

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of Amending and Adopting Rules in
WAC 480-123
Relating to Universal Service
.....) DOCKET UT-131239
))
)) GENERAL ORDER R-575
))
)) ORDER AMENDING AND
)) ADOPTING RULES
)) PERMANENTLY
))

1 **STATUTORY OR OTHER AUTHORITY:** The Washington Utilities and Transportation Commission (Commission) takes this action under Notice WSR # 14-08-094, filed with the Code Reviser on April 2, 2014. The Commission has authority to take this action pursuant to RCW 80.01.040(4), RCW 80.36.630, RCW 80.36.650, RCW 80.36.660, RCW 80.36.670, RCW 80.36.680, RCW 80.36.690, and RCW 80.36.700.

2 **STATEMENT OF COMPLIANCE:** This proceeding complies with the Administrative Procedure Act (RCW 34.05), the State Register Act (RCW 34.08), the State Environmental Policy Act of 1971 (RCW 43.21C), and the Regulatory Fairness Act (RCW 19.85).

3 **DATE OF ADOPTION:** The Commission adopts this rule on the date this Order is entered.

4 **CONCISE STATEMENT OF PURPOSE AND EFFECT OF THE RULE:** RCW 34.05.325(6) requires the Commission to prepare and publish a concise explanatory statement about an adopted rule. The statement must identify the Commission's

<p>OFFICE OF THE CODE REVISER STATE OF WASHINGTON FILED</p> <p>DATE: May 22, 2014 TIME: 2:09 PM</p> <p>WSR 14-12-008</p>
--

reasons for adopting the rule, describe the differences between the version of the proposed rules published in the register and the rules adopted (other than editing changes), summarize the comments received regarding the proposed rule changes, and state the Commission's responses to the comments reflecting the Commission's consideration of them.

5 In 2013, the legislature directed the Commission to implement a state universal telecommunications program (Program). 2E2SHB 1971, § 203, and authorizes the Commission to adopt rules by July 1, 2014, concerning:

- Operation of the Program;
- Criteria for eligibility for distributions from the account, use of distributed funds, identification of reports to be filed with the Commission;
- Disbursements from the universal communications services account;
- Benchmarks and other criteria to calculate distributions from the account; and
- An advisory board to advise the commission on rules and policies governing the operation of the Program.

6 The Commission amends and adopts rules in WAC 480-123 to implement this legislation. The Commission designates the discussion in this Order as the remainder of its concise explanatory statement, as that discussion provides a complete but concise explanation of the agency's actions and its reasons for taking those actions.

7 **REFERENCE TO AFFECTED RULES:** This Order amends and adopts the following sections of the Washington Administrative Code:

Amend	WAC 480-123-020	Definitions.
Adopt	WAC 480-123-100	Prerequisites for requesting program support.
Adopt	WAC 480-123-110	Petitions for eligibility to receive program support.
Adopt	WAC 480-123-120	Eligibility and distributions from the program.
Adopt	WAC 480-123-130	Reporting requirements.
Adopt	WAC 480-123-140	Commission compliance review of accounts and records.
Adopt	WAC 480-123-150	Advisory board.
Adopt	WAC 480-123-160	Resolution of disputes.
Adopt	WAC 480-123-170	Operation of the program.

8 **PREPROPOSAL STATEMENT OF INQUIRY AND ACTIONS**

THEREUNDER: The Commission filed a Preproposal Statement of Inquiry (CR-101) on July 3, 2013, at WSR # 13-14-122. The statement advised interested persons that the Commission was considering entering a rulemaking to consider amending and adopting rules to implement to provisions of Second Engrossed Second Substitute House Bill (2E2SHB 1971), enacted in the 2013 Second Special Legislative Session. Section 204 of the bill required the Commission to establish rules to implement a state universal communications service program. The Commission also informed persons of this inquiry by providing notice of the subject and the CR-101 to everyone on the Commission's list of persons requesting such information pursuant to RCW 34.05.320(3) and by sending notice to all registered telecommunications companies, the Commission's list of telecommunications attorneys and the list for all persons interested in rulemaking dockets. The Commission posted the relevant rulemaking information on its Internet website at <http://www.utc.wa.gov/131239>. Pursuant to the notice, the Commission hosted a stakeholder workshop on July 15, 2013, and received written comments by August 2, 2014. On December 3, 2013, the Commission issued draft rules to all interested persons with a December 20, 2013, deadline for filing comments.

