

**BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of Commission Designation of Eligible Telecommunications Carriers (ETCs) Pursuant to 47 U.S.C. § 214(e) and RCW 80.36.610, and Annual Certification Concerning the Use of Federal Universal Support Funds Pursuant to 47 C.F.R. § 54.313 and 314 and WAC 480-120-311.

Docket No. UT-053021

COMMENTS OF Rural Cellular Corp.  
AND U. S. Cellular Corporation

**INTRODUCTION AND BACKGROUND**

Rural Cellular Corporation (“RCC”) and U. S. Cellular Corporation (“USCC”) (collectively “Commenters”) welcome this opportunity to address a potential rulemaking proceeding by the WUTC in the wake of the FCC’s order in *Federal-State Joint Board on Universal Service, Report and Order*, CC Docket 96-45, FCC 05-46 (rel. March 17, 2005) (“*FCC ETC Order*”). While policy on administration of the federal universal service fund (“USF”) is largely made at the federal level by the FCC and the Federal-State Joint Board on Universal Service (“Joint Board”), state commissions play a critically important role in implementing federal policies, as the Congress delegated to state commissions the authority to designate and certify Eligible Telecommunications Carriers (“ETCs”).

The WUTC has been a leader in designating competitive ETCs (“CETCs”) to help bring the benefits of federal support to rural Washington. This leadership has paid off, as Washington has moved into first place among all states<sup>1</sup> in telephone subscribership penetration,

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<sup>1</sup> Tied with Utah.

at 96.9% of all households.<sup>2</sup> Adoption of state rules that are consistent with federal policy may help provide additional guidance and clarity to current and prospective ETCs. However, to date the WUTC has done an excellent job of implementing federal policies and protecting the public interest without a specific set of rules. Accordingly, the WUTC could well conclude that a new set of state regulations may not be necessary.

The biggest concern at the federal level and in many states has been a decline in revenues for the services that have traditionally been assessed to support the fund. It is important to note, however, that the USF is not a single fund and the states participate in administration of only a portion of the fund. The fund established by the Telecommunications Act of 1996 (“Act”) addresses four areas: 1. Improving telecommunications infrastructure and delivering affordable voice communications in rural areas (high-cost program); 2. subsidizing telephone charges for low income households (low income program); 3. providing discounts for internet connectivity to schools and libraries (schools and libraries program); and 4. providing discounts for Internet connectivity and selected telecommunications services to rural health care providers. Of these four programs, the states have no direct impact on or participation in the schools and libraries or rural health care programs. The Schools and Libraries Fund alone consumed over \$1.3 billion of the \$5.6 billion USF in 2004, or 23.2%. Rural incumbent local exchange carriers (“rural ILECs” or “RLECs”) received roughly \$3 billion of the fund, or about 53%. CETCs receive less than ten percent of the fund. Thus, the actions of an individual state commission in designating CETCs, while likely to have a great impact on the public interest of its state, are unlikely to have more than a negligible impact on the overall size of the USF.

When Congress passed the Act, it had several important goals in mind. First, universal service subsidies were no longer to be implicit. Congress required that subsidies be explicit and be made available to any qualified carrier providing the basic services that comprise

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<sup>2</sup> Telephone Subscribership In The United States, Industry Analysis and Technology Division, Wireline Competition Bureau, (FCC rel. May 25, 2005)

voice communications. *See* 47 U.S.C. § 254. Pursuant to the Act and the recommendations of the Joint Board, the FCC adopted as a core principle the requirement of competitive neutrality, meaning that all universal service rules must not favor a class of carrier or technology. *Federal-State Joint Board on Universal Service, Report & Order*, 12 FCC Rcd. 8776, 8801 (1997), *aff'd in part, rev'd in part sub nom. Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393 (5<sup>th</sup> Cir. 1999), *cert denied*, 530 U.S. 1210, 1223 (2000), *and cert. dismissed*, 531 U.S. 975 (2000) (“*First Report and Order*”).<sup>3</sup> Because the FCC has been moving from implicit support to explicit programs it is not unexpected that funding has increased by over \$1 billion per year since 1999. The designation of CETCs has contributed a relatively small portion of this growth, going from zero in 1997 to an estimated \$400 million projected for 2005. In contrast, support to rural ILECs has increased by \$620 million per year in real dollars since 1999.

As their names imply, RCC and USCC are wireless carriers. Wireless customers collectively contribute over \$2 billion to the USF every year. Use of USF support in Washington by RCC, USCC and other carriers has helped to vault the state into first place in telephone subscribership penetration.<sup>4</sup> For example, USCC’s service area covers the Yakima reservation. Its aggressive efforts to increase penetration on the reservation have been very successful in achieving significant increases in telephone penetration. USCC has roughly 5000 reservation subscribers. Many of the areas in Washington that have seen new service and increased subscribership have done so specifically because of the availability of USF support for wireless services.

The FCC’s directive of “competitive neutrality” is working and must continue to be followed for the full benefits of the USF to be realized. Neutrality means that: 1. support must be explicit so that carriers compete for customers on level playing field;<sup>5</sup> 2. universal

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<sup>3</sup> Indeed, the Washington legislature has explicitly declared competitive and technical neutrality to be the policy of the state at such time as a state program is approved. RCW 80.36.600(1).

<sup>4</sup> The FCC’s surveys take wireless service into account in determining penetration statistics.

<sup>5</sup> 47 U.S.C. § 254(e).

service rules must harmonize with the core principle that competition must be introduced in every market;<sup>6</sup> and 3. all universal service rules must not advantage or disadvantage a class of carrier.<sup>7</sup> As the WUTC reviews the issues raised in this proceeding, these core principles should be kept in mind.

### **RCC'S AND U.S. CELLULAR'S RESPONSES TO UTC QUESTIONS**

- 1. Single connection: ETCs designated by the WUTC receive support for all connections based on expenditures or on access lines served. This includes support for multiline business and residential customers. Can the WUTC limit through the ETC designation process the number of access lines per-customer for which an ETC receives support? Can the WUTC limit through the ETC designation process the type of customer (i.e., business or residential) for which an ETC receives support?**

No. The federal rules require all CETCs to submit all lines for support. CETCs do not request funds – they simply submit lines and receive whatever per-line support the federal program provides, based on ILEC disaggregation plans and FCC's formula for support to ILECs. The WUTC cannot change this formula. However, if there were a state USF program, the WUTC could make such rules for the state program.

- 2. The WUTC has relied on the principles of competitive and technological neutrality in analysis of ETC designation decisions. Should the WUTC continue to apply these principles to ETC designation analysis? Are there practical or other limits to the principles of competitive and technological neutrality in the context of ETC designations? Could broadband (VoIP), cable, WiMax, or satellite phone service providers be designated ETCs?**

Without question, the WUTC should continue to apply principles of competitive neutrality to ETC designations, as well as all other universal service rules. When the Congress adopted 47 U.S.C. § 254, it mandated core principles for the FCC to follow in advancing universal service. It also gave the FCC the power to adopt additional core principles. 47 U.S.C. §

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<sup>6</sup> See Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. at 113 (declaring the purpose of the 1996 Act “to provide for a pro-competitive, de-regulatory national policy framework” aimed at fostering rapid deployment of telecommunications services to all Americans “by opening all telecommunications markets to competition. . .”).

<sup>7</sup> See *First Report and Order*, *supra*, 12 FCC Rcd at 8801. See also RCW 80.36.600(1).

254 (b)(7). The FCC adopted competitive neutrality as an additional core principle for all of its universal service rules. This principle means that all universal service rules must not favor one competitor or one technology over another. *First Report and Order, supra*, 12 FCC Rcd at 8801. It is the effect of the rule, not the method imposed, that must be examined in determining whether it is competitively neutral. *Federal-State Joint Board on Universal Service, Declaratory Ruling*, 15 FCC Rcd 15168, 15177 (2000).

