

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of Amending

WAC 480-123 Universal service

To Implement Legislation Amending
and Extending the State Universal
Communications Service Program

DOCKET UT-190437

GENERAL ORDER R-598

AMENDING AND ADOPTING
RULES PERMANENTLY

1 **STATUTORY OR OTHER AUTHORITY:** The Washington Utilities and
Transportation Commission (Commission) takes this action under Notice WSR # 20-05-
040, filed with the Code Reviser on February 12, 2020. The Commission has authority to
take this action pursuant to RCW 80.01.040, RCW 80.04.160, 80.36.630, 80.36.650,
80.36.660, 80.36.670, 80.6.680, 80.36.690 and 80.36.700.

2 **STATEMENT OF COMPLIANCE:** This proceeding complies with the
Administrative Procedure Act (RCW 34.05), the State Register Act (RCW 34.08), the
State Environmental Policy Act of 1971 (RCW 43.21C), and the Regulatory Fairness Act
(RCW 19.85).

3 **DATE OF ADOPTION:** The Commission adopts this rule on the date this Order is
entered.

4 **CONCISE STATEMENT OF PURPOSE AND EFFECT OF THE RULE:** RCW
34.05.325(6) requires the Commission to prepare and publish a concise explanatory
statement about an adopted rule. The statement must identify the Commission's reasons
for adopting the rule, describe the differences between the version of the proposed rules
published in the register and the rules adopted (other than editing changes), summarize
the comments received regarding the proposed rule changes, and state the Commission's
responses to the comments reflecting the Commission's consideration of them.

5 To avoid unnecessary duplication in the record of this docket, the Commission designates
the discussion in this Order, including appendices, as its concise explanatory statement.
This Order provides a complete but concise explanation of the agency's actions and its
reasons for taking those actions.

OFFICE OF THE CODE REVISER
STATE OF WASHINGTON
FILED

DATE: May 27, 2020

TIME: 10:13 AM

WSR 20-12-021

6 **REFERENCE TO AFFECTED RULES:** This Order amends the following sections of the Washington Administrative Code:

| | | |
|-------|-----------------|--|
| Amend | WAC 480-123-020 | Definitions |
| Amend | WAC 480-123-030 | Contents of petition for eligible telecommunications carriers. |
| Amend | WAC 480-123-070 | Annual certifications and reports. |
| Amend | WAC 480-123-100 | Prerequisites for requesting program support. |
| Amend | WAC 480-123-110 | Petitions for eligibility to receive program support. |
| Amend | WAC 480-123-120 | Eligibility and distributions from the program. |
| Amend | WAC 480-123-130 | Reporting requirements. |
| Amend | WAC 480-123-150 | Advisory board. |
| Amend | WAC 480-123-160 | Resolution of disputes. |

7 **PREPROPOSAL STATEMENT OF INQUIRY AND ACTIONS THEREUNDER:**

The Commission filed a Preproposal Statement of Inquiry (CR-101) on August 8, 2019, at WSR # 19-17-008. The statement advised interested persons that the Commission was considering entering a rulemaking concerning the possible adoption of proposed revisions to WAC 480-123, Universal service, to implement the provisions of sections 11 through 18 of Second Substitute Senate Bill 5511 (Broadband Bill), enacted in the 2019 Legislative Session. The Commission also informed persons of this inquiry by providing notice of the subject and the CR-101 to everyone on the Commission's list of persons requesting such information pursuant to RCW 34.05.320(3) and by sending notice to all registered telecommunications companies and the Commission's list of telecommunications attorneys. Pursuant to the notice, the Commission received comments on September 9, 2019. The Commission issued draft rules on November 15, 2019, and received comments on December 16, 2019.

8 **SMALL BUSINESS ECONOMIC IMPACT ANALYSIS:** On November 15, 2019, the Commission issued a Small Business Economic Impact Questionnaire to all interested persons. The Commission received no responses to this questionnaire. The proposed rules implement the Broadband Bill and provide the opportunity for eligible telecommunications companies to obtain state universal service support. The Commission has no basis to find that any costs businesses will incur to comply with the rules will be more than minor. Pursuant to RCW 19.85.030(1)(a), therefore, no small business economic impact statement is required.

9 **NOTICE OF PROPOSED RULEMAKING:** The Commission filed a notice of Proposed Rulemaking (CR-102) on February 12, 2020, at WSR #20-05-040. The

Commission scheduled this matter for oral comment and adoption under Notice WSR #20-05-04 at 9:30 a.m. on March 30, 2020, in the Commission's Richard Hemstad Hearing Room, 621 Woodland Square Loop SE, Lacey, Washington. The Notice provided interested persons the opportunity to submit written comments to the Commission. On February 21, 2019, the Commission issued a notice rescheduling the adoption hearing to May 7, 2020, at 1:30 p.m., and on April 3, 2020, due to the COVID-19 public health crisis, the Commission issued a notice converting the hearing to a virtual hearing, requiring telephonic or online participation.