9 **WORKSHOPS:** The Commission held a workshop on July 15, 2013, and October 16, 2013, in the Commission's Hearing Room, Second Floor, Richard Hemstad Building, 1300 S. Evergreen Park Drive S.W., Olympia, Washington. Participants in the workshops included CenturyLink, the Washington Independent Telephone Association (WITA), Tenino Telephone Company, Kalama Telephone Company, Inland Telephone Company, Whidbey Telephone Company, Frontier Communications Northwest Inc. (Frontier), Western Wahkiakum County Telephone Company, Comcast, Broadband Communications of Washington, and the Public Counsel Section of the Washington Attorney General's Office (Public Counsel).

10 **NOTICE OF PROPOSED RULEMAKING:** The Commission filed a notice of Proposed Rulemaking (CR-102) on April 2, 2014, at WSR # 14-08-094. The Commission scheduled this matter for oral comment and adoption under Notice WSR # 14-08-094 at 1:30 p.m., Thursday, May 15, 2014, in the Commission's Hearing Room, Second Floor, Richard Hemstad Building, 1300 S. Evergreen Park Drive S.W.,

Olympia, Washington. The Notice provided interested persons the opportunity to submit written comments to the Commission.

- 11 **WRITTEN COMMENTS:** The Commission received written comments from WITA, Public Counsel, Frontier, CenturyLink, and AT&T Corp., New Cingular Wireless PCS, LLC, and Teleport Communications America, Inc. (collectively AT&T).
- 12 **RULEMAKING HEARING:** The Commission considered the proposed rules for adoption at a rulemaking hearing on May 15, 2014, before Chairman David W. Danner, Commissioner Philip B. Jones, and Commissioner Jeffrey D. Goltz. The Commission heard oral comments from WITA and AT&T, both of whom emphasized aspects of their written comments.
- 13 **SUGGESTIONS FOR CHANGE THAT ARE REJECTED/ACCEPTED:** The Commission received written and oral comments suggesting changes to the proposed rules. A summary of the suggested changes and the Commission's reason for rejecting or accepting those suggestions are described below.

WITA

Calendar Year Distribution

- 14 WITA expressed concern with provisions in the proposed rules that the Commission will authorize distributions from the Program on a calendar year basis because the legislature provided funding for the Program on a state fiscal year basis running from July 1 through June 30. WITA suggests that distributing funding on a calendar year basis runs the risk that a stakeholder may claim during the fifth year of the Program that the final distributions can cover only half of calendar year 2019 and thus should be less than a full year distribution. WITA suggests that the rule language be revised to reflect Program operations on a fiscal year basis.
- 15 The proposed rules provide for distributions on a calendar year basis to match the time period for other aspects of the Program, specifically federal Connect America Fund (CAF) calculations and state and federal data reporting, all of which are based on calendar years. We find it unlikely that any stakeholder would challenge the amount of the distribution in the final year of the Program as WITA fears, particularly

when that amount will be calculated based data from the prior years. We nevertheless will modify the rules to refer only to “annual” distributions, and we confirm that our intent is to make complete distributions to eligible companies each of the five years the Program is in effect.

