BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

Eligible Telecommunications Carrier (ETC) Rulemaking

Docket No. UT-053021

COMMENTS OF THE WASHINGTON INDEPENDENT TELEPHONE ASSOCIATION

May 5, 2006

INTRODUCTION

The Washington Independent Telephone Association (WITA) welcomes the opportunity to comment on the most recent draft of Chapter 480-123 WAC dealing with eligible telecommunication carrier (ETC) rules. WITA greatly appreciates the changes that have been incorporated in the most recent draft. The rules as presented in the current draft represent a substantial improvement from the starting point.

However, there is still room for further clarification and improvement. WITA trusts the Commission will accept these Comments in the spirit in which they are offered.

PROPOSED RULES ON ETC DESIGNATION PROCESS[1]

1. WAC 480-123-030 Contents of Petition for Eligible Telecommunications Carriers.

Under Subsection (1)(f), wireless petitioners are asked to provide a map of the proposed service areas with "shading to indicate where the carrier provides commercial mobile radio service signals." WITA believes that the standard contained in Subsection (1)(f) is vague. WITA suggests that the standard would have greater clarity if it read as follows: "shading to indicate where the carrier provides commercial mobile radio service signals sufficient to provide reliable voice services."

As an alternative, the rule could incorporate a signal strength criterion. For example, it is fairly well agreed within the wireless industry that a signal strength of -87 dBm will provide sufficient reliability for voice-grade service, although there will still

[1] These Comments will not separately address WAC 480-123-020 Definitions. There are questions about two of the definitions that will be addressed as the substantive rules are discussed.

be a number of dropped calls. A more reliable standard is -79 dBm. Thus the rule could read: "shading to indicate where the carrier provides commercial mobile radio service signals of at least -87 dBm (-79 dBm)."

Use of either of these alternatives will provide a more useable standard.

2. WAC 480-123-040 Approval of Petitions for Eligible Telecommunications Carriers.

In this rule, the Commission states, in part, that the petition for designation as an ETC will be approved if the designation "is in the public interest." However, there is no substance to describe what constitutes the public interest. In the Federal Communication Commission's "ETC Designation Order,"[2] the FCC described in detail what it meant by the public interest for ETC designation purposes. At a minimum, WITA suggests that the rule reference 47 U.S.C. §214(e)(2). This cross-reference could be included in the concluding clause of the rule to read as follows: "...and the designation is in the public interest as required by 47 U.S.C. §214(e)(2)."

It is also important to keep in mind that the FCC found that a public interest test applies both for designation as an ETC in non-rural incumbent areas and in rural incumbent areas. However, the FCC determined that the application of the public interest test is more rigorous in rural incumbent service areas.[3] It is not clear how draft WAC 480-123-040 treats this distinction.

[2] In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report and Order, FCC 05-46 (Released March 17, 2005).
[3] ETC Designation Order at Paragraphs 43 and 49, for example.

REVOCATION PROCESS

1. WAC 480-123-050 Revocation of Eligible Telecommunications Carrier Designation.

WITA has two comments to offer. One is technical in nature, the second more substantive.

On the technical issue, this rule references "section 47 U.S.C. Sec. 214(e)." Other than some redundancy in the language, the point that WITA desires to make is that the only standards that can be interpreted as a requirement in Section 214(e) are found in Subsection (e)(1). Thus, WITA suggests the language read as follows: "...if it determines that the ETC has failed to comply with the requirements of 47 U.S.C. §214(e)(1)...."

The substantive issue deals with the language contained in the rule that the Commission may revoke, suspend or modify a designation based upon a determination that the ETC has failed to comply with "any other condition imposed by the Commission." There are significant due process problems inherent in such a vague standard. Is this reference meant to incorporate conditions imposed by the Commission in the order granting designation? Is it meant to refer to the standards contained in Sections .070 and .080? As written, the rule is subject to challenge as vague and unenforceable.

ANNUAL CERTIFICATION PROCESS

1. WAC 480-123-060 Annual Certification of Eligible Telecommunications Carriers.

It is WITA's understanding from the current draft rule language that the Commission acknowledges that it has no role in the certification process for IAS and ICLS. WITA bases this assumption on the use of the reference to "federal high-cost funds pursuant to 47 C.F.R. §§54.307, 54.313 or 54.314" contained in the draft rule. The certification process for IAS is found in 47 C.F.R. §54.809. The certification process for ICLS is found in 47 C.F.R. §54.904. Under these rules, certification is to the Administrator (the Universal Service Administrative Company or USAC) and the Federal Communications Commission, not to the state commission. If WITA's assumption is not correct, then WITA requests that the Commission identify the source of the Commission's legal authority to be a part of the certification process of IAS and ICLS.

