BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of 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 PUBLIC COUNSEL

I. INTRODUCTION

1. Second Engrossed Second Substitute House Bill 1971 (hereafter HB 1971) created what appears to be the only universal service support program in the Nation that is funded by general revenue funds rather than by assessments on carriers and their customers. The program is limited in time and funding. In adopting rules to implement this unique Universal Communications Service Program (UCSP),[1] the statutory language should govern. Fundamentally, the UCSP must not be used for purposes not germane to the statutory provisions. The central need is to further the public interest in universal communications service, consistent with the directive of the Legislature. As a threshold matter, the UCSP only provides for support to incumbent local exchange carriers with fewer than 40,000 access lines[2] (referred to here as "SLECs" (i.e. "small local exchange carriers")) that are at risk of rate instability or service interruptions or cessation (RISIC) absent the support.

[1] The acronym UCSP is used here in order to distinguish this program from the more-typical universal service fund (USF).
[2] HB 1971, Sec. 203(3)(a). Section references in the comments refer to HB 1971.

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2. The Commission has now issued draft rules, and requested comment on them. Public Counsel appreciates the opportunity to comment on the proposed rules. [3]

3. Public Counsel agrees with the general approach taken in the draft rules, but has concerns with some proposals, as discussed at greater length later in these comments. These concerns include:

- Use of the federal urban rate floor (increased by some percentage) as a surrogate for "a reasonable amount customers should pay for basic residential service provided over the incumbent public network" (referred to here as "BRS")[4] could be problematic.
- While Public Counsel supports using the rate of return and return on equity as benchmarks,[5] more work is required to refine how the Commission will establish its percentages, or show a connection between these return numbers and the "risk of rate instability, service interruptions or cessation" (RISIC) required by the statute.[6]
- Although the proposed rules calculate the amount of support based on lost intrastate access charge revenues,[7] the statute qualifies SLECs for support if they are at risk of RISIC "absent the support."[8] The statute does not create a necessary connection between lost access charge revenues and such risk.

[3] These comments were prepared with the assistance of David C. Bergmann of Telecom Policy Consulting for Consumers, Columbus, Ohio.
[4] Sec. 203(4).
[5] Proposed Rule (PR) (I).
[6] Sec. 203(3)(b).
[7] PR (III)(2).
[8] *Id*. (emphasis added).

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4. In the Public Notice, the Commission also asked three questions relating to rate of return benchmarks and to existing support mechanisms. Public Counsel addresses these questions in the comments.[9]

5. The UCSP is funded by Washington taxpayer dollars. The primary goal of the rules should be to ensure these tax funds are used effectively and efficiently. In addition, in establishing the program, the Commission should ideally use Washington-specific data where feasible to tailor the program to Washington needs and circumstances.

II. THE RULES MUST ENSURE THAT THE STATUTORY CONDITIONS FOR THE UCSP ARE MET

6. The statute contains three primary conditions or filters that determine whether a SLEC receives UCSP funding. The draft rules implement the conditions in different ways.

A. First Condition: Fewer Than 40,000 Access Lines.

7. The draft rules address this as one of the "prerequisites for requesting program support."[10] That is appropriate. According to the Washington Independent Telephone Association (WITA), eighteen Washington LECs[11] meet the statute's first condition.[12] There does not appear to be dispute about which LECs meet the condition; there also does not seem to be a likelihood that any of the SLECs will reach the 40,000 access line threshold within the five-year term of the UCSP.[13]

[9] The statute and the rules allow support to go to eligible wireless carriers. Based on discussion at the July 17, 2013, Workshop, it does not appear likely that any wireless carriers will apply for support. These comments do not specifically address wireless issues.
[10] PR (I)(1)(a).
[11] WITA Comments, Exhibit No. 2.
[12] Sec. 203(3)(a).
[13] See Workshop Transcript.

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B. Second Condition: Use of Rate Benchmarks.

8. "Rate benchmarks" appear later in the statute.[14] Once established they should be relatively simple to apply as a threshold for eligibility. The statute requires the benchmark to be "a reasonable amount customers should pay"[15] for basic residential service (BRS). The statute defines "basic residential service" as "those services set out in 47 C.F.R. § 54.101(a)(2011) and mandatory extended area service approved by the commission."[16] The services set out in the Code of Federal Regulations:

> must provide voice grade access to the public switched network or its functional equivalent; minutes of use for local service provided at no additional charge to end users; access to the emergency services provided by local government or other public safety organizations, such as 911 and enhanced 911, to the extent the local government in an eligible carrier's service area has implemented 911 or enhanced 911 systems; and toll limitation services to qualifying low-income consumers as provided in subpart E of this part.[17]

9. The draft rules establish the rate benchmark at "XX percent above the local urban rate floor established by the Federal Communications Commission pursuant to 47 C.F.R. § 54.318 prior to July 1 of the year in which the provider files a petition for support.**"**[18] Thus the draft rule uses the federal urban rate floor (increased by some percentage) as a surrogate for "a reasonable amount customers should pay."