Cash Flow

- 16 WITA contends that a cash flow issue arises from the Commission terminating the traditional universal service support pool as of July 1, 2014, but not making the first distribution from the Program until January 2015. Companies entitled to support under both the traditional fund and the new fund will not receive their monthly distribution from the traditional fund for six months or more, potentially imperiling their ability to meet their financial obligations. WITA suggests modifying the language of proposed WAC 480-123-120 to allow a one-time payment related to the termination of the traditional universal service fund in October 2014.
- 17 We are sensitive to WITA’s cash flow concerns. At the same time, however, we note that only eligible companies may receive Program support, and we are unwilling to adopt rule language that would require a partial distribution to companies that have applied for such support before the Commission has made a final eligibility determination. Accordingly, we will modify proposed WAC 480-123-120 to provide the Commission with the flexibility to make a partial distribution to eligible companies before the first distribution of Program funds early next year if circumstances warrant and permit such action.

Timing of Distributions

- 18 WITA expresses concern about proposed WAC 480-123-120 which states, “Each eligible provider will receive a single distribution for the year after January 1 of that year.” WITA fears that the Commission could make the distribution as late as December 31 of that year, and WITA members need greater certainty about the timing of the distributions to structure their financial obligations accordingly. WITA proposes that the provision be revised to state, “Each eligible provider will receive a single distribution for the fiscal year between January 1 and January 15 of that year.”
- 19 As we stated in the context of addressing WITA’s cash flow issue, we will order funds from the Program to be distributed only to companies that are eligible to receive those funds. We are unwilling to adopt a rule that requires distributions by a specific

date when the Commission, despite reasonable efforts, may not be able to make a final eligibility determination by that date. Our goal, however, is to make reasonable efforts to ensure that the annual distributions to eligible companies occur soon after January 1 of each year of the Program.

Benchmark Rate Calculation

- 20 WITA objects to using the FCC's urban rate floor as the basis for the benchmark monthly local exchange service rate the Commission must establish in proposed WAC 480-123-100(1)(d) as threshold requirement for eligibility for Program funding. WITA acknowledges that it previously had recommended using the FCC's urban rate floor in prior comments in this proceeding, but WITA now questions that accuracy and utility of the FCC's calculations after the FCC announced that it expects its urban rate floor to rise to approximately \$20.46 over the next two years. WITA offers three alternatives for setting the benchmark: (1) use the FCC's urban rate floor in effect in 2013; (2) calculate the weighted average of the stand-alone residential rate paid by the customers of the two largest incumbent local exchange carriers in Washington; or (3) use the FCC's urban rate floor rate that is in effect as of the date of the carrier's initial filing for eligibility (currently \$14.00).
- 21 Eligible carriers receive the lion's share of their universal service support funding from the federal government, and that funding is tied to the carriers charging local exchange rates at or above the FCC's urban rate floor. The proposed rule appropriately bases the benchmark rate the Commission establishes for state USF support on the federal standard. Indeed, WITA initially advocated that the Commission adopt this approach, but WITA changed its position when the FCC published its latest calculations. We find that the proposed rule properly uses a principled basis for establishing the benchmark rate in Washington that is administratively efficient and consistent with federal law. The requirement that the Commission set the benchmark rate *based* on the FCC urban rate floor establishes a presumption that those two rates will be the same but allows the Commission the flexibility to make an adjustment if necessary to ensure that local service rates for rural ILECs in Washington are fair, just, reasonable, and sufficient. We reject WITA's suggested changes to the proposed rules on this issue.

Benchmark Rate as Threshold Requirement

- 22 No company would be eligible for Program funding if its local exchange rates are not at or above the benchmark the Commission would establish under proposed WAC 480-123-100(1)(d). WITA recommends that the Commission modify this requirement to allow petitioning carriers to charge rates below the benchmark as long as the company imputes the revenues the company would have received if its rates were at the benchmark. A company would then have the flexibility to set its rates at levels the market will bear as long as the company is willing to accept lower revenues from its local service rates.
- 23 The statute establishes three eligibility criteria for companies seeking support from the Program, one of which is that “[t]he customers of the communications provider are a risk of rate instability or service interruptions or cessations absent a distribution to the provider that will allow the provider to maintain rates reasonably close to the benchmark.”¹ Customers of a company that voluntarily charges a local service rate below the benchmark rate the Commission establishes are not at risk of rate instability. To the contrary, that company’s response to competitive pressures will keep its rates in check.
- 24 The purpose of the Program is not to subsidize a company’s ability to compete with other providers in a competitive market. Rather, the legislature has provided that state funds should only be distributed to companies that otherwise would be compelled to raise their customers’ local rates well above the benchmark rate. The proposed rule properly implements this statutory requirement by conditioning a company’s eligibility for Program support on the provider charging local service rates at or above the benchmark. The Commission, therefore, rejects WITA’s suggested modification.