WITA also notes that there is at least facially a conflict between this section and proposed WAC 480-123-050 as to where the burden of proof lies. WAC 480-123-060(2) seems to place the burden of proof on the ETC. However, for purposes of modification or revocation of an ETC designation, the burden of proof seems to lie with the Commission under WAC 480-123-050. Perhaps the best way to reconcile these two sections is that under WAC 480-123-060(2), the ETC has the obligation to present the prima facia case, but the burden of proof for any action by the Commission under WAC 480-123-050 lies with the Commission.

2. WAC 480-123-070 Annual Certifications and Reports.

A. Initial Comments.

As an initial matter, WITA wants to express its understanding of the certification requirements contained in the draft rule. The certification requirements appear to be clearly delineated, but to avoid any misunderstanding, WITA expresses its review of the rule as follows: the only certification requirements, which means submitted under penalty of perjury, relate to proposed WAC 480-123-070(5), (6) and (7), but not to the reports required in other subsections of the rule. If WITA is incorrect in its interpretation, WITA requests clarification as to specific other certification requirements.

Further, it is WITA's interpretation that the certification requirement under WAC 480-123-070(5) for wireline carriers relates to WAC 480-120-401, 402, 411, 412, 414, 438, 439, 440 and 450. Again, if WITA's interpretation is incorrect, then further discussion is warranted.

WITA also understands that the certification requirement in WAC 480-123-070(6) for wireline carriers relates to WAC 480-120-411. If this is correct, then this requirement is both redundant and over-broad. The requirement is redundant since WAC 480-120-411 is included within the certification requirements of WAC 480-123-070(5) and need not be repeated. More importantly, it is over-broad in that the only emergency standard in the rule is contained in WAC 480-120-411(3). The other subsections of WAC 480-120-411 do not directly relate to emergency performance. WAC 480-123-411(1) deals with maintenance obligations. WAC 480-120-411(2) deals with testing. While maintenance and testing are probably appropriate for inclusion in

the application process described in WAC 480-123-030 as to how a prospective ETC will deal with those issues, it is not part of the certification of ability to function in an emergency situation. For this reason, a more specific reference in WAC 480-123-070(6) is appropriate.

B. Reporting Period.

Under WAC 480-123-070(1)(a), the draft rule appears to require incumbent ETCs to provide a description of the investment and expenses from the immediately prior year. For 2006 reports, this would be the calendar period of January 1 through December 31, 2005.

C. Definitions.

An issue is raised about the use of the word "substantive," as defined in WAC 480-123-020. The issue which arises is that the definition in WAC 480-123-020 requires a description that allows the Commission to evaluate the "specific benefits for customers." (Emphasis added.) A large percentage of the investment and expenses for an incumbent ETC will not be related to a specific customer benefit. Rather, such investment and expenses will accrue to the benefit of all customers generally. For example, a high percentage of a company's expenses go to employee salaries for customer service operations, general administrative operations, and general repair and maintenance operations. Other than being able to state that those operations enable the company to continue to provide the level of service that customers receive, there is no quantifiable specific benefit.

Further, a substantial portion of the expense incurred in the prior year will go to pay back long-term debt obligations on capital investments. For example, it is common

for a small rural company to have a substantial debt obligation to RUS, RTFC, CoBank or other lending institution for borrowed funds used to build plant and facilities that support the basic services. Again, other than providing a general statement that those expenditures support the continued use of the plant and facilities to provide services to customers, it is not possible to describe the specific benefits to customers in any quantitative way. This is an important issue since failure to demonstrate compliance with WAC 480-123-070 requirements can lead to a decision not to certify the company as eligible to receive the next year's high-cost funds. See, draft WAC 480-123-060.

WITA suggests that the definition of "substantive" in WAC 480-123-020 be amended to delete the word "specific." In many instances, only general benefits can be described.

WECA has the same comments about the use of the word "substantive" related to proposed WAC 480-123-070(1)(b). A good deal of relief can be provided by the amendment of the definition of the term "substantive."

D. Elimination of Duplicative Requirements.

A substantial amount of work by a rural telephone company goes into preparation of what is known as the NECA-1 Report. For 2006, this report is due July 31, 2006. It will contain a report of investment made and expenses incurred in 2005. The report is the basis upon which, along with the company's cost study, high-cost USF support is provided to the rural incumbent company. Rather than having to prepare two separate reports (one to NECA and one to the Commission), WITA proposes that the second paragraph of WAC 480-123-070(1)(a) be amended to add the following

language at the end of the paragraph: "Provided, however, submission of the ETC's NECA-1 Report shall be deemed to satisfy the requirement of this paragraph."