By statute, any provider of telecommunications service may be designated as an ETC so long as it (1) is a common carrier; and (2) demonstrates the commitment and capability to offer and advertise the suite of services that are supported by the high-cost Universal Service Fund. 47 U.S.C. § 214(e)(1), 47 C.F.R. § 54.201. Subject to those criteria, the statute does not provide any limitation on the type of technology that an ETC may use.

High-cost support must be sufficient for consumers to receive the supported services. It matters not which carrier receives the support, only that consumers have access to the supported services. *See Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 620-21 (5<sup>th</sup> Cir. 2000). Competitive and technological neutrality enable all carriers to compete for consumers and support, with efficient carriers having an incentive to enter high-cost areas. Thus, it is entirely possible that a Wi-Max carrier could apply for ETC status, if it can provide the nine supported services, if it is an efficient carrier, and if it can offer and advertise services throughout its ETC service area.

It is also possible for a VOIP carrier to be designated, if it is providing service through a facilities-based network. A pure VOIP carrier, which has constructed no facilities, but only provides service by delivering software through another carrier's facilities, would not appear to meet the statutory requirement for receiving federal high-cost support, to offer service through one's facilities, or a combination of facilities and resale. See, 47 U.S.C. Section 214(e)(1)(A).

3. **The WUTC has required ETC petitioners to state that the carrier will offer its services throughout the area for which it seeks designation. The FCC has determined that it will “require that an ETC applicant make specific commitments to provide service to requesting customers in the service areas for which it is designated as an ETC.” Does the FCC’s new requirement differ from the WUTC’s requirement? If the WUTC were to adopt a rule on this topic, what “specific commitments” should be required?**

The FCC’s new requirement is consistent with the WUTC’s requirement of a general commitment to offer its services throughout the area for which it seeks designation. This requirement has always been qualified that services only provided to customers who make a reasonable request for service. As the FCC noted in paragraph 22 of the *FCC ETC Order*, “The Commission and state commissions will need to determine whether a particular request for service is ‘reasonable’”.<sup>8</sup> The requirement to provide service “throughout” the designated area has never been construed as a requirement for any carrier of any technology to serve “every location” in the area.

The principle that a carrier’s obligation to serve is always tempered by reasonableness was well illustrated in the recent order in the *Timm Ranch* case.<sup>9</sup> In *Timm Ranch*, the WUTC did not order Verizon to extend service with a 30 mile line extension nor require construction of new cell towers to serve five remote residences. The Commission found that the extraordinary costs outweighed the incremental benefits of service to a handful of additional customers, stating that:

There is no provision of federal or state law that prescribes that every location and every potential customer, no matter how remote or expensive to reach by wireline, is entitled to wireline service. We do not read the “reasonableness” test of our state law, RCW 80.36.090, to be inconsistent with a requirement for “reasonably comparable services at reasonably comparable prices.”

*Id.*, ¶ 66. Even the new FCC “requirement” of six specific steps to extend service is qualified with the prerequisite the ETC applicant need take them only if it can “provide service within a reasonable period of time if service [and] at reasonable cost . . . .” Given the qualifier of

<sup>8</sup> *FCC ETC Order* at ¶ 22 n. 50.

<sup>9</sup> Twelfth Supplemental Order Granting Waiver, *In the Matter of the Petition of Verizon Northwest, Inc.*, Dkt. No. UT-011439 (WUTC, April 23, 2003).

“reasonableness,” the FCC’s new requirement is not substantively different from the WUTC’s existing requirement. Thus, a new rule is probably not necessary.

The *Timm Ranch* case was brought under the WUTC’s rule on line extensions, WAC 480-120-071. Although litigation was necessary to resolve that case, the rule otherwise seems to have worked for ILECs, since the rule provides them with an explicit cost recovery mechanism. However, the rule does not translate well, if at all, to wireless ETCs. The new FCC requirement provides some guidance as to what is “reasonable” in that it outlines a series of steps for wireless ETCs. If the WUTC were to adopt a rule, Commenters encourage the WUTC to refrain from going beyond the requirements in paragraph 22 of the *FCC ETC Order*. Additionally, any new rule on this topic should incorporate the term “reasonable,” as did the FCC in paragraph 22 of the *FCC ETC Order* and consistent with long-standing state and federal law.<sup>10</sup> Finally, any rule should be competitively neutral and should allow for differences in network technologies.

**4. The WUTC has required ETCs to offer service throughout the service areas for which the ETC is designated. The WUTC has refrained from directing ETCs to provide service in a particular manner. The FCC lists six methods for extending service. Should WUTC now require the method(s) of service in addition to requiring service?**

As discussed above, RCC and USCC believe a rule requiring such methods is not needed. Changes in technology for wireless carriers may require frequent revisions to the rule or new technologies may provide different means of provisioning service. If the Commission decides to adopt a rule, both RCC and USCC are subject to the FCC’s six-step process in other states and would not object to it being adopted here. If a rule were to be adopted, it would be easier for the Commenters to maintain compliance with a rule that is consistent with the federal requirements, rather than one that varies from it.

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<sup>10</sup> See 47 U.S.C. § 201(a) (“It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor. . .”).

5. The FCC now requires “that an ETC applicant submit a five-year plan describing with specificity its proposed improvements or upgrades to the applicant’s network on a wire center-by-wire center basis throughout its designated service area.” The FCC has stated that an ETC’s five-year plan “must include: (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.” Are there circumstances in Washington that provide support for an approach similar to the FCC’s, or support an approach different from the FCC’s?

**Please provide information about the effort and cost that might be required to comply with the FCC requirements should they be adopted by the WUTC.**

**If the WUTC requests five-year plans, should there be an evaluation of the plans, and if so, what criteria should be used to determine the adequacy or accuracy of the plans?**

While the circumstances in Washington are similar to those observed by the FCC in other rural areas, there are good reasons to adopt a different approach than the FCC’s five-year plan. Like many other states, wireless carriers in Washington have relatively young networks that require significant capital investment to improve networks to the point where consumers throughout an ETC service area have a high-quality network that provides a viable choice in service that is similar to that available in urban areas.

The *FCC ETC Order* requires carriers who file a petition at the FCC to provide a five-year plan for using support to improve their networks.<sup>11</sup> It does not require a carrier to demonstrate that it will complete construction of its network to reach ubiquitous service within five years. Moreover, the FCC has made clear that market conditions may change the plan along the way and carriers are thus permitted to amend their plans in subsequent years.<sup>12</sup>

Given that wireless carriers in rural areas have very young networks, rapid growth means that business and construction plans change rapidly, sometimes quarter to quarter. The order in which a carrier constructs facilities and the areas within which consumers are

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<sup>11</sup> *FCC ETC Order* at para 23.

<sup>12</sup> *Id.* at para. 24; *See also Virginia Cellular, LLC*, 19 FCC Rcd 1563, 1571 (2004).



demanding service often shift in response to many market conditions. The amount of support a carrier receives also fluctuates, sometimes significantly.<sup>13</sup> Moreover, the FCC is expected to change the way support is provided to all carriers within the next 12 to 18 months, which may significantly change the level of support flowing to competitors.<sup>14</sup>

Thus, any plan beyond 24 months is little more than a guess that is almost certain to be amended. If this Commission wishes to adopt a rule that gets the most useful and accurate data from carriers and efficiently drives infrastructure in the state year after year, the best way to do it is to follow the example of other states, such as West Virginia, Maine, Vermont, Oregon, and South Dakota, which have implemented successful compliance programs. We suggest a model that will provide targeted and reliable data each year, in advance of the deadline for state certification to the FCC:

- Describe how much support the carrier received in the prior calendar year.
- Describe how that support was used, or will be used, for the provision, maintenance, or upgrading of the company's facilities and services to provide supported services.
- Explain any changes from plans that have been previously provided to the Commission.
- Provide an estimate of how much support the carrier anticipates receiving in the following calendar year.
- Describe how that support will be used, for the provision, maintenance, or upgrading of the company's facilities and services to provide supported services, providing specific construction projects and, if necessary, maps, depicting how coverage will be improved in the upcoming year.

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<sup>13</sup> On information and belief, in some areas where wireless carriers have entered as ETCs, support to rural ILECs – and therefore per-line support available to CETCs – has dropped significantly.