Notification of Distribution Amounts

- 25 WITA states that its members need some degree of certainty concerning the amounts they will be receiving from the Program in order to properly post accruals for their financial statements. WITA does not propose a modification to the draft rules but requests the Commission state in its adoption order that the carriers will be notified of

¹ RCW 80.36.650(3)(b).

their approved distribution by December 1 prior to the distribution the following January.

- 26 As we stated above, the Commission intends to make final eligibility determinations and calculations of Program support for each eligible company so that funds can be distributed soon after January 1 of each year the Program is in effect. The Commission cannot know, much less guarantee, that this process will be completed by December 1. The Commission, however, will promptly notify companies eligible for Program support when the Commission has made its eligibility determinations and corresponding Program support calculations.

Duplicative Information

- 27 WITA is concerned that proposed WAC 480-123-110(1) requires duplicative reporting because subsection (e), subparts (i), (ii), and (v), and subsection (f) each ask essentially for the same information. To reduce redundant filings, WITA suggests that draft WAC 480-123-110(3) be modified to enable companies to refer to any documentation they have previously filed with the Commission, not just documents filed in conjunction with a filing for certification as an eligible telecommunications carrier, so that companies need not provide multiple copies of the same documents in response to the filing requirements in the rule.
- 28 WITA's suggested changes to proposed WAC 480-123-110(1)(e) are reasonable, and we will incorporate them into the final rule.

Identification of ILECs

- 29 WITA states that in proposed WAC 480-123-100(1)(b), the citation identifying which companies are incumbent local exchange companies (ILECs) should be to 47 U.S.C. sec. 251(h), not 253(h). In addition, WITA recommends that to include companies that became ILECs after that statute was enacted, the proposed rule should state that an ILEC can also be a company that the FCC has designated as an ILEC.
- 30 WITA's suggested changes to proposed WAC 480-123-100(1)(b) are reasonable, and we will incorporate them into the final rule.

WECA Administrative Costs

- 31 WITA observes that when the Commission terminates the traditional universal service fund, WECA will need to undertake certain activities to end the pool activities. WITA points to current contracts, previously approved by the Commission, related to WECA's administration of the pools that contain procedures that must be followed to true-up the activities related to the Traditional Universal Service Fund (USF) access rate element, including the conducting of audits and other actions. In its written comments, WITA suggests that proposed WAC 480-123-120(2) be expanded to add a subsection that would enable these costs to be paid from Program distributions. At the adoption hearing, however, WITA stated its support for Staff's proposal to fund these costs by allowing WECA to continue to collect revenues from the Traditional USF switched access charge rate element for a limited period of time after that fund terminates.
- 32 We, too, agree with Staff that the appropriate vehicle for funding WECA's winding down of the Traditional USF is a temporary continuation of the Traditional USF rate element. Accordingly, we address this issue in the order we enter in Docket UT-971140 terminating the Traditional USF.

Business Plans

- 33 WITA objects to provisions in proposed WAC 480-123-120(1) and WAC 480-123-130(1)(f) requiring companies that receive distributions from the Program to provide reports on the company's business plan to implement operational efficiency and to transition from the provision of legacy voice service to broadband service. WITA suggests the Commission should recognize that the provision of broadband service in rural areas is a capital intensive proposition, requiring constant upgrades to equipment. WITA specifically objects to the word "efficiency" if it is intended to mean operating at a lower cost because the Commission would be building into the rule an unrealistic expectation. WITA notes that the Commission annually will receive each company's five-year plan set out in the FCC Form 481 filing and that the five-year plan contains substantial information about deployment of broadband.
- 34 WITA misunderstands these rule requirements. The legislature established the Program as a temporary source of funding for rural ILECs to facilitate their transition to modern communications markets. More specifically, the Program gives these

companies more time to reduce their reliance on federal or state USF support, and the Commission must report to the legislature on the effectiveness of the Program in achieving that goal.

