BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

Rulemaking to Consider Amending and Adopting Rules in WAC 480-120, Telephone Companies, and WAC 480-123, Universal Service, to Implement Legislation Establishing a State Universal Communications Service Program	)	**DOCKET UT-131239**

COMMENTS OF THE BROADBAND COMMUNICATIONS ASSOCIATION OF WASHINGTON REGARDING THE COMMISSION'S INITIAL DRAFT RULES

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Comments of the Broadband Communications Association of Washington Regarding the Commission's Initial Draft Rules

INTRODUCTION

The Broadband Communications Association of Washington ("BCAW") appreciates this opportunity to provide comments on the Commission's initial set of draft rules, issued September 26, 2013, relating to the intrastate universal service fund established in recently enacted legislation.[1] BCAW commends the Commission on its initial set of draft rules. The draft rules are consistent with the overarching goals of ESS HB 1971, in which the Legislature expressly created a finite transitional support mechanism designed to provide small companies with temporary relief from the impact of federally-mandated reductions to federal universal service support and access revenues while they alter their business plans in order to compete in the marketplace.[2]

The Commission's initial set of draft rules follow directly from the years of investigation by this Commission that resulted in ESS HB 1971. This thorough investigation by the Commission included significant input from stakeholders, examination of the communications market in the State, and a review of the financial and operational profile of Washington's small incumbent local exchange companies ("ILECs"). The draft rules are clearly designed to implement a limited universal service fund targeted to small rural carriers to "compensate the ILEC for reduced access revenues after increasing local service rates to a

[1] *See* Second Engrossed Second Substitute House Bill 1971, Part II, § 201, *et seq.* ("ESS HB 1971").
[2] While BCAW does not agree that the small companies need such relief, the legislative intent is clear and the Commission's draft rules must carry out the Legislative intent.

'benchmark' but . . . not make the ILEC 'whole' relative to its overall shortfall relative to its total intrastate revenue requirement," as described in the Commission's November 2010 recommendation to the Legislature .[3] Also consistent with the Commission's 2010 recommendation to the Legislature, the draft rules would create a fund that will "serve as a transitional mechanism during which ILECs could make the investments in operational adjustments necessary to further develop their networks and pursue business objectives and opportunities."[4]

The draft rules appropriately seek to establish eligibility criteria and a formula for calculating support amounts designed to effectuate these legislative goals. For example, the rules are tailored to ensure that support will be provided only to those entities who, without artificially low residential local service rates, can demonstrate they would suffer financial hardship on a consolidated company basis, absent support. The rules also make clear that support amounts will be calculated in a manner that focuses on helping to replace small company revenue decreases due to "changes in federal universal service fund and intercarrier compensation support", as mandated in Section 203(1) of ESS HB 1971, and not as a make whole mechanism that would insulate small companies from competition. Each of these important components of the rules are discussed more specifically below.

In addition to comments regarding the draft rules generally, the Commission has asked for comment on three specific additional items, including: 1) the mechanism for establishing rate of return and return on equity eligibility thresholds to be used as criteria for

[3] Washington Utilities and Transportation Commission Report Reviewing State Telecommunications Policies on Universal Service, Docket UT-100562 (November 29, 2010), p. 29.
[4] *Id.*

fund distributions; 2) the intrastate switched access rate elements administered by the Washington Exchange Carrier Association ("WECA") that should be abolished concurrent with initiation of the WUSF; and 3) the proper procedural mechanism for abolishing these WECA rate elements. These comments address the Commission's additional questions first and then turn to specific comments regarding the draft rules.

COMMENTS REGARDING THE COMMISSION'S ADDITIONAL QUESTIONS

BCAW's comments on each additional issue set forth in the Commission's September 26th Notice are set forth below.

Commission Inquiry

1. What mechanism should the Commission use to establish the rate of return and return on equity levels carriers must fall below to be eligible for distributions from the program?

BCAW Response

In subsection 1 of section III of the draft rules (Eligibility and distributions from the program), the Commission proposes that a carrier would be eligible to receive distributions from the program only if the provider first demonstrates that: 1) its earned rate of return on a total Washington company books and un-separated regulated operations basis is at or below the percentage established by the Commission; and 2) its return on equity at a holding company or parent company level is at or below the

percentage established by the Commission for the calendar year immediately preceding the year in which the provider filed its petition. The legislative intent underlying establishment of the fund is to avoid "unreasonable telephone service rate increases or cessation of service for some Washington consumers"[5] and the Legislature expressly therefore limited eligibility to carriers whose customers "are at risk of rate instability or service interruptions or cessations absent a distribution to the provider that will allow the provider to maintain rates reasonably close to the benchmark."[6] Accordingly, the rate of return and return on equity levels utilized by the Commission in determining eligibility should reflect those that a carrier could not fall below without serious and deleterious impacts on its ability to continue to provide service to its customers. The Commission should, therefore, base these rates of return and returns on equity on an examination of average rates of return for companies in industries with similar levels of risk. For this purpose, BCAW recommends following the guidance in the FCC's ICC/USF Transformation Order and reducing the RLEC rate-of-return to no more than 9%.[7] In the event the FCC subsequently reduces the RLEC rate of return, the Commission should revisit the rules and adjust the RLEC rate of return accordingly.