- 10 **WRITTEN COMMENTS:** The Commission received written comments in response to the CR-102 from the Washington Independent Telecommunications Association (WITA). A matrix summarizing those comments and the responses of Commission staff (Staff) is attached as Appendix A to this Order.
- 11 **RULEMAKING HEARING:** The Commission considered the proposed rules for adoption at a rulemaking hearing on May 7, 2020, before Chair David W. Danner, Commissioner Ann E. Rendahl, and Commissioner Jay M. Balasbas. The Commission heard oral comments from Sean Bennett, Regulatory Analyst, representing Staff; Richard A. Finnigan on behalf of WITA; and Lisa Gafken from the Public Counsel Unit of the Washington Attorney General's Office (Public Counsel). WITA reiterated its written suggestions for the changes to the proposed rules that Staff recommends the Commission not adopt. Public Counsel stated its support for the proposed rules and Staff's recommendations.
- 12 **SUGGESTIONS FOR CHANGES THAT ARE REJECTED/ACCEPTED:** Written and oral comments suggested changes to the proposed rules. The suggested changes and Staff's recommendations for rejecting or accepting the suggested changes are included in Appendix A. The Commission accepts and adopts Staff's recommendations as its own. The accepted changes provide greater clarity and consistency with the intent of the proposed rules.
- 13 With respect to changes the Commission does not accept, we agree with Staff and Public Counsel that including a buildout requirement for companies that claim eligibility for funding under Criterion One pursuant to WAC 480-123-110(1)(j)(i) and WAC 480-123-120(2) (described in paragraph 19, below) is reasonable and consistent with the legislature's intent in the Broadband Bill to promote greater access to broadband services. This is largely a theoretical issue, moreover, given that WITA is unaware of any company that will petition for eligibility under this criterion. In a similar vein, we also agree with Staff that the rules appropriately leave to the Advisory Board the future determination of eligibility and distribution calculations for other providers. It is

unknown whether any such providers will seek state universal service funding, much less the nature of any such provider or its operations, and any attempt to establish baseline requirements at this point would be inefficient at best.

- 14 **COMMISSION ACTION:** After considering all of the information regarding this proposal, the Commission finds and concludes that it should amend and adopt the rules as proposed in the CR-102 at WSR # 20-05-040 with the minor changes described in paragraph 26 of this Order. The Broadband Bill amends the state universal service fund program (Program) to support broadband in addition to basic local telecommunications services. Eligible providers may now receive a distribution from the Program if they have adopted a plan to provide, enhance, or maintain broadband services in their service areas. The proposed rules implement this legislative directive.
- 15 *Broadband Definition.* The proposed rules first define “broadband.” Federal law defines advanced telecommunications capability as “high-speed, switched broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.”¹ The proposed rules mirror this definition. The rules do not specify download and upload speeds, providing instead that the Commission will establish appropriate minimums by order to more easily reflect the rapid advancement of Internet access technology. In this order, we establish initial minimum standards of 25 megabits per second download and 3 megabits per second upload (25/3) for service to be considered high-speed broadband for purposes of these rules. This standard was supported by Staff, WITA, and Public Counsel, and is consistent with the minimum speeds established in the definition of “broadband” in RCW 42.330.530(2). The Commission will review and update these standards as technology advances and consumer demand changes.
- 16 *Eligibility Criteria.* Consistent with the Broadband Bill, the rules also revise the eligibility criteria for telecommunications carriers seeking support. Rather than focus on a company’s overall rate of return as the Commission has done previously, the proposed rules establish four different eligibility criteria for determining the extent to which a petitioning company will use the requested funds to promote and sustain the deployment of broadband in rural areas while continuing to provide basic telecommunications services. A company may petition for funding under any one of the four criteria and must satisfy only that criterion to receive Program support.

¹ 47 U.S.C. § 706.