<sup>14</sup> See *Public Notice, Federal-State Joint Board on Universal Service Seeks Comment on Certain of the Commission's Rules Relating to High-Cost Universal Service Support*, FCC 04J-2 (rel. Aug. 16, 2004).

If a carrier submits such a report, along with a map showing where support was used to enhance coverage and service quality, a state can easily determine from year to year whether infrastructure in rural parts of the state is being improved commensurate with the level of support received.

We also note that a publicly filed five-year plan is going to carry with it expectations in small towns across the state. Some towns will be unhappy that they are listed in year five. Other towns will be unhappy that they were moved down the list as a result of changed market conditions. The simple fact that support cannot be estimated with any degree of reliability more than a year out will saddle carriers and commissioners with a burden of expectations that were never realistic on the date such a plan was filed. The plan set forth above will provide the Commission with better and more accurate information that will enable each annual certification to be made to the FCC with confidence and will provide precisely the kind of data that regulators need to ensure that support is being used to improve and expand service in rural Washington.

The cost of preparing detailed plans for five years is significant and it will provide no countervailing benefit to the state, as plans often change. The budgeting process that a carrier undertakes for just one upcoming year takes literally hundreds of man-hours to research, create, review, and approve. Moreover, since there is no way to estimate with any degree of certainty how much support will be available, it is impossible to accurately predict, beyond 12-24 months, what investments can be made. Plans made for years 3-5 will have to be completely redone each year, as new assessments will be made to account for changes in market conditions, regulatory conditions, the amount of support available, and the status of competition in the proposed ETC service area. In short, most of the data provided in a five-year plan will be burdensome to produce and it will be of little or no use to the WUTC. Moreover, an annual report which provides the WUTC with reliable data, will enable the Commission to better perform its two

essential functions – to assess whether funds are being used lawfully and whether the Commission should recertify the ETC for another year.

6. **The FCC now requires ETCs to demonstrate supported improvements have been made through particular report elements. It requires “an ETC applicant must submit coverage maps detailing the amount of high-cost support received for the past year, how these monies were used to improve its network, and specifically where signal strength, coverage, or capacity has been improved in each wire center in each service area for which funding was received. In addition, an ETC applicant must submit on an annual basis a detailed explanation regarding why any targets established in its five-year improvement plan have not been met.” If the WUTC were to adopt this reporting requirement, are there other investments or expenditures that should qualify as satisfactory to meet the requirement to use federal support only for intended purposes?**

A requirement that all support be used for new construction and upgrades would ignore that both CETCs and ILECs are permitted to use high-cost support not only for the upgrading of facilities and services, but also for provision and maintenance of the same. 47 U.S.C. § 254(e); 47 C.F.R. § 54.7. Moreover, any tracking of USF expenditures must be done in a competitively neutral fashion to be consistent with 47 U.S.C. § 253. A CETC must be permitted to use support in the same fashion as an incumbent. As USCC and RCC understand it, ILECs use high-cost support for a variety of purposes, including new capital expenditures, operations, maintenance, general and administrative, and perhaps other uses as well. If incumbents are legally permitted to use high-cost funds on a particular category of expenditure, then all ETCs must likewise be permitted to use support for similar expenditures.

**Should the WUTC require ETC applicants to submit formal improvement plans? If so, what should those plans include? What reports should be required of ETCs; what should be the focus of the review; and what should occur when reported results vary from plans?**

RCC and USCC believe that the plan set forth in response to question 5 above is the best way to ensure that support is being properly used. If each year all ETCs provide coverage maps that demonstrate how they are serving customers, then the Commission will have a year-over-year picture of each carrier’s progress as the years pass. When reported results vary

from plans, the Commission should require an explanation, provided under certification. As stated above, there are many potential reasons why plans can change, such as changes in market conditions, changes in support levels, regulatory changes, and unexpected changes in customer requests for service. All such reasons are legitimate and the Commission should expect an explanation from the ETC when such changes occur.

**7. The FCC rejected suggestions that build-out plans include a specific timeline. Should the WUTC request build-out plans with specific timelines?**

No. Put simply, no CETC knows how much support it will receive from year to year. For example, if program rules change and support drops by 50%, specific timelines for building out are not going to be kept. Moreover, the FCC understood full well that an ETC is not required to build out a ubiquitous network. Under 47 U.S.C. § 214(e)(1)(A), a carrier may operate as an ETC using its facilities, or a combination of facilities and resale or other means. Under the current ‘per-line’ methodology, a new ETC can only construct facilities in an area when the combination of support and customer revenue will be sufficient. Thus, the decision process of where to build, and when, is an ongoing process dictated by customer demand, available support, and appropriate business considerations.

To illustrate, if only one customer in an area requests service, it may be filled by resale and the CETC will receive no support for service via resale. If a cluster of resale customers can be aggregated and served by a cell site, then there is an incentive to construct and serve them with facilities so that both customer revenue and support revenue can be captured.

Finally, the difference in how incumbents and CETCs are provided with support must be taken into consideration. Incumbents can construct facilities using a combination of line extension charges, state and federal support, to guarantee a return on investment in almost all cases. Because a CETC only receives a “per-line” amount for extending service to any one

customer, the CETC is not guaranteed a return. Thus, it cannot set forth a time line for specific network construction beyond the next year with any degree of certainty.

8. **The FCC will require an applicant for ETC designation to demonstrate its ability to remain functional in emergency situations, and to “demonstrate it has a reasonable amount of back-up power to ensure functionality without an external power source, is able to reroute traffic around damaged facilities, and is capable of managing traffic spikes resulting from emergency situations.” Should the WUTC adopt this requirement? If it does, how should “emergency situation” be defined? What does it mean “to remain functional” in an emergency situation?**

**Many ETCs in Washington operate under WAC 480-120-412 and 414. If the FCC requirement were adopted by the WUTC, would compliance with these rules satisfy the FCC requirement?**

Most, if not all, wireless carriers, including RCC and USCC, already provide back-up power and take other steps to ensure network reliability during emergency situations. Competitive pressure is already working to force wireless carriers to provide reliable networks. Consumers who are unhappy with their service for any reason, including reliability, have the option to switch service providers, which is a more powerful incentive to improve service, oftentimes to levels higher than a baseline regulatory requirement.

While RCC and USCC would not have any objection to a requirement similar to that contained in paragraph 25 of the *FCC ETC Order*, they urge restraint in adopting new regulatory requirements for wireless ETCs, since there is no evidence that competition is not already ensuring reasonably reliable service, even in emergencies. Additionally, the WUTC needs to be mindful of potential challenges to its regulations if they appear to extend the regulation to wireless carriers in the absence of a clear grant of jurisdiction to the WUTC to regulate wireless telecommunications. *See* RCW 80.36.370(6) and RCW 80.66.010. Wireless jurisdictional issues are discussed further below. If the WUTC does propose a rule, it should follow the provision in paragraph 25 of the *FCC ETC Order* that: “If states impose any additional requirements, we encourage them to do so in a manner that is consistent with the universal service principle of competitive neutrality.”

- 9. The WUTC has a rule that address backup power and reserve battery capacity. WAC 480-120-411. Would compliance with that rule satisfy the FCC’s requirement in Paragraph 25?**

RCC and U. S. Cellular will not comment on this question as WAC 480-120-411 only applies to wireline carriers.

- 10. The FCC rejected a proposal for a requirement that an ETC maintain eight hours of back-up power and ability to reroute traffic to other cell sites in emergency situations. What does your company have in place today to meet back-up power needs? Should the WUTC adopt an eight-hour requirement? Require the ability to reroute traffic to other cell sites in emergency situations? Require the ability to reroute traffic from the line-side of a switch?**

RCC’s Capabilities:

RCC’s standard cell sites are engineered for 8 hours of battery back-up. High-capacity sites are engineered for 4 hours of battery back-up. In addition to battery back-ups, all major microwave hubs also have back-up generators. RCC also has portable generators available for providing longer power supplies if the duration of an outage is expected to exceed the available battery back-up. RCC’s switch is engineered for 12 hours of battery back-up and also has a stand-by generator to provide uninterrupted power supplies if necessary. If a cell site is down, and there is overlapping coverage from another cell site, there will be no loss of service (the call will be processed through the tower now providing coverage). Major cell site outages are normally resolved in less than 6 hours.