10. Although use of the FCC urban rate floor as a starting point has the benefit of simplicity here are some issues with its use. The urban rate floor was created for the FCC's purposes.[19] Its name signals a different purpose than that of the Washington-specific statutory benchmark. The

[14] Sec. 203(4).
[15] *Id*.
[16] Sec. 202(1)(a).
[17] 47 C.F.R. § 54.101(a).
[18] PR (I)(1)(d).
[19] *Connect America Fund,* 26 F.C.C.R. 17663 (2011), ¶ 238.

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most recent urban rate floor is $14.00.[20] According to the draft rules, the Commission would determine an adder (an "XX factor") to the $14.00 such that the total will represent the "reasonable amount customers should pay." The use of $14.00 plus an adder appears to refelect a premise that, for Washington customers, a BRS rate of $14.00 is less than a reasonable amount of customer should pay for the service. Given the increasingly diverse services offered over incumbent networks by SLECs and larger carriers alike, however, the cost responsibility of BRS should be decreasing not increasing, so this premise may be suspect. Determining the percentage above the floor may not be a simple task and risks arbitrariness, unless based on a reasonable formula or data analysis.

11. As an alternative, given the Washington-specific nature of the UCSP, Public Counsel recommends consideration of a metric that uses current Washington BRS rates as representing "a reasonable amount customers should pay" for the service. Under this approach, the Washington-specific BRS benchmark would be a weighted average of the BRS rates for all the Washington ILECs, using 2013 data.[21]

12. The Commission should not use, as proposed by the Broadband Coalition of Washington (BCAW),[22] the average price paid for voice service in the State. The statute specifies that the benchmark be the "rate the commission determines to be a reasonable amount customers should pay for basic residential service provided over the *incumbent public network*."[23] Thus, rates charged by wireless, CLECs or cable companies are irrelevant under the statute

[20] See USAC filing (September 5, 2013) in FCC Docket Nos. 05-337 and 10-90, at 1.
[21] To avoid issues of confidentiality for line counts, the computation of the average should be done by UTC Staff. Note further that this is an annual process, so eligibility may change during the five-year term of the program.
[22] BCAW Comments at 4.
[23] Sec. 203(4) (emphasis added).

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C. Third Condition: Carrier At Risk of RISIC.

13. The statute establishes a third filter, namely that the customers must be at risk of rate instability or service interruptions or cessation. This is unfortunately not further defined in the statute. A key point is that, per the statute, it is the SLEC's customers who are at RISIC, not the carrier itself.[24] The draft rules, appropriately, require a SLEC, when applying for support, to submit a "demonstration that the provider's customers are at risk of rate instability or service interruptions or cessation in the absence of support from the program…" [25] It is unclear how a review of that SLEC demonstration is then used in the eligibility determination, however.

14. Instead the rules propose a two-level return test, using a total Washington company RoR at the first stage, then a return on equity (RoE) on a "total holding company or parent company level" for the second stage.[26] Public Counsel supports this two-part test but has some observations.

15. Determining the risk of RISIC on the basis of a rate of return (RoR) analysis – which assesses company risk – can be an appropriate approach, but does raise some issues. First its important to recall that the legal standard for a reasonable return for utilities[27] provides the opportunity – not a guarantee – of earning a reasonable return. Second, and importantly in this context, not earning the authorized return is different from a "risk of RISIC." The Legislature was presumably aware of the traditional use of RoR, where a utility can seek a rate increase if its earned return falls below the reasonable return level, but did not use that concept in HB 1971. Instead, the statute's use of risk of "rate instability" or "service interruptions or cessations," in

[24] Sec. 203(4)(b).
[25] PR (II)(1)(d).
[26] PR (III)(1).

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its very *ad terrorem* terms, implies that there must be a greater risk for company shareholders and customers [28] than simply earning below the authorized return. Accordingly, Public Counsel recommends that the Commission set its "risk of RISIC" benchmark at a point below the established reasonable return level, applying a downward adjustment to the rate of return to set the benchmark RoR for UCSP purposes. Public Counsel has not quantified the amount of an appropriate downward adjustment at this stage, but suggests that such an adjustment is conceptually required to adhere to the statutory test.

