements for ETC applicants are a step in the right direction, and are common sense measures that are necessary to assure that only deserving carriers will receive Universal Service support. This will, in turn, improve the long-term sustainability of the FUSF.

Respectfully submitted this 29th day of June, 2005

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