Additionally, RCC has built-in network redundancies in some areas, including interexchange facilities and in connections to the local exchange network, which enable rerouting of traffic due to outages. Many of RCC’s cell sites in Washington are located in very remote areas where microwave facilities are the only means of transporting traffic from a cell site back to the switch (“MTSO” or “mobile telephone switching office”). In these links, system redundancies are impossible, similar to the “last mile” connection to a wireline customer. Fortunately, the microwave network is very robust in all weather conditions and the company

reports less down time on microwave facilities than it does on wireline facilities used to transport traffic.

USCC:

USCC provides a minimum battery back-up for cell sites of four hours. The specific amount of battery back-up is engineered based on number of factors, including remoteness of location, space constraints, weight constraints, and thermal issues. MTSOs have eight-hour battery back-ups. USCC also uses back-up generators as needed to provide back-up power. “Rerouting” for wireless networks is different than for wireline networks and inherently depends on the amount of RF overlap from adjacent or surrounding cell sites. In some cases, USCC can bring in COWs (cell on wheels) or COLTs (cell on light track) to provide coverage in the event of an outage or in the event of an emergency or other event requiring additional call capacity in an area.

Comments:

As noted above, the WUTC should tread lightly in adopting regulations. The competitive market is working well to ensure reasonable back-up power and emergency coverage. A specific back-up power requirement shall not be imposed because cell sites vary widely in location and exposure to power outages. A back-up diesel generator can be delivered to a cell site, typically within an hour. A cell site that is in an area that experiences very few power outages should not have the same back-up power requirements as a cell site on a remote mountain top.

RCC and USCC also encourage the Commission not to adopt a requirement for an ability to reroute traffic to other cell sites in emergency situations. Such a requirement would be incompatible with their existing networks in a number of areas. Since “rerouting” could require each wireless carrier to provide ubiquitous duplicate RF coverage of their entire service areas, such a requirement could unnecessarily impose a massive build-out obligation that delivers almost no consumer benefit and is not competitively neutral with wireline carriers who do not

have redundancies on their ‘last mile’. Most cell phones have a “roaming” capability, which will allow cell users to switch to a competitive network if their primary carrier’s cell site is down and there is no overlapping coverage. Moreover, such specific regulations would raise jurisdictional issues for the WUTC, which does not have jurisdiction over wireless carriers in most instances.

**11. The FCC will now require reporting on an annual basis of outages experienced by ETCs. Should the WUTC require similar reports on an annual or more frequent basis? How could the WUTC use the reports in the annual certification process?**

The WUTC should require all CETCs who are required to report outages to the FCC to submit a copy to the WUTC in connection with the annual certification process. There is no need to have companies report separate outage data for the state’s purposes. The FCC’s outage reporting requirement provides both the amount and type of information the Commission can use to reasonably judge whether there is a service quality problem in the state, either with a single company or a class of carrier.

From an administrative standpoint, companies such as USCC and RCC who operate in multiple states, will find it much more efficient to have a single reporting requirement which can be copied to states which require it. The FCC already has two different outage reporting requirements and therefore adding a third reporting requirement in Washington is not necessary. USCC and RCC believe that providing the WUTC with copies of reports delivered to the FCC is the better course and will provide the WUTC with ample data on which to review network service quality.



- 12. The FCC will require a carrier seeking “ETC designation to demonstrate its commitment to meeting consumer protection and service quality standards” by making “a specific commitment to objective measures to protect consumers.” The FCC did not adopt standards; it permits an ETC to propose standards to which the ETC will adhere. What are the concerns for consumer protection and service quality in Washington that should be addressed by standards? If there are concerns, what standards should apply?**

The Commenters note that the new FCC rule requires a demonstration that the applicant will meet “applicable” consumer protection and service quality standards. 47 C.F.R. § 54.202(a)(3). The word “applicable” is crucial here because it underscores the importance of restraint when determining what regulations, if any, to apply to CETCs. In other words, rather than require a commitment to satisfy consumer protection and service quality regulations currently applicable to wireline carriers, the FCC rule narrowly references “applicable” standards – and often such regulations are not properly applied to carriers operating in competitive markets. Indeed, consumer protection and service quality standards applicable to wireline carriers were designed to protect consumers from monopoly business practices; they were not imposed as a condition of ETC status. When competitors are introduced – particularly wireless competitors that have no rate-of-return guarantees and are accustomed to performing in an intensely competitive environment – this type of intrusive regulation is largely unnecessary.

The Commenters believe the proper approach is to follow the FCC’s lead by requiring CETCs to commit to follow the CTIA Code. See response to Question 13, *infra*.

- 13. The FCC stated that “we encourage states to consider, among other things, the extent to which a particular regulation is necessary to protect consumers in the ETC context, as well as the extent to which it may disadvantage an ETC specifically because it is not the incumbent LEC,” and to “not require regulatory parity for parity’s sake.” If the WUTC were to adopt a rule “to protect consumers in the ETC context,” what existing (demonstrated) problems should be addressed and in what way?**

The WUTC can only regulate wireless carriers to the extent that they provide “the only voice grade, local exchange telecommunications service available to a customer of the

company.”<sup>15</sup> RCW 80.36.370(7); *see also*, RCW 80.66.010. As a practical matter, this limitation on the WUTC’s jurisdiction precludes adoption of a service quality rule applicable generally to wireless carriers. Very few wireless customers would be covered by such a rule—probably a small fraction of one percent. Fortunately for Washington’s consumers, no regulation of wireless ETC service quality is needed. In every ETC area, a wireless ETC has at least one competitor, the ILEC.

At the most, the WUTC should follow the FCC’s lead and condition grant of ETC status to a wireless carrier on a commitment to comply with the Cellular Telecommunications and Internet Association’s Consumer Code for Wireless Service (“CTIA Code”), which the FCC found “will satisfy this requirement for a wireless ETC applicant seeking designation before the [Federal Communications] Commission.” *FCC ETC Order*, 28. The CTIA Code, which is available at [http://www.wow-com.com/pdf/The\\_Code.pdf](http://www.wow-com.com/pdf/The_Code.pdf), provides that wireless carriers agree to:

- (1) [D]isclose rates and terms of service to customers;
- (2) make available maps showing where service is generally available;
- (3) provide contract terms to customers and confirm changes in service;
- (4) allow a trial period for new service;
- (5) provide specific disclosures in advertising;
- (6) separately identify carrier charges from taxes on billing statements;
- (7) provide customers the right to terminate service for changes to contract terms;
- (8) provide ready access to customer service;
- (9) promptly respond to consumer inquiries and complaints received from government agencies; and
- (10) abide by policies for protection of consumer privacy.

*Id.*, note 71.

As the FCC cautioned, “states should not require regulatory parity for parity’s sake.”<sup>16</sup> Many if not most of the WUTC’s traditional service quality rules are appropriate only for wireline carriers. Attempting to impose such traditional requirements on all ETCs could

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<sup>15</sup> And even then, the WUTC is preempted from regulating wireless rates. *E.g.*, *FCC ETC Order*, ¶ 31 (“Section 332(c)(3) of the Act preempts states from regulating the rates and entry of CMRS providers . . . .”)