- 35 Accordingly, the proposed rules require companies who seek or obtain Program support to detail what they are doing to accomplish the legislature's objective, including operational efficiencies they undertake to reduce their costs and business plans they develop and implement to modernize their networks and service options. The Commission does not intend to provide state tax dollars to companies merely to enable them only to maintain the status quo. The proposed rules, therefore, appropriately provide that among the factors the Commission will consider when determining eligibility for the Program and how participants make use of Program support is the extent to which companies are planning or implementing operational efficiencies and business plan modifications consistent with the Program's goals. We reject WITA's suggested modifications to the rules on this issue.

AT&T

Calculation of Support Amount

- 36 AT&T expresses a single concern about the Commission's flexibility under the draft rules to adopt a benchmark local exchange rate that is lower than the FCC urban rate floor. A potential unintended consequence of that flexibility, according to AT&T, is that by setting a lower benchmark, the Commission might inadvertently enable an eligible a carrier to receive Program funding for the reduction in its federal funding resulting from the carrier charging less than the FCC urban rate floor. AT&T proposes that the Commission modify WAC 480-123-020(2)(b) to clarify that no such result is possible.
- 37 We appreciate AT&T's concerns, but we do not find that any clarification of the rule is necessary. Program support under proposed WAC 480-123-120(2) is limited to (a) Traditional USF fund amounts received in 2012; and (b) "[t]he cumulative reduction in support from the Connect America Fund incurred by the provider." A reduction in support from the CAF does not include imputed revenues for the difference between the FCC urban rate floor and a provider's actual local rates. Even if a provider receives less federal support as a result of charging rates below the FCC urban rate floor, the rule we adopt today does not authorize that provider to receive any Program

funds to compensate for that lower level of federal support. The rule reflects our intent to authorize an eligible provider to receive no more than the cumulative 5 percent annual CAF reduction the FCC has mandated for carriers whose local service rates are at the FCC urban rate floor (to the extent Program funds are available) in addition to the provider's 2012 state Traditional USF distribution. We reject AT&T's suggested clarification of WAC 480-123-020(2)(b).

Public Counsel

Benchmark Rate

38 Public Counsel contends that the Commission should implement a Washington-specific local rate benchmark rather than use the FCC urban rate floor. Public Counsel believes that the Commission should determine independently "a reasonable level customers should pay," particularly in light of the ongoing concerns at the federal level and circumstances affecting the calculations of the national average rate. Public Counsel, moreover, recommends that the Commission should undertake to review this issue once the FCC has issued its decision on implementation of the new urban rate floor.

39 We addressed the issue of establishing the benchmark rate in response to WITA's concerns above, and we incorporate that discussion here.² We reject Public Counsel's suggested changes to the proposed rule.

Advisory Board

40 Public Counsel notes possible confusion between proposed WAC 480-123-150(4) (initiating advisory board action) and WAC 480-123-160 (resolution of disputes). The former provision allows "any person" to petition the Commission to initiate advisory board action regarding "program issues or matters." The latter provision, however, appears to limit the right to petition the Commission more narrowly to "an affected provider" regarding "any disputed matter concerning the program." Public Counsel seeks clarification of this apparent inconsistency.

41 No clarification to the rules is necessary on this point. The two proposed rules govern different circumstances. Proposed WAC 480-123-150(4) requires any person seeking

² See *supra* ¶ 20.

advisory board action to petition the Commission. Proposed WAC 480-123-160 establishes the process for an affected provider to resolve disputes concerning the Program and provides that the Commission, at its discretion, may refer any such dispute to the advisory board for initial review and consideration. These rules operate independently, and nothing in WAC 480-123-150(4) limits the ability of persons other than an affected provider to petition the Commission to initiate advisory board action pursuant to WAC 480-123-160.

