

**BEFORE THE  
WASHINGTON UTILITIES AND  
TRANSPORTATION COMMISSION**

In the Matter of

Policy Statement to Review State Universal  
Service Policies

Docket UT-100562

**Comments of United States Cellular Corporation in Response to  
Notice Seeking Comment on Draft Legislation  
to Establish a State Universal Service Fund**

**I. Introduction.**

United States Cellular Corporation (“U.S. Cellular”), appreciates this opportunity to comment on the proposed draft legislation to establish a state universal service fund (“USF”). U.S. Cellular has an interest in any legislation relating to the Washington USF as both a potential contributor to the fund and as a potential recipient of USF support. As a participant in the federal high-cost fund, U.S. Cellular is very interested in using support to expand service to communities that would not otherwise receive high-quality mobile wireless services. Given that the legacy program administered by the FCC is being phased out, and that it is unclear whether U.S. Cellular will receive any funding under the new Connect America Fund (“CAF”), any state legislation must ensure that Washington’s rural citizens have access to high quality mobile broadband services, which are critically important to the state’s economic development and competitiveness in the coming decades.

While U.S. Cellular certainly recognizes that the recent changes to the Federal USF (“FUSF”) have created challenges for all recipients of FUSF, U.S. Cellular urges care in the creation of any state USF. A state USF can be beneficial if it meets a demonstrated need and ensures that funds are used efficiently, where needed, and to support necessary services using the

most cost effective technologies and rewarding the most efficient provider. The only way a state fund can achieve these critically important public policy goals is by ensuring that USF support is both collected and distributed in a competitively neutral manner. It is for this reason, among others, that both federal and state law require any state USF to award support on a competitively neutral basis. Unfortunately, the Commission’s drafters seem to have lost sight of the basic premise that a USF should support services that citizens need, not specific networks or—worse still—specific companies.

The proposed draft legislation fails the competitive neutrality test. Support would be expressly limited to “small” “incumbent local exchange carriers” (“ILECs”). Accordingly, the draft legislation is not only bad public policy, it would be unlawful, if adopted. Adopting a state USF that taxes all carriers but funds only ILECs, effectively forces the wireless industry—which will likely pay over half of the costs of the fund—to subsidize its wireline competitors.<sup>1</sup> If a state fund is to be created,<sup>2</sup> the Commission must enact a competitively neutral mechanism that allows all potential service providers to meet legitimate universal service needs of rural citizens living in high-cost areas.

## **II. Discussion.**

### **A. Limiting USF Support to Small ILECs is Bad Public Policy.**

A USF fund that is expressly limited to small ILECs inherently precludes any ability of the administrator to ensure that necessary services are provided using the most efficient and cost-

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<sup>1</sup> Based on published FCC data on number utilization and line counts as of 2009 and 2011, respectively, U.S. Cellular estimates that wireless carriers have about 46% of the working numbers in Washington as of 2011. Given the ongoing trends toward more cell phones and fewer wirelines, by the time Washington’s program could be implemented, the wireless industry is likely to be covering over half the cost of the program. Although the issue of the base for calculation of support is outside the scope of these comments, U.S. Cellular’s silence on the issue at this time should not be construed as agreement. In fact, U.S. Cellular has recently filed comments with the FCC opposing just such a scheme at the federal level. *In the Matter of Universal Service Contribution Methodology*, Comments of U.S. Cellular at 32-33, FCC WC Dkt. No. 06-122 (July 9, 2012).

<sup>2</sup> U.S. Cellular is not yet convinced that Washington should adopt a fund. But Washington should definitely *not* adopt a fund if it is not competitively neutral.

effective technology and most efficient service provider. Worse still, the ILECs are insulated from competition by their exclusive access to the subsidy, giving them less incentive to become more efficient.

For years, the ILECs criticized the “equal support rule” of the FUSF on the grounds that it unfairly *supported lower cost wireless networks* at the level of *higher cost wireline networks*. Assuming this argument was true, then under the current draft, the Washington fund will limit its support payments to one class of carrier, irrespective whether its costs are higher than those of a more efficient competitor. The current draft of the legislation would prevent the WUTC from using its expertise to determine the best use of USF contributions made by Washington’s citizens, including those living in rural areas who do not currently have access to high-quality mobile broadband services. Such an approach, again, smacks of favoritism and certainly does not ensure efficient use of scarce public funds.

Rather than giving ILECs a monopoly on USF support, the Commission should seek legislation that enables it to create a fund where support is portable, or at least equitable. If any carrier can provide high-quality service at a lower cost than ILECs, it must be permitted to compete for USF support on a level playing field. To rule otherwise is to select a marketplace winner, effectively preventing competitors from entering areas where citizens want and need high-quality services.

**B. Limiting USF Support to Small ILECs Violates Federal Law.**

In the Telecommunications Act of 1996, Congress permitted states to supplement the FUSF with state funds. But to ensure that states did not thwart the overriding Congressional goal of the Act to promote open and competitive markets, Congress required state universal service mechanisms to be competitively neutral. 47 U.S.C. § 253(b). Additionally, Congress required that any state funds be “necessary” to “ensure the continued quality of telecommunications

services.” *Id.* In other words, the guiding principle and requirement is that a state USF mechanism must support “services” not companies, or technologies, or even networks.