<sup>16</sup> *Id.* at para. 30, *citing Federal-State Joint Board on Universal Service, Recommended Decision*, 19 FCC Rcd 4257, 4271, para. 34 (2004).

harm the public in two ways. First, in order to ensure competitive neutrality, revising the existing rules could lead to less protection for wireline customers, who may still need some service quality regulations. Second, imposing service quality requirements developed in a wireline world on wireless carriers could lead to unnecessary increase costs or a loss of competitive neutrality. Rather than increasing regulation, the Commission should be open to decreasing regulation. As the high-cost support flowing into Washington permits wireless carriers to build networks that provide a truly viable competitive option to the RLECs, the WUTC will be able to begin reducing the regulatory burden on ILECs.<sup>17</sup>

As this Commission recently noted, in the four years since it first designated a CETC in rural areas it received only two customer complaints, both of which related to the alleged failure of a non-rural wireline LEC to provide service.<sup>18</sup> The Commission can and should monitor complaints. The Commission could adopt a prerequisite to ETC designation that carriers include in their bills the WUTC phone number or address informing ETC customers where to complain. If the Commission imposes the annual reporting requirements set forth in paragraph 69 of the *FCC ETC Order* on all ETCs, then that will give the WUTC complaint data for all ETCs in an area. By comparing complaint levels among all carriers, the WUTC could then determine whether the current level of service quality regulation is working or not.

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<sup>17</sup> The situation is analogous to the FCC's regulation of AT&T after the 1984 divestiture and of its competitors such as MCI and SPRINT. For many years the FCC imposed greater regulatory requirements on AT&T. As competition emerged and matured, the FCC pursued a measured deregulation of AT&T.

<sup>18</sup> Order Granting Petition for Designation as an [ETC], *In the Matter of the Petition of AT&T Wireless, et al.*, ¶ 43, Dkt. No. UT-043011 (WUTC, April 13, 2004).

14. **The FCC will require an ETC to “demonstrate that it offers a local usage plan comparable to the one offered by the incumbent LEC in the service areas for which the applicant seeks designation.” The FCC itself declined to adopt a specific local usage threshold, but will review local usage offerings on a case-by-case basis. The FCC intends to “ensure that each ETC provides a local usage component in its universal service offerings that is comparable to the plan offered by the incumbent LEC in the area.” The FCC encourages states to determine whether the ETC “provides adequate local usage.” If the WUTC determines it should require wireless ETCs to offer something other than their current subscriber offerings, should the WUTC investigate the revenues and expenses of wireless companies to determine if the offering intended to be comparable to the incumbent LEC’s offering is fair, just, reasonable, and sufficient?**

**If the WUTC considers a requirement that wireless ETCs provide local usage comparable to that of the incumbent LEC, should the WUTC also consider a requirement that incumbent LECs have a local usage offering comparable to one or more wireless plans, including limited “anytime” minutes, extended area calling, or national “toll free” service?**

Commissioner Stephen L. Diamond of the Maine Public Utility Commission (“MPUC”), speaking just last week at an MPUC meeting, commented that the FCC has thrown states something of a twist here by giving them discretion to regulate local usage in some fashion, even though the statute denies states “any authority” to regulate CMRS rates. 47 U.S.C. § 332(c)(3)(A). Mr. Diamond properly pointed out that the *FCC ETC Order*’s treatment of local usage is both muddled and inconsistent with the statutory prohibition on rate and entry regulation by states. Both USCC and RCC believe this portion of the *FCC ETC Order* may well be appealed. USCC and RCC believe that the best course is to avoid unnecessary regulation in an area where there is no demonstrated problem and where there appear to be legal infirmities with the FCC’s approach. Regulation of quantity is inextricably intertwined with rates. For example, if an increase in quantity is mandated, but a rate increase is prohibited, then the unit cost of the product or service has been regulated. Likewise, if an increase in quantity is mandated and the rate is permitted to increase, then the cost to the customer has been increased. In either case, rates have been regulated.<sup>19</sup>

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<sup>19</sup> See *Southwestern Bell Mobile System, Inc., Memorandum Opinion and Order*, 14 FCC Rcd 19898, 19907, para. 20 (1999) (“[W]e find that the term ‘rates charged’ in Section 332(c)(3)(A) may include both *rate levels* and *rate structures* for CMRS and that the states are precluded from regulating either of these.”) (emphasis in original).

Under federal law, states cannot regulate rates of CMRS carriers, even if the CMRS carrier is an ETC. *See* 47 U.S.C. Section 332(c)(3); *Petition of the State Independent Alliance and the Independent Telecommunications Group for a Declaratory Ruling that the Basic Universal Service Offering Provided by Western Wireless in Kansas is Subject to Regulation as Local Exchange Service*, 17 FCC Rcd 14802, 14820 (2002) (“*State Independent Alliance*”) (“Kansas is precluded and preempted from imposing rate and entry regulations on Western Wireless’ BUS offering, but Kansas may regulate other terms and conditions, and Kansas may impose universal service regulations that are not inconsistent with section 332(c)(3)(A), other provisions of the Act, and the Commission’s regulations.”)

Rate regulation has been interpreted broadly by the courts. *See Bastien v. AT&T Wireless Service, Inc.*, 205 F.3d 983, 989 (7<sup>th</sup> Cir. 2000). Additionally, the *TOPUC* decision by the Fifth Circuit confirmed that Section 254(f) of the Act — which allows a state to “adopt regulations not inconsistent with the Commission’s rules to preserve and advance universal service” — cannot be read to supersede the preemptive effect of Section 332(c)(3).<sup>20</sup> In sum, Congress made no “universal service exception” to its preemption of CMRS rate regulation.

The FCC’s rules specifically provide that each ETC must offer “an amount of minutes of use of exchange service, prescribed by the Commission, provided free of charge to end users.” 47 C.F.R. § 54.101(a)(2). On its face, the FCC’s rules require the FCC to prescribe the amount of minutes of exchange service carriers must offer. Thus, the FCC’s pronouncement that there is nothing that would prohibit states from imposing such a requirement appears at odds with the statute and its own rules. We believe that this is why the FCC decided to only require CETCs to have one rate plan that is comparable with that offered by ILECs. In so doing, the FCC did not mandate unlimited local usage or any particular rate structure, but left it open for each

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<sup>20</sup> *See Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 431 (5<sup>th</sup> Cir. 1999).

state to determine comparability on a case-by-case basis, taking into account local calling areas, price, and other factors. *See FCC ETC Order* at para. 33.

As a practical matter, wireless ETCs already offer consumers greater value than do most or all landline carriers. There is hard evidence that consumers are arbitraging substantial minutes from ILEC networks to wireless to access wider local calling areas, take advantage of lower long distance rates and to avoid high intra-state toll charges. Moreover, in big cities, where wireless networks are now of higher quality, a significant number of consumers are ‘cutting the cord’ altogether for voice services, retaining a landline phone line for Internet access only. Thus, both USCC and RCC believe that as long as an ETC is offering consumers a variety of local usage options, it is meeting its obligation to offer local usage. *See Virginia Cellular, LLC*, 19 FCC Rcd 1563 (2004).

USCC and RCC believe that competitive neutrality would require the same showing by wireline LECs – that is, that wireline LECs offer at least one rate plan that is comparable to rate plans offered by wireless carriers operating in their service areas. But neither company wishes to push the point. Having such a requirement inevitably leads to regulation of minutiae and inefficiencies for all carriers and would be contrary to Congress’s “general preference in favor of reliance on market forces rather than regulation.” *Petition of N.Y. State Pub. Serv. Comm’n to Extend Rate Regulation, Report and Order*, 10 FCC Rcd 8187, 8190, para. 18 (1995).

To fulfill the goals of the 1996 Act, all universal service regulations should promote competition and a level playing field. If wireless carriers are permitted to comply with local usage requirements by meeting the *Virginia Cellular* standard, which approved a CETCs offering of a variety of local usage offerings, then the better course is to allow consumers to decide which service best suits their needs. This would be consistent with the WUTC’s prior ETC designations. All USCC and RCC want is the opportunity to compete for customers and

support on a level playing field. If a carrier's rates are too high, consumers will choose an alternative if they have one.

By using high-cost support to improve wireless infrastructure, both USCC and RCC will drive those additional consumer choices and benefits without the need to impose specific rate plan requirements on competitors. There is anecdotal evidence that designation of CETCs in Kansas has caused ILECs there to amend tariffs to offer wider area local calling – a marketplace response that was achieved without a regulatory requirement.