17 Staff has developed benchmarks for the number of locations to which each company should deploy broadband and the costs to build to such locations. Staff’s cost benchmarks are based on the Federal Communications Commission (FCC) Alternative Connect America Cost Model (A-CAM) analysis and are set out for each WITA company in the chart below:²

| Company | Annual CAM Cost per* | Category One/Three Broadband | Category Two Broadband |
|--------------------|----------------------|------------------------------|------------------------|
| | Location | Deployment Obligation | Deployment Obligation |
| Asotin | \$ 3,082.67 | 13 | 26 |
| Consolidated | \$ 2,876.66 | 199 | 398 |
| Hat Island | \$ 810.27 | 1 | 2 |
| Hood Canal | \$ 1,884.18 | 39 | 78 |
| Inland | \$ 1,678.16 | 127 | 254 |
| Kalama | \$ 2,145.80 | 61 | 122 |
| Lewis River | \$ 695.76 | 132 | 264 |
| McDaniel | \$ 718.37 | 175 | 350 |
| Pend Oreille | \$ 1,653.83 | 114 | 228 |
| Pioneer | \$ 3,635.10 | 22 | 44 |
| Ranier Connect | \$ 1,706.91 | 50 | 100 |
| Skyline | \$ 5,133.44 | 12 | 24 |
| St. John | \$ 4,145.62 | 11 | 22 |
| Tenino | \$ 5,926.93 | 21 | 42 |
| Toledo | \$ 7,803.78 | 20 | 40 |
| Wahkiakum | \$ 5,954.35 | 20 | 40 |
| Westgate (Weavtel) | \$ 1,562.67 | 35 | 70 |
| Whidbey | \$ 365.39 | 1139 | 2278 |
| TOTAL | \$ 2,876.66 | 2192 | 4384 |

* Carrier Cost is found from one of two FCC Public Notices. See <https://docs.fcc.gov/public/attachments/DA-19-373A1.pdf> or <https://docs.fcc.gov/public/attachments/DA-16-1141A1.doc>.

18 We will rely on these benchmarks when determining company eligibility, obligations, and levels of program support. Some companies may contend that Staff’s benchmark cost per location is too low and therefore produces more locations than is realistically appropriate given the actual cost per location. In such circumstances, the petitioner may provide evidence of its actual cost of deploying 25/3 locations or propose an alternative approach for estimating the cost of deploying 25/3 locations as a substitute mechanism to

² Staff has calculated the benchmarks using the company-specific A-CAM cost per location and a company’s estimated program support through fiscal year 2024. Staff estimates total program support, based on the current fund balance and an annual \$5 million appropriation (less administrative expenses) to be \$6,078,083 in fiscal year 2021 and \$4,850,000 annually for fiscal years 2022-2024. If program support increases or decreases, a company’s broadband deployment obligation will be adjusted proportionately.

calculate the applicable requirement. Staff will review a company's proposed alternative methodology and provide a recommendation to the Commission.³

19 *Criterion One.* Rate of return review was the hallmark of the Program prior to passage of the Broadband Bill. The revised rules retain such a review, coupled with an obligation to build out broadband infrastructure, as one eligibility option. To encourage companies qualifying under this criterion to deploy broadband more extensively, the Commission will divide the distribution of funds for the Program into two parts. One part will be funds for maintenance of the existing network (including traditional telephony) and one part for construction.⁴ A company that satisfies both the rate of return and buildout requirements will receive the full distribution. If an otherwise eligible petitioner does not satisfy the rate of return requirements,⁵ but commits to deploying broadband to the number of locations identified in Staff's benchmark, the company will receive a partial allocation for construction but will not obtain funds for maintenance of its existing network.

20 *Criterion Two.* This criterion provides a direct incentive to petitioners to construct broadband infrastructure to additional 25/3 locations. The company must commit to deploy broadband to the number of locations in Staff's benchmark, and has the option to commit to meeting twice the level of the Staff benchmark over the remaining life of the Program.⁶ If a petitioner relying on this criterion commits to construct 25/3 locations to

³ For example, Consolidated Communications of Washington (Consolidated) is a price cap company. The FCC's current cost information per location for price cap companies is premised on a 10/1 build, not 25/3. Accordingly, Consolidated and Staff have agreed, subject to Commission approval, to use the statewide average A-CAM cost per location at 25/3 for all other WITA members as a surrogate.

⁴ This distinction is for eligibility and distribution purposes. Actual expenditures may differ. The recipient of Program funds will need to explain how the funds were spent in its compliance report. The allocation for distribution purposes is not intended to limit a company's flexibility on how it spends the funds as long as they are used for their intended purpose.

⁵ Consistent with how the Commission has acted in the past in analyzing rate of return review under the Program, the review will be flexible to take into account individual company circumstances. For example, it may be that a company undertook a construction program during the test year that resulted in the allocation of employee time to plant that is not yet in service, which resulted in a corresponding reduction to operating expenses. This type of activity can produce a rate of return that is higher than it would be under normal operations. The Commission will take such circumstances into account in its evaluation of a company's eligibility.

⁶ The Program currently expires