E. Service Outage Reports.

As a matter for the Commission's consideration under WAC 480-123-070(2), the Commission may want to revisit the definition of "service outage." Although this subsection does not appear to apply to wireline companies,[4] WITA is not interested in imposing standards on wireless ETCs that WITA would view overly burdensome for its own members. In particular point, the definition of "service outage" in WAC 480-123-020 contains an exception for planned service interruptions of less than five minutes between the hours of 12:00 midnight and 5:00 a.m. This implies that a planned outage of more than five minutes must be reported as a "service outage." As a practical matter, it may take more than five minutes to do a network cut over. WITA suggests that some other standard be applied for planned service interruptions in the early morning hours such as the major outage standard in WAC 480-120-021.

F. Language Suggestions for Clarification.

In WAC 480-123-070(4), WITA suggests that the word "known" be inserted in front of the word "complaints" in the third line of the rule. This is offered for clarification purposes.

For clarification and because the phrase "continued adherence to" in proposed WAC 480-123-070(6) causes confusion and does not appear to add substance to the rule, WITA suggests the deletion of that language so that the requirement reads as follows: "Certify that it had the ability to function in emergency situations based on the

[4] As written, WAC 480-120-412 and WAC 480-120-439(5) apply to both Class A and Class B wireline companies.

standards found in WAC 480-123-030(1)(g)." As noted earlier, the correct standard for a wireline company is not the entirety of WAC 480-120-411 (which is the rule that is referenced in WAC 480-123-030(1)(g)) but only subsection (3) of WAC 480-120-411.

WITA also offers two clarifications to the language in WAC 480-123-070(7). First, WITA suggests inserting the word "its" in front of "Lifeline service" in the third line of the proposed rule. Second, WITA suggests adding "within its ETC service area" at the very end of the rule. These two minor changes help the rule make a more definitive statement of the proposed requirements.

3. WAC 480-123-080 Annual Plan for Universal Service Support Expenditures.

A. WAC 480-123-080(1).

This rule presents some very practical problems for rural telephone companies. To put this rule in perspective, we ask the Commission to keep in mind the size and scope of most rural telephone companies: most rural telephone companies serve a limited number of customers and have a very small staff. They do not have the size or scope of Cingular, or even of US Cellular Corporation or RCC Minnesota. They do not have "departments" and staff to generate reports. Instead, what they have are a small number of employees, usually performing multiple tasks.

During the summer months, those employees are all fully engaged in providing service to customers or constructing that year's building projects, or both. There is rarely a moment to spare to devote to the next year's planning process. When the manager of the company is operating a plow installing new cable or fielding a complaint from a customer (often a neighbor) about some interexchange carrier, there is little time to be planning next year's construction budget. As a result, most small

companies do not have their capital budgets prepared by July of the prior year. That process must wait, from a staffing and workload standpoint, until late in the year (after the current year construction window).

Further, for most small companies, there is also a very practical reason to wait. In July of the year prior to the year in which investment will be made, most building permits for the next year have not been issued. The company does not know in July where additional plant may be needed. There may be some general ideas, but specific projects have not been developed because builders have not been granted construction permits.

One exception where information can be provided is when the company is in the midst of a planned RUS financed project. That RUS project will have an engineering design associated with it to meet the company's future growth needs for a specific period of time based upon the particular design criteria employed by the RUS for that specific project. Beyond this exception, there are a few instances where a rural telephone company will have specific knowledge of investment commitments by July of the year preceding the year in which the investment will be made.

Another practical issue to be considered is that for small rural telephone companies investment is often a cyclical process. For example, it may be that a rural company has a major construction program in the 2004 calendar year. That construction program will fill the foreseeable capital needs for plant facilities for the next five years. This situation is the rule, not the exception, for small companies. If the company is not making any substantial investments in 2007, is it in violation of the Commission's standards for ETC certification? What useful information will be

provided to the Commission under the draft rule for an evaluation of cyclical investment for a rural telephone company? All the rural telephone company can say is that the high-cost funds it receives will be used to maintain the current level of service to customers and to pay down the debt incurred to finance the 2004 project.

As a practical means of following what rural telephone companies are doing, WITA proposes that the filing of the NECA-1 form on an annual basis will provide a database for the Commission to track how a company is performing over time in terms of its investment and expenses.

WITA suggests that WAC 480-123-080(1)(b) be rewritten as follows:

> The investment and expenses related to Washington state which the ETC expects to use as the basis to request federal support for any category in the federal high-cost fund; provided, that, this obligation may be satisfied by filing the current year NECA-1 form, or its substantial equivalent if the NECA-1 form is replaced, and, provided further, that for the 2006 filing, both the 2004-1 and 2005-1 forms shall be filed.