**15. The FCC did not impose an equal access requirement on all ETCs, it stated that ETC applicants should acknowledge that the FCC may require equal access in the event that no other ETC is providing equal access within the same service area. Should the WUTC consider imposing an equal access requirement?**

The WUTC should adopt the FCC's rule requiring ETC applicants to acknowledge that the FCC may require equal access in the event that no other ETC is providing equal access within the same service area. A requirement by the WUTC to offer equal access as a condition of ETC designation would violate federal law if applied to CMRS carriers and would provide no public benefit.

If applied to wireless carriers, an equal access requirement would violate Section 332(c)(8) of the Act, which provides that CMRS providers "shall not be required to provide equal access to common carriers for the provision of telephone toll services." As with rate regulation, there is no exception to this rule based on assumption of ETC obligations.<sup>21</sup> Moreover, the corollary provision, that the FCC may require a wireless ETC to provide equal access in the event no other carrier is providing equal access in the same area, is a restatement of the FCC's exclusive authority under Section 332(c)(8) to require equal access if it determines that "subscribers . . . are denied access to the provider of telephone toll services of the

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<sup>21</sup> *State Independent Alliance, supra*, 17 FCC Rcd at 14819 ("Unless the requirements imposed by the Kansas Commission are entry, rate, or equal access regulations, the Kansas Commission is not prevented from applying such requirements to CMRS ETCs consistent with the Act and the Commission's universal service regulations.")

subscribers' choice, and that such denial is contrary to the public interest, convenience, and necessity[.]” If a wireless carrier is the sole ETC and carrier, then it may be appropriate for the *FCC* to impose equal access on that carrier. Thus, whether as a condition of ETC designation or on a case-by-case basis, the imposition of an equal access requirement on CMRS providers by the WUTC would be prohibited by law.

Even assuming this Commission determined that it does have authority to impose equal access as a condition of ETC designation, there are several practical reasons why imposition of equal access would be a very poor regulatory choice. First and foremost, no party has ever identified a consumer benefit that would accrue as a result of imposing equal access on competitors. Claims that consumers would have more choice are without merit. Wireless carriers today offer dozens of rate plans to suit virtually any consumer need. If an ETC were required to add one additional rate plan that permitted a caller to dial their IXC of choice, that rate plan would pass through IXC rates at retail. As a result, the consumer choosing his or her IXC would have the privilege of paying the highest rates of any wireless consumer because it is simply impossible for an individual consumer to negotiate rates that are lower than the wholesale rates obtained by wireless carriers.

Consumers today choose wireless service to obtain lower long distance rates and to avoid intra- and inter-LATA toll charges altogether. While, in doing so, consumers may give up their IXC of choice, customers today view long distance as they do bleach or other fungible products – largely indistinguishable except for price. There is simply no public-interest benefit in requiring wireless carriers to offer consumers a service that is priced higher than what they can obtain today.



**16. The FCC did not adopt a requirement for ETC applicants to demonstrate the financial capability to provide quality services throughout the designated service area. Should the WUTC adopt a requirement that an ETC applicant demonstrate the financial capability to sustain supported services? Should the WUTC require proof of financial capability to sustain supported services as part of the annual certification process?**

A financial capability requirement would present competitive neutrality concerns. ILECs were not required to pass any financial qualification test before being designated as ETCs. Thus, it is not competitively neutral to impose such a standard on new ETCs. If it is to be imposed, then all ETCs must be reviewed as well, on the same basis as new entrants.

If financial qualifications are to be measured before support is provided, then ILECs must likewise be required to demonstrate that they would be financially sound without the benefit of high-cost support being provided. In some proceedings, rural ILECs have testified that they receive as much as 60% of their revenue through state and federal high-cost mechanisms. In recommending that these standards be imposed, the Commission runs the risk of disqualifying numerous rural ILECs that have freely admitted that they would not be in business without high-cost support.

The FCC's decision to provide support to competitive carriers only on a "per line" basis is precisely the correct policy in ensuring that support is used efficiently. Carriers in financial distress that sell out or merge will pass ETC status on to a new owner and the FCC will have an opportunity to examine the new carrier's financial qualifications in the course of processing an application for assignment or transfer of control.

Imposing new financial qualifications criteria will provide little or no new assurances that services will be delivered efficiently and will not provide real benefit to consumers.

17. **The FCC states that in making a public interest determination, the “public interest benefits of a particular ETC designation must be analyzed in a manner that is consistent with the purposes of the Act itself, including the fundamental goals of preserving and advancing universal service; ensuring the availability of quality telecommunications services at just, reasonable, and affordable rates; and promoting the deployment of advanced telecommunications and information services to all regions of the nation, including rural and high-cost areas.” To what degree should the WUTC consider the purposes of the Act and section 254 principles, including “the deployment of advanced telecommunications and information services to all regions” in making the public service determination?**

The Commission must consider the purposes of the Act and Section 254 in making its determination as, after all, this is a federal program which created CETC eligibility by statute. Some have advocated “going back to the original intent of universal service” which is to simply connect people to the telephone network. Congress changed the fundamental purpose of universal service in the 1996 Act, permitting competitors to access high-cost support so as to drive competition in rural areas that will advance universal service and fulfill a critical goal of the Act – to provide rural consumers with access to an array of telecommunications services comparable to those available in urban areas. 47 U.S.C. § 254(b)(3).

It is axiomatic that competition drives consumer benefit. It is difficult, if not impossible, to identify any market characterized by monopoly service as providing benefits to consumers that are superior to those available in a competitive market. Nine years ago the Congress understood full well the value of advanced services to rural America, including mobile wireless service. It has now been over 15 years since the first wireless licenses were awarded in rural America, yet in many rural areas, the quality of wireless infrastructure is poor. This state of affairs is the best evidence that in many rural areas there is no business plan that supports construction of high-quality wireless networks. High cost support is essential to get rural wireless networks constructed.

The Congress intended for the benefits of mobile wireless communication, including health, safety, and economic development, to be available in rural areas as well as urban areas. We submit that the WUTC must look first to the needs of consumers, not any one

class of carrier, in making public interest determinations. Many small communities in Washington are today receiving service from CETCs which could not have been provided without high-cost support. In each case, the WUTC must consider whether the benefits of providing competitors with an incentive to construct facilities beyond the state's low-cost areas will benefit consumers. At this time, when wireless networks remain in their relative infancy, funds used to construct new networks will have enormous benefit for consumers who have waited too long to enjoy the benefits of modern technology and advanced services.

**18. The FCC states “in light of the numerous factors it considers in its public interest analysis, the value of increased competition, by itself, is unlikely to satisfy the public interest test.” The WUTC has considered the benefits of competition, not competition itself. How should the WUTC factor in the benefits of competition when determining the public interest in ETC designation?**

The WUTC must continue to consider the benefits of competition in its public interest analysis. The FCC continues to understand how consumers benefit from competition, but it has asked states to broaden their criteria. In past cases, the WUTC has found that incumbent carriers have failed to demonstrate any detriment to consumers as a result of any particular designation. In the future, the WUTC should continue to weigh the benefits of competition against the commitments an ETC petitioner makes to fulfill its ETC obligations.

Under the current rules, a CETC can only get support by constructing network facilities in high-cost portions of Washington. This is because this state has disaggregated ILEC support out of low-cost areas. Moreover, since a competitor can receive support only when it gains a customer, the number of CETCs designated in the state is largely irrelevant because the number of lines in the state is limited by its population. Thus, competition for consumers and support is a critical driver of consumer benefit and, under the current rules, should remain the foremost component in evaluating a petition for ETC status.