The FCC has considered whether the imposition of a state fund that provides USF support only to ILECs complies with the Communications Act. The FCC has stated that such a fund—exactly as this Commission has proposed—would violate both Sections 253(a) and 253(b):

The criteria set forth in section 253(b) preserve the states’ ability “to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service ....” We have held that a state program must meet all three of these criteria -- it must be “competitively neutral,” “consistent with section 254,” and “necessary to preserve and advance universal service”—to fall within the “safe harbor” of section 253(b). We have preempted state regulations for failure to satisfy even one of the three criteria.

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It appears doubtful that a program which limits eligibility for universal service funding to ILECs would be found competitively neutral, and thus within the authority reserved to the states in section 253(b).

*In the Matter of Western Wireless Corp. Petition for Preemption of Kansas Universal Service Fund*, 15 FCC Rcd. 16,227, ¶¶ 9-10 (2000) (footnotes and citations omitted)(emphasis added).

There can be little question that the proposed legislation, in its current form, violates one or more of the three criteria under Section 253(b) and therefore would be pre-empted as inconsistent with federal law.

B. Limiting USF Support to Small ILECs Violates State Law.

The current proposal to favor ILECs at the expense of competitors on both the wireline and wireless side is contrary to decades of Washington policy promoting competition in telecommunications markets and is inconsistent with the Washington Constitution. Over 25 years ago, the legislature declared it to be the policy of the state to “promote diversity in the supply of telecommunications services and products ... throughout the state.” RCW

80.36.300(5). This declaration is consistent with the state’s “abhorrence of monopolies.” *See In re Electric Lightwave, Inc.*, 123 Wn. 2d 530, 538 (1994); *see also* Wash. Const., art. XII, § 22.

The current legislative proposal promotes monopoly service and reduces the potential for diversity of telecommunications services, turning this longstanding policy on its head.

The draft legislation also grants an unconstitutional privilege for a particular class of corporation, ILECs. Wash. Const., art. I, § 12 states, in relevant part: “No law shall be passed granting to any ... corporation ... privileges or immunities which upon the same terms shall not equally belong to all ... corporations.” This state “equal protection clause” is, by its express terms, applicable to corporations, such as ILECs, CLECs, and wireless carriers. Legislation that classifies corporations and accords them unequal treatment must have some “rational basis” for the classifications.<sup>3</sup> *See, e.g., American Network, Inc. v. WUTC*, 113 Wn. 2d 59 (1989). Under the legislation as proposed, there can be no rational basis for according ILECs the special privilege of receipt of USF support—at the expense of their competitors whose customers pay the tax—while withholding the same from CLECs or wireless carriers which may be:

1. Already providing the services to some or all of the supported ILECs’ customers; or,
2. Equally capable of providing the supported services to some or all of the ILECs’ customers at the same or lower subsidy.

If the Commission loses sight of the goal of a USF—to support necessary services, not companies or networks—then not only is public policy not served, serious constitutional impediments arise as well. The Commission would likely find it difficult to defend a program in which wireless companies pay over 50% of the contributions, but are eligible to receive 0% of

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<sup>3</sup> Presumably the ILECs will argue that they have “carrier of last resort” or “COLR” obligations that set them apart. But COLR in Washington is a flexible and amorphous concept. *See, e.g., In the Matter of the Petition of Verizon Northwest, Inc.* Twelfth Supp’l Order, Docket UT-011439 (WUTC, 2003)(denying request for service as “unreasonable”). ILECs have, in the past, been willing to extend service to uneconomic areas because they could receive implicit subsidies to do so. Once the subsidies for serving high cost/low revenue areas become explicit, however, there is no rational basis to give ILECs a monopoly on the ability to qualify for the subsidies to serve such areas and automatically exclude other qualified carriers based merely on their status.

the support, when both wireless and wireline companies are equally capable of providing the supported services.

Another potential constitutional infirmity arises under Wash. Const., art. VII, § 1, which provides that, “[t]he power of taxation ... shall be levied and collected for public purposes only.” (Emphasis added). A state USF that supports necessary services, rather than specific networks or companies is clearly a permissible public purpose. But the support of a particular class of company without regard to whether such class is the most efficient provider of service may well be considered an impermissible private use of USF tax receipts.<sup>4</sup>

### **III. Conclusion.**

Limiting support for universal service to ILECs is bad public policy because it fails to ensure efficient support and competitive options for consumers throughout the state. Moreover, such an approach is likely contrary to applicable federal and state law. If the Legislature should choose to establish a state high-cost USF program, it should ensure the program is competitively neutral.

Respectfully submitted the 10<sup>th</sup> day of August, 2012.

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<sup>4</sup> It might be argued that state USF contributions are not a “tax” for purposes of this constitutional provision. But since the state has never had a USF, there is no court guidance on whether state USF contributions are a tax. The problem should be avoided altogether by ensuring that distributions of USF are for a proper public purpose.