42 **COMMISSION ACTION:** After considering all of the information regarding this proposal, the Commission finds and concludes that it should amend and adopt the rules as proposed in the CR-102 at WSR # 14-08-094 with the changes described below.

43 **CHANGES FROM PROPOSAL:** The Commission adopts the proposal with the following changes from the text noticed at WSR # 14-08-094 based on the discussion above.

- WAC 480-123-100(b) – correct 253(h) to 251(h) and add immediately thereafter, “or has been designated as an incumbent local exchange carrier by the Federal Communications Commission” (see paragraphs 29-30 above);
- WAC 480-123-110(1)(h) – delete the word “calendar” (see paragraphs 14-15 above);
- WAC 480-123-110(3) – delete the phrase “in conjunction with its application for certification as an eligible telecommunications carrier,” (see paragraphs 27-28 above);
- WAC 480-123-120 – in the first sentence, replace “a calendar year” with “an annual”; in the second sentence, replace “that” with “each” and add the following phrase at the end of the sentence: “of eligibility, except as otherwise authorized by the commission” (see paragraphs 14-17 above); and
- WAC 480-123-150(2)(a)(v) – replace “division” with “section” to accurately name Public Counsel.

44 **STATEMENT OF ACTION; STATEMENT OF EFFECTIVE DATE:** After reviewing the entire record, the Commission determines that WAC 480-123-020

should be amended and WAC 480-123-100, WAC 480-123-110, WAC 480-123-120, WAC 480-123-130, WAC 480-123-140, WAC 480-123-150, WAC 480-123-160, and WAC 480-123-170 should be adopted to read as set forth in Appendix A, as rules of the Washington Utilities and Transportation Commission, to take effect on the thirty-first day after the date of filing with the Code Reviser pursuant to RCW 34.05.380(2).

ORDER

45 **THE COMMISSION ORDERS:**

46 The Commission amends WAC 480-123-020, and adopts WAC 480-123-100, WAC 480-123-110, WAC 480-123-120, WAC 480-123-130, WAC 480-123-140, WAC 480-123-150, WAC 480-123-160, and WAC 480-123-170 to read as set forth in Appendix A, as rules of the Washington Utilities and Transportation Commission, to take effect on the thirty-first day after the date of filing with the Code Reviser pursuant to RCW 34.05.380(2).

47 This Order and the rule set out below, after being recorded in the register of the Washington Utilities and Transportation Commission, shall be forwarded to the Code Reviser for filing pursuant to RCW 80.01 and RCW 34.05 and WAC 1-21.

DATED at Olympia, Washington, May 22, 2014.

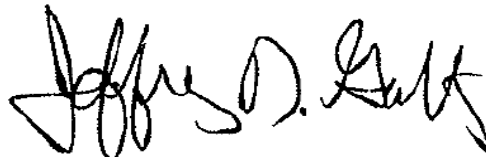
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION



DAVID W. DANNER, Chairman



PHILIP B. JONES, Commissioner



JEFFREY D. GOLTZ, Commissioner

Note: The following is added at Code Reviser request for statistical purposes:

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, amended 0, repealed 0; Federal Rules or Standards: New 0, amended 0, repealed 0; or Recently Enacted State Statutes: New 8, amended 1, repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, amended 0, repealed 0.

Number of Sections Adopted on the Agency's own Initiative: New 0, amended 0, repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, amended 0, repealed 0.

Number of Sections Adopted using Negotiated Rule Making: New 0, amended 0, repealed 0; Pilot Rule Making: New 0, amended 0, repealed 0; or Other Alternative Rule Making: New 0, amended 0, repealed 0.

Appendix A
[WAC 480-123 - RULES]