- 19. The FCC states that it weighs advantages and disadvantages of particular service offerings. The WUTC has stated that it believes customers can determine the value of advantages and disadvantages of service offerings better than the government. Should the WUTC consider advantages and disadvantages of carrier service offerings when making a public interest determination in an ETC designation? Is the price of a service offering an “advantage or disadvantage?” Is the quality of a service offering an “advantage or disadvantage?”**

The Commenters agree with the WUTC’s current deregulatory approach of leaving it to the consumer to determine which rate plans are most advantageous. With high-cost support limited to the number of customers they can acquire and keep, CETCs have every incentive to bring a proliferation of rate plans and a high level of service to rural areas lacking in such choices. Consumers will vote with their pocketbooks: if a CETC wins over large numbers of consumers by offering mobility with wider local calling areas and a high level of customer service, it will receive the per-line support commensurate with its subscriber gains. If its service offerings fail to entice customers, then it will face the ultimate punishment: loss of customer revenue and corresponding high-cost support. These incentives set CETCs apart from the incumbents in that CETCs have none of the rate-of-return guarantees or assurances of cost recovery through the high-cost mechanism that ILECs have.

- 20. The FCC has emphasized service quality of carriers seeking ETC designation. It states, “the requirements to demonstrate compliance with a service quality improvement plan and to respond to any reasonable request for service will ensure designation of ETC applicants that are committed to using high-cost support to alleviate poor service quality in the ETC’s service area.” Is there a service quality problem among ETCs in Washington; if so, what is the problem? What specific information about poor service quality is in the record of the FCC that the WUTC might use to compare to carriers’ service quality in Washington as part of the process of determining whether to grant or deny ETC designation?**

The service quality problem that exists for CETCs is inherent in the fact that high cost support to CETCs in rural areas has only just begun flowing. Wireless network quality in rural areas is often poor. Indeed, this is the basis for providing high cost support to wireless carriers – to improve their networks. However, there is no specific information in the FCC’s record that the quality of customer service is poor. Given that in four years of experience with

CETCs the WUTC has not been faced with complaints about their service,<sup>22</sup> this suggests that the current ad hoc approach is working and a rigid rule is not needed. *See Western Wireless Corp., Petition for Designation as an Eligible Telecommunications Carrier in the State of Wyoming*, 16 FCC Rcd 48, 54 (2000) (“WWC Wyoming Order”), *recon. denied*, 16 FCC Rcd 19144 (2001) (“WWC Wyoming Recon. Order”) (“We . . . believe that the forces of competition will provide an incentive to maintain affordable rates and quality service to customers. Competitive ETCs will receive universal service support only to the extent that they acquire customers. In order to do so, it is reasonable to assume that competitive ETCs must offer a service package comparable in price and quality to the incumbent carrier.”).

**21. Should the WUTC determine that ETC designation of a carrier will confer a public benefit before making the initial designation? If so, what information should the WUTC use to arrive at a determination of public benefit? Should the WUTC require some proof of continuing public benefit as part of the annual certification process?**

In areas served by rural ILECs, the federal statute makes clear that a public interest finding is necessary for a competitive ETC designation. Thus, it would be appropriate to require a finding that a competitive ETC designation in a rural area would confer a public benefit.

The Commenters believe that the WUTC got it right when it concluded that “Competition alone may not be sufficient to meet the public interest test, but the benefits of competition are more than sufficient.”<sup>23</sup> The 1996 Act was written with the intent of opening all telecommunications markets to competition,<sup>24</sup> and it aspires to bring to rural consumers the same variety of services and rate plans enjoyed by their urban and suburban counterparts.<sup>25</sup> Thus, it is

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<sup>22</sup> See response to Question 13, *supra*.

<sup>23</sup> Order Granting Petition for Designation as an Eligible Telecommunications Carrier, *In the Matter of RCC Minnesota, Inc., d/b/a Cellular One*, Docket No. UT-023033 at para. 59 (Aug. 14, 2002).

<sup>24</sup> See *supra* n.6.

<sup>25</sup> 47 U.S.C. § 254(b)(3) (“Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to

clear that introducing competition and its attendant benefits is in the public interest and has been so recognized by Congress and the FCC. Foremost among the benefits of competition are the increased choice and improved quality that come as carriers compete for customers.

There are also specific benefits conferred by the designation of wireless carriers, particularly the ability of such carriers to use high-cost support to bring quality signal to areas with spotty or no coverage. Consumers increasingly demand wireless service, as evidenced by the fact that wireless usage and spending are now outpacing wireline. Wireless is increasingly seen as an essential service for both convenience and from a public safety perspective. Businesses need quality wireless signal and increasingly factor its availability into decisions to locate offices or plants. Thus, the increased availability of wireless service should be considered a special public benefit for the purposes of ETC designations in rural areas.

Although a public benefit finding is appropriate in the designation process, the Commenters do not believe that it is necessary to include an explicit “continuing public benefit” finding in the annual recertification process. Once a designation is made, and compliance and reporting conditions are imposed, it should be assumed that the public benefit will continue so long as the ETC spends its support lawfully and complies with the conditions of its designation.

- 22. The FCC has rules that provide federal high-cost support to rural incumbents based on embedded costs of those carriers. The FCC rules provide support to non-incumbent ETCs for every line served based on the costs of incumbents, not on the costs of the ETC. In Washington, federal universal service has been disaggregated for rural incumbents so that support is based on costs associated with each rural exchange. As a result, non-incumbent ETCs receive support based on the level of support needed by the rural incumbent to serve an exchange. Should the WUTC address cream skimming more than it has: if so, how?**

The Commenters believe that the WUTC and the rural ILECs in Washington have properly addressed cream-skimming concerns in a manner that is much more effective than the

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telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.”)

“population density proxy” adopted by the FCC. By disaggregating support to the wire center level and redefining the same carriers’ service areas in similar fashion, the WUTC and rural ILECs ensured that the level of high-cost support available to a competitor will vary depending on the true costs of an ILEC licensed to serve a particular wire center. Thus, any previous concerns that a competitor might selectively enter low-cost, high-density areas have been resolved, and competitors are properly incented to target consumers in less densely populated areas.

Because Washington has taken the lead in resolving cream-skimming concerns in a comprehensive manner, the FCC’s relatively new approach involving population density is inapposite here. An analysis of whether a competitor seeks to serve primarily high- or low-density wire centers is inappropriate because population density bears only a very weak relationship to wireline costs when measured at the wire center level. Because the vast majority of rural ILECs nationwide declined to take advantage of the FCC’s disaggregation rules, the FCC and many other states face situations where a competitor seeks to serve densely populated areas with per-line support levels based on the entire study area. For this reason, the FCC adopted its population density analysis, and many states have followed suit.

Washington is different, however. Where support has been disaggregated and targeted to the wire center, it matters not how many high-density, low-cost wire centers a competitor seeks to serve. In Washington, the ability of competitors to take advantage of study area-wide support levels has been removed, protecting ILECs from subsidized competition in low-cost areas, and as a result rural consumers have reaped the benefits.

**23. The FCC declined to adopt a specific test to use when considering whether designation of an ETC will affect the size and sustainability of the high-cost fund. In the absence of a federal test, should the WUTC apply a test and what test should it apply?**

The Commenters agree with the FCC’s conclusion that “analyzing the impact of one ETC on the overall fund may be inconclusive” because “it is unlikely that any individual ETC designation would have a substantial impact on the overall size of the fund.”<sup>26</sup> Moreover, as the FCC noted, there are ongoing proceedings to address the sustainability of the fund by altering the way in which incumbent and competitive ETCs receive support and revising the manner in which carrier contributions to the fund are calculated. These broad concerns are beyond the scope of any individual designation by the FCC or any state commission. Finally, one of the best controls on fund growth is the disaggregation and targeting of high-cost support in rural areas, a measure that ensures that competitors will not be unduly rewarded with large amounts of support for serving low-cost areas instead of more remote areas that are in need of competitive service. This has already been accomplished in Washington.

**24. The FCC states, “one relevant factor in considering whether or not it is in the public interest to have additional ETCs designated in any area may be the level of per-line support provided to the area. If the per-line support level is high enough, the state may be justified in limiting the number of ETCs in that study area, because funding multiple ETCs in such areas could impose strains on the universal service fund.” However, the FCC also has determined that a non-incumbent ETC is entitled to receive support for each line served in an amount equal to the per-line amount received by an incumbent ETC. May the WUTC deny ETC designation to an otherwise qualified carrier because receipt of the federally-determined support amount “could impose strains on the universal service fund?”**

**If a non-incumbent will serve a location without support, would fund sustainability be increased if the incumbent is not designated an ETC?**

High per-line support levels should not prevent the designation of a competitive ETC. Because of the disaggregation that has already been achieved in Washington, relatively high per-line support levels are targeted to the more sparsely populated areas – areas where increased competition should be promoted, not impeded.