16. While, as noted above, use of Washington specific data is preferable where feasible, if the Commission does not calculate a Washington-specific RoR, then it should use an up-to-date surrogate. The Commission should not use the FCC's antiquated RoR benchmark of 11.25 percent, which is over 20 years old, and on its face not consistent with current return levels.[29] Any current RoR would be much lower.[30] The FCC is currently reevaluating its own benchmark, but will not decide the RoR issue before the UTC has to decide on its formulae. Public Counsel would urge the Commission to consider using the recommendation of the FCC staff –in the range of 8.06 percent-8.72 percent[31] – as a surrogate for a Washington-specific RoR. The FCC staff's recommendation is based on a wide variety of companies, large and small, and is to be used for small rural carriers, like those covered by the UCSP. By using the lower end of the range, as recommended to the FCC by NASUCA,[32] the Commission would in effect

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[27] *FPC v. Hope Nat. Gas Co*, 320 U.S. 591 (1944); see "Rate of Return: Regulation" by Mark A. Jamison, Director of the Public Utility Research Center at the University of Florida, **http://warrington.ufl.edu/centers/purc/purcdocs/papers/0528_jamison_rate_of_return.pdf**.
[28] See PR III(1).
[29] *Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers*, CC Docket 89-624, Order, 5 FCC Red 7507 (1990) (1990 Represcription Order).
[30] See NASUCA Initial Comments http://apps.fcc.gov/ecfs/document/view?id=7520933139 and ex parte http://apps.fcc.gov/ecfs/document/view?id=7520942806 in the FCC RoR docket WC 10-90.
[31] FCC Docket WC 10-90, DA 13-1111 (rel. May 16, 2011) (FCC Staff Report).
[32] NASUCA Comments, n.39 at i.

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incorporate a form of the "downward adjustment" recommended above, in order to establish a RISIC standard.

III. DETERMINING THE AMOUNT OF SUPPORT A CARRIER WOULD RECEIVE

17. The draft rules set the amount of support that will go to qualified SLECs as:

> the difference between the company's actual intrastate access charge revenues for calendar year 2011 or any subsequent base year the commission establishes, including any distributions from the fund administered by the Washington Exchange Carrier Association, and the company's actual intrastate access charge revenues for the calendar year preceding the year the company files its petition seeking support….[33]

18. The statute, however, does not expressly tie support to lost access charge revenues, rather providing that support should be given 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."[34] Intrastate access charges are thus only part of the picture for determining support, and "maintain[ing} rates reasonably close to the [rate] benchmark" is the goal for the amount of support.

19. While the Commission could decide to use lost access charges as a surrogate for alleviating the risk of RISIC, the approach is somewhat imprecise. If the SLEC is at risk of RISIC for reasons other than the loss of intrastate access revenue (or in addition to that loss), then support based on the lost access charge revenue will be insufficient, and will not allow the provider to maintain rates reasonably close to the benchmark. On the other hand, if the access charge loss is offset by other revenues, then support based on lost access charge revenues will be more than sufficient to allow the SLEC to maintain its rates reasonably near the benchmark.

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[33] PR (III)(2). The draft rules also mention "distributions from the fund administered by the Washington Exchange Carrier Association during that year…" (id.), which will be discussed in the next section of these comments.
[34] Sec. 203(3)(b) .

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20. Public Counsel recommends consideration of an alternative to replacement of lost access revenues, basing support instead on the amount required to bring the SLEC back to the "risk of RISIC" return benchmark. Thus, for example, if the SLEC falls below the return benchmark because its revenues are $250,000 short of producing the benchmark, then support will be $250,000. The RoR benchmark[35] is, by definition, the level below which a SLEC is at risk of RISIC. Thus bringing the RoR back up to that level will, by definition, alleviate the risk, in a manner more closely tied to the statute.

21. In the event the Commission does decide to base UCSP payments on lost access charge revenues, it should use the most recent access charge actual revenue, rather than using 2011 as the proposed rules suggest is an option.[36] Under FCC directives, all intercarrier compensation – including intrastate access charges – has been and will continue to be decreasing.[37] Use of 2011 revenue levels may have the effect of exaggerating the relief a SLEC should get.

IV. COMMENTS ON COMMISSION QUESTIONS

22. The Commission asks:

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?*

23. See discussion at Section II.C., above.

2. *Which specific intrastate switched access charge rate elements currently assessed by Washington carriers and administered by the Washington Exchange Carrier*

[35] This refers to the RISIC-adjusted rate of return.
[36] PR (III)(2).
[37] *In the Matter of Connect America Fund,* WC Docket No. 10-90, *A National Broadband Plan for Our Future,* GN Docket No. 09-51, *Establishing Just and Reasonable Rates for Local Exchange Carriers,* WC Docket No. 07-135, *High-Cost Universal Service Support,* WC Docket No. 05-337, *Developing an Unified Intercarrier Compensation Regime,* CC Docket No. 01-92, *Federal-State Joint Board on Universal Service,* CC Docket No. 96-45, *Lifeline and Link-Up*, WC Docket No. 03-109, *Universal Service – Mobility Fund,* WT Docket No. 10-208, Report And Order And Further Notice of Proposed Rulemaking (*Order*) (adopted October 27, 2011, released November 18, 2011), FCC 11-161*,* ¶ 764. Opposing the FCC's preemptive action is one of the key aspects of the 10th Circuit appeal *In re: FCC 11-161.* The National Association of Regulatory Utility Commissioners is a Petitioner on this issue.