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[5] ESS HB 1971 Section 201(b)(2).

[6] *Id.* at Section 203(3)(b).

[7] *See* In re Connect Am. Fund, A Nat'l Broadband Plan for Our Future et al., WC Docket No. 10-90, et al., 26 FCC Rcd 17663, 18055 (2011) ("USF/ICC Transformation Order"). In that order, the FCC characterized a reduction to no more than 9% as a "conservative" adjustment amidst evidence suggesting that the ideal authorized rate of return should be lower: "We estimate, using recent public data, the WACC for AT&T and Verizon and find it in the range of 6 to 8 percent. This range is consistent with other analysts' estimates. We find a similar range when considering other mid-size and competitive carriers. Even if the interest rate were to increase by 1.5 percent, which seems unlikely in today's economy, the WACC would remain in the range of approximately 7 to 8 percent. This preliminary analysis would conservatively suggest that the authorized interstate rate of return should be no more than 9 percent. We seek comment on this analysis and note that this preliminary analysis does not prejudge the Commission's ability to select a higher or lower rate of return in this proceeding." *Id.*

Commission Inquiry

2. Which specific intrastate switched access charge rate elements currently assessed by Washington carriers and administered by the Washington Exchange Carrier Association (WECA) should be abolished concurrently with initiation of program funding to eligible carriers?

BCAW Response

This issue is addressed in the "Comments of AT&T" filed with the Commission on August 2, 2013. In those comments, AT&T correctly noted that at the July 15, 2013 Workshop in this docket there was general consensus among the parties that the Traditional USF ("TUSF") rate element of $0.00152, currently collected by WECA, should be abolished concurrent with implementation of the Washington Universal Service Fund.[8] BCAW agrees that the TUSF rate element should be abolished concurrent with the initiation of program funding to eligible carriers. [9]

Commission Inquiry

3. Should the Commission abolish the WECA support fund through these rules or by order in a separate docket?

BCAW Response

The Commission should expressly abolish the WECA TUSF rate element by rule and by Commission order. The TUSF was originally adopted in the Eighteenth

[88] *See* Comments of AT&T, dated August 2, 2013, p. 4.
[9] It is BCAW's understanding that the Interim Universal Service rate element and the Common Carrier Line Charge rate elements previously administered by WECA were eliminated effective July 2013.

Supplemental Order and Nineteenth Supplemental Order in Consolidated Cause Nos. U-85-23, et al., and subsequently modified by the Commission's Ninth Supplemental Order in WUTC Docket No. UT-971140. WECA administers the fund pursuant to a standard agreement with other carriers that provides in pertinent part that the agreement shall continue in effect unless and until the Commission enters "an order finding and ordering that the USF is no longer required to serve the public interest." In order to clearly eliminate any remaining contractual obligations under the WECA standard agreement, the Commission should issue an order that makes clear that the TUSF is no longer in the public interest and is eliminated concurrent with the initiation of program funding.

SPECIFIC COMMENTS REGARDING THE DRAFT RULES

As noted in the introduction to these comments, BCAW believes the Commission has done an excellent job of capturing and effectuating the intent of the Legislature in the Commission's initial set of draft rules. These comments, therefore, are limited to only a handful of items that may require additional attention as the Commission moves forward on finalizing the rules in this proceeding.

Benchmark: WAC 480-123-030 (Prerequisites for requesting program support)

In subsection 1(d) of section I (Prerequisites for requesting program support), the Commission's draft rules require that a wireline provider may seek program support if, among other things, "[t]he provider's rates for residential local exchange service, plus

mandatory exchange area service charges, are XX percent above the local urban rate floor established by the Federal Communications Commission . . . ."[10]

In its Initial Comments, filed with the Commission on August 2, 2013, BCAW recommended that:

> The benchmark should reflect what the average consumer pays for service in the State, whether that service is purchased from ILECs, wireless providers, competitive local exchange carriers ("CLECs") or cable companies. In the alternative, BCAW suggests the Commission set the benchmark based on the R-1 rate floor set by the FCC in effect on July 1, 2014, which will likely be approximately $16.00.

The Commission's draft rule establishes a means to set a benchmark that approximates the amount the average consumer pays for voice service, regardless of provider. BCAW believes that the average market rate is substantially higher than the $16.00 FCC R-1 rate floor. For example, Wave Broadband offers consumers stand-alone voice service for $34.95 per month. Just like ILECs' local calling plans, the "Washington Regional WavePhone" plan features unlimited local calling and separate long distance charges.[11] Yet Wave's market-based pricing is more than twice the current FCC R-1 rate (approximately 118% more), demonstrating that – in the actual market for services – consumers in the State are willing to pay substantially more than the FCC's R-1 rate floor. Therefore, to avoid subsidizing below-market competition, BCAW recommends that the Commission revise the draft rule to set a benchmark of at least 75% above the FCC's R-1 rate floor. This is appropriate and consistent with the Legislative intent. Carriers should not be entitled to seek

[10] The reference in subsection 1(b) to 47 U.S.C. §253(h) should instead be to 47 U.S.C. §251(h).
[11] *See* http://www.wavebroadband.com/rc/north-rates.pdf (visited October 9, 2013). The $34.95 price increases to $39.95 if caller ID and call waiting are included. *See id.*

program support if their residential local service rates are artificially lower than what the market suggests customers are willing to pay for service. The public should not be required to subsidize service at rates that bear no relation to the market for similar services offered by other providers.

Total requests in excess of available funds: WAC 480-123-___ (Eligibility and distributions from the fund)

Subsection 4 of section III (Eligibility and distribution from the program) addresses how the Commission should distribute available funds to eligible providers when total requests exceed the program funds available for that year. The draft rules provide that the in such circumstances the Commission will seek a recommendation from the advisory board. While BCAW agrees that the advisory board should be consulted in the event requests exceed available program funds, the default distribution mechanism in such a circumstance should be pro rata reductions in the amount requested by each eligible carrier. This should result in the most appropriate distribution, but could be modified to recognize special circumstances. The advisory board would then be in a position to make recommendations for any warranted modifications to pro rata adjustments.

Proper use of support: WAC 480-123-___ (Reporting requirements)

In subsection 1(b) of section IV (Reporting requirements) the draft rules would require providers that receive program support to report to the Commission "[d]etailed information on how the provider used program support other than providing basic telecommunications services". This reporting requirement suggests that program support can

legitimately be utilized for the provision of non-basic telecommunications services. This is contrary to the express mandate of ESS HB 1971, which states in pertinent part: "[t]he purpose of the program is to support continued provision of basic telecommunications service". Program support should not be used for other purposes. Accordingly, BCAW recommends the Commission delete this reporting requirement as it suggests that such use of funds would be appropriate.

Similarly, in subsection 1(f) of section IV, the draft rules would require providers that receive program support to report on "operational efficiencies or business plan modifications the provider has undertaken to transition or expand from primary provision of legacy voice telephone service to broadband service, *and whether and how disbursements from the program were used to accomplish such outcomes.*" (Emphasis added). For the reasons set forth above, BCAW recommends the Commission delete the italicized language from the draft rule.

Report to the Legislature: WAC 480-123-___ (Reporting requirements)

In subsection 1(h) of section IV, the draft rules include a "catch all" provision for such additional information as may be needed for the Commission to "provide a report to the legislature concerning the program." ESS HB 1971 requires such a report in 2017. While the draft proposed rule is needed, it does not go far enough. In its Initial Comments, BCAW recommended that "prior to compiling the required report, the Commission open a proceeding to receive input from all stakeholders in the form of workshops and written comments (and evidentiary hearings if needed)." BCAW continues to urge the Commission to include such a provision in the rules.

Records: WAC 480-123-___ (Commission compliance review of accounts and records)

In section V, the draft rules require that "[e]ach provider shall retain all records required to demonstrate to the commission that the support the company received was consistent with RCW 80.36.___ and commission rules and orders." BCAW recommends that the requirement be expanded to include record retention to demonstrate that the support was used consistent with the requirements of the statute and commission rules and orders. Accordingly, BCAW recommends the draft rule be revised to read as follows: "[e]ach provider shall retain all records required to demonstrate to the commission that the support the company received *and the manner in which it was utilized* was consistent with RCW 80.36.___ and commission rules and orders."

Advisory Board duties: WAC 480-123-___ (Advisory Board)

In subsection (3)(a) of section VI, the draft rules describe the consultative role of the advisory board. As drafted, the rule would allow third parties to place requests directly to the advisory board to consult on matters. This provision is too broad and could lead to the advisory board's limited meeting time to be consumed by matters not necessarily relevant to its primary role of providing advice to the Commission. BCAW recommends the draft rule be revised to allow third parties to petition the Commission for permission to consult with the advisory board on any given issue. This will allow the Commission to determine whether a particular issue is one upon which it desires advisory board consultation.

Respectfully submitted this 10th day of October, 2013.

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