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<sup>26</sup> *FCC ETC Order* at para. 54.



25. **The FCC declined “to adopt a specific national per-line support benchmark for designating ETCs,” and stated “Although giving support to ETCs in particularly high-cost areas may increase the size of the fund, we must balance that concern against other objectives, including giving consumers throughout the country access to services comparable to services in urban areas and ensuring competitive neutrality. In addition, as a practical matter, we do not believe we currently have an adequate record to determine what specific benchmark or benchmark should be set.” Can the WUTC develop a state benchmark and apply it in the context of an ETC designation decision? What would be the benchmark?**

For reasons similar to those outlined in response to questions 24 and 25 above, the Commenters believe per-line support benchmarks were properly rejected by the FCC and should likewise be rejected by the WUTC. In light of the congressional goal of providing rural consumers with the same choices among services and rates as those available in urban areas, it would be counterproductive to cut out of the picture precisely those high-cost areas in which those services are most lacking. It would also be counterintuitive in that such a scheme would reward the least efficient carrier.

It is sometimes argued that some areas are so costly to serve that it makes no sense to designate an additional ETC when the area cannot support even one carrier without subsidy. This argument is made by those favoring incumbent protection, which the Fifth Circuit struck down.<sup>27</sup> Moreover, it fails to recognize the fundamental benefit that the FCC’s program for CETCs brings to rural America. That is, per-line support only permits competitive carriers to construct facilities where facilities-based competition is feasible. If a small portion of a service area will not support multiple networks, then a competitor will have to offer service through resale or UNEs, as contemplated by the FCC. Competitive ETCs such as Smith Bagley, Inc., Western Wireless, and others have demonstrated that some of the most remote areas of the country will support competition and there is absolutely no reason for regulators, by fiat, to deny

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<sup>27</sup> See *Alenco, supra*, 201 F.3d at 620 (“The Act does *not* guarantee all local telephone service providers a sufficient return on investment; quite to the contrary, it is intended to introduce competition into the market. Competition necessarily brings the risk that some telephone service providers will be unable to compete. The Act only promises universal service, and that is a goal that requires sufficient funding of *customers*, not *providers*.”) (emphasis in original).

consumers who need support the most the possibility of having the same kinds of choices in communications services as those available in urban areas.

- 26. The FCC declined to adopt a proposal that would allow only one wireline ETC and one wireless ETC in each service area. The FCC also stated “Such a proposal that limits the number of ETCs in each service area creates a practical problem of determining which wireless and wireline provider would be selected.” Should the WUTC limit ETC designation to one wireline company and one wireless company in any location? Adopt a rebuttable presumption that it is not in the public interest to have more than one ETC in rural areas?**

The number of ETCs in a given area should not be artificially limited because the federal high-cost mechanism already has built-in safeguards that accomplish the same result. In a sparsely populated area, there are a small and finite number of potential lines that can be captured. Assuming a given area draws one competitive ETC, and that ETC constructs facilities in a large portion of the area and captures a significant portion of the available demand for service, it will be doubly difficult for a second competitive ETC to commit to serve that area *and to construct facilities to meet that commitment.*

It will be even harder for a third carrier to do so. In order to meet their commitments to offer and advertise service throughout the area, subsequent ETCs will have to resell service on existing networks, which increases competition in a rural area without funding additional networks. The reason for this is that the current system does not provide support for resold lines. Most carriers do not want to be in the resale business in any significant way. Few, if any, carriers are going to propose to be an ETC in an area that is already constructed by the competition and requires resale on a large scale. The current mechanism is a very effective self-regulating force on the number of ETCs in any given area.

- 27. The FCC also declined to treat smaller and larger wireless carriers differently when the issue is the effect on the fund of ETC designation. What process and standards of review should be applied to various classes of ETC applicants? Should the same process and standards apply equally to all applicants?**

To apply different standards based on the size of a particular business would run afoul of the universal service principle of competitive neutrality. If a streamlined designation process were provided for smaller carriers, then their larger competitors would be punished merely by virtue of being in a different class of carrier. Accordingly, the Commenters believe that the standards for ETC designation must remain the same across all classes of carrier, large and small.

- 28. The FCC addresses issues related to ETC designations for carriers whose service areas will include tribal lands. The WUTC has designated several ETCs that serve tribal lands, and in particular reservations. Should the WUTC require ETC applicants to send notice (a copy of the petition) to Indian tribes that might be affected by the designation?**

The Commenters believe that it would be reasonable for the WUTC to require ETC applicants to send a copy of their petition to any tribes that have reservation lands within the proposed ETC service area.

- 29. The FCC will require information from ETCs every year when the ETC makes its annual certification that it will use federal universal service support only for the intended purposes. Much of the information the FCC will require is similar to the information discussed in questions concerning initial designation. The FCC's new annual certification also requires information regarding the ETC's network and its use support funds. Should the WUTC require the same information as will the FCC?**

**The FCC created the Lifeline and Link Up programs to assist low-income consumers, and the federal tribal lifeline program to target low-income support to residents of Indian reservations. If the WUTC develops additional requirements for annual certification of designated ETCs, should it require annual reports on ETC efforts to publicize the availability of lifeline service in a manner reasonably designed to reach those likely to qualify for the service? Should it inquire into ETC practices related to accepting and processing requests for Lifeline service?**

**If the WUTC imposes any requirements for certification, must it do so by rule, or may it do so by order?**

RCC and USCC would not be opposed to the WUTC adopting the same annual reporting requirements in connection with recertification as the FCC requires of ETCs under its jurisdiction, provided that the requirement is applied to all ETCs, not just to CETCs. If the Commission adopts such a rule, the Commenters urge it not to deviate from the FCC's requirements. If the reporting requirements are consistent between federal and state jurisdictions and among the states, then carriers operating in multiple states can establish a single, uniform record-keeping and reporting program. Inconsistent requirements would be inefficient and more susceptible to errors in record keeping and reporting.

If the WUTC adopts generally applicable requirements for annual certification, it should do so by rule, rather than by order. Under the Administrative Procedure Act, a "rule" is "any agency order, directive, or regulation of general applicability . . . ." RCW 34.05.010(12). Thus, the requirements that seem to be contemplated by this question appear to constitute a "rule" under the APA. The APA contains numerous requirements before an agency, such as the WUTC, can impose a rule. *See generally*, RCW 34.05.310 *et seq.* To avoid potential challenges, the WUTC should follow the APA's formal rulemaking processes.

**30. Should the WUTC disclaim jurisdiction with respect to one, some, or all ETC designations? Is the WUTC permitted to disclaim jurisdiction to conduct annual certifications for ETCs designated by the FCC? ETCs designated by the WUTC?**

The WUTC should not, and probably cannot, disclaim jurisdiction as to any or all ETCs. The Commission obviously has jurisdiction over the ILECs. Even though the Commission's jurisdiction over wireless carriers generally is very limited, the Commission does appear to have jurisdiction to deal with wireless ETCs in connection with administration of the USF. *See, e.g.*, RCW 80.36.600(5). Moreover, the Commission has broad authority to implement the provisions of the Act that Congress delegated to the states in the Act. RCW 80.36.910(1).

**Appendix C: Applicability of RCW Ch. 19.85 (SBEIS).**

RCC and USCC have no comment on this question. Neither company would be considered a “small business” under the statute.

**CONCLUSION**

RCC and USCC urge caution in adopting any new rules relating to designation or certification of ETCs. The approach taken by the WUTC has so far been working well. New regulations should not be adopted unless a compelling need is demonstrated. If new rules are adopted at the state level, they should follow the guidelines set forth in the *FCC ETC Order*. RCC and USCC plan to participate in the WUTC’s workshop in this docket and are open to further discussion of the issues set forth in the foregoing questions and answers.

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