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Association (WECA) should be abolished concurrently with initiation of program funding to eligible carriers?

24. There does not appear to be any language in HB 1971 that mandates the abolition (or even the reduction) of intrastate access charges. Nor, as noted above, does the statute by its terms link UCSP support to the FCC's reduction or eventual elimination of interstate and intrastate access charges. Only if the reduction results in the SLEC being at risk of RISIC should UCSP support be forthcoming. There is no basis for the Commission to impose additional reductions on currently decreasing intrastate access revenues.[38] Indeed, as NASUCA has noted in comments at the FCC, reasonable access charges – interstate, and more importantly here, intrastate – and their revenues are an appropriate way for carriers to compensate other carriers for use of their networks.[39] The UCSP rules should not be grounded on a zero-contribution access policy.

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

25. As with access charges, there is no language in the statute that requires abolition of the current long distance carrier-funded support mechanism. The lack of a specific mandate to eliminate the mechanism in the statute indicates that that Legislature did not – at this point – intend the automatic elimination of this mechanism.[40] In crafting these rules, the Commission should avoid unduly favoring the competitive interests of any particular industry segment. Abolition of existing USF mechanisms will benefit some carriers and disadvantage others and at

[38] *See* AT&T Comments at 5.
[39] FCC Docket 10-90, et al., Comments of NASUCA (August 24, 2011) at 15-26. See http://www.nasuca.org/archive/10-90_08-24-11_NASUCA_Initial%20Comments.pdf The FCC's zero intercarrier compensation (ICC) ICC rate as required in the 2011 Order (footnote 37, supra) is another key issue in the 10th Circuit appeal.
[40] *But see* AT&T Comments at 4-6 (arguingfor elimination of the traditional mechanism).

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the same time likely increase the strain on the limited-budget UCSP.

V. PUBLIC INTEREST REQUIREMENTS

26. Public Counsel believes the reporting requirements in the rules further the public interest, and makes some added suggestions. It is critical that the Commission, Legislature, and the public have the information to track and evaluate the expenditure of funds, and to determine the impact of the UCSP.

27. PR IV(1)(e) requires supported SLECs to file with the UTC a copy of the annual FCC Form 477. This form reports information about broadband connections to end user locations, interconnected VoIP services, and wired and wireless local telephone services.[41] In addition, PR IV(1)(f) requires a 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…." PR IV (1)(b) requires detailed information regarding the use of the program support "other than providing basic telecommunications services." This exception does not appear in the statute.[42] Public Counsel recommends the rule simply require reporting in detail on the use of the funds, without the limiting language, to ensure more comprehensive information is made available. The rule should also include a reporting requirement regarding the "communication provider's infrastructure"[43] as required by the statute.

[41] See http://www.commlawgroup.com/news/2013/08/01/fcc-form-477,-broadband-and-telephone-competition-report,-is-due-september-1st/.
[42] Section 204(1)(a) requires filing of reports or data to show "how a communications provider used the distributed funds[.]"
[43] Sec. 204 (1)(a).

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28. Along the same lines, it would advance the universal service goal of the statute[44] if the rules required supported SLECs would also report on their efforts to enhance the penetration of Lifeline service[45] among eligible customers. Lifeline is the primary means of supporting low-income consumers' access to communications services at reasonable rates.[46]

29. In addition, the statute requires SLECs make an "affirmative agreement to provide continued services under the rates, terms, and conditions established by the commission under this chapter for the period covered by the distribution."[47] This provision "tightens up" (makes more explicit) the current state carrier of last resort (COLR) requirements and is incorporated in PR IV (1)(h). Public Counsel would recommend that the rule language in this section be modified to mirror the statute, which refers to "rates, terms, and conditions" rather than "tariffs."

30. PR II(1)(g) requires applicants to file "information detailing the number of residential and business local exchange customers and the monthly rate charged to each customer category…" For clarity the rule should specify that it is the monthly rate for BRS that is required. Public Counsel would also recommend that the monthly rate for the SLEC's most popular service bundle be reported.

VI. CONCLUSION

31. Public Counsel expresses its appreciation for the opportunity to comment on the implementation of Washington's unique UCSP. Public Counsel respectfully requests that the Commission take these comments into account in preparing the final rules and looks forward to further participating in the workshops and comment process.

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[44] Sec. 201(b).
[45] RCW 80.36.410 *et seq.*; 47 C.F.R § 54.400-417.
[46] Sec. 201(b).
[47] Sec. 203(2).

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