By requiring both the 2004 and 2005 reports in the initial filing, Commission Staff can view the changes over the two year period. That will then provide the base upon which future years' filings can be tracked in the database.

B. WAC 480-123-080(2).

WITA notes that subsection (2) of WAC 480-123-080 contains redundant language. This redundancy occurs because by definition the term "substantive" requires an explanation of customer benefits. Therefore, there is no reason to require a "substantive description of how those investments and expenditures will benefit customers," when there is another clause in the sentence that requires submission of a "substantive" plan. Further, in light of the earlier discussion of the problems created by the use of the word "specific" in the definition of the term "substantive" and in light of

practical difficulties presented by this proposed rule, WITA proposes that subsection (2) be rewritten as set forth below. This suggested revision makes the rule both more concise and enables the rural telephone companies to comply with the rule.

> WAC 480-123-080(2): The report must include a substantive plan and description of investments and expenditures to be made with the federal high cost fund support; provided, however, this reporting requirement shall be deemed satisfied for rural telephone companies by filing of the NECA-1 reports as set forth above.

C. Summary Remarks.

Part of WITA's concern with the language of the draft rules is that the rules specifically relate back to the requirements set forth in WAC 480-123-060(2) for continued receipt of high-cost funds. As a practical matter, it is impossible for rural companies to satisfy a standard which would require that they set out a detailed budget for capital expenditures by July 31 of the year prior to which the expenditures will be made in order to continue to receive high-cost funds. The rural companies, as a general matter, have neither the staff nor the time to meet this requirement. Thus, they would not be able to meet the "only if" language set forth in WAC 480-123-060(2).

In WITA's discussions about its concerns with this proposed rule with Commission Staff, Commission Staff indicates that it understands the issues posed by this rule, and provides verbal assurance that all that is sought is a good faith effort and, further, that descriptions of general benefits are acceptable for major categories of expenditures when specific benefits cannot be identified. However, WITA's members are very concerned that such verbal understandings will not get carried forward in a rule. A change in administration can lead to very drastic changes in interpretation of rule language, particularly where the interpretation is not clearly supported by the

language of the rule. Thus, this is the reason the clarifications and changes sought in these Comments are necessary.

FURTHER COMMENTS

Part of the basis for WITA's Comments is the distinction that should be drawn between incumbent ETCs and competitive ETCs. WITA recognizes that the Commission has taken the distinction into consideration in some respects. WITA appreciates that effort.

However, at the risk of overemphasizing a point, WITA firmly believes that in WAC 480-123-080, the Commission should take into account the difference in the way in which high-cost funding is determined between incumbent ETCs and competitive ETCs. For incumbent ETCs, there is a two year lag between the time that the investment is made and the expenses are incurred on the one hand and reimbursement from the high-cost fund occurs on the other hand. The reimbursement of past investment and expenses of an incumbent ETC is based upon cost studies supporting the actual investment and expenses. For competitive ETCs, the funding from the high-cost fund is based upon the current year's draw of the per-line support for the incumbent ETC. There is no filing of cost studies. There is no two year lag.

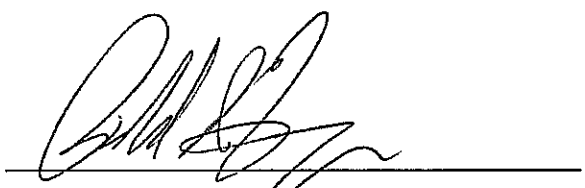
As a result, it is appropriate to have competitive ETCs demonstrate what they will do with the money that they are to receive from the high-cost fund. Probably more appropriately for incumbent ETCs, it is appropriate to ask what have you done with the high-cost funds. This is why proposed WAC 480-123-080 is so difficult for incumbent ETCs as compared to competitive ETCs. The appropriate regulatory burden, to provide

an equality between incumbent ETCs and competitive ETCs, relates to the past tense for incumbent ETCs and the future tense for competitive ETCs.

CONCLUSION

WITA greatly appreciates the consideration that the Commission has given to WITA's prior comments, and it is optimistic that the Commission will continue to consider the comments that WITA offers. WITA is not attempting to gain any particular advantage for its members in these filings. WITA's firm position is that regulatory burdens should be lessened for all participants and that the regulatory burdens should be on an equivalent basis for each category of ETC, taking into account in the determination of equivalency differences in technology and the basis for receipt of high-cost funds.

Respectfully submitted this 5th day of May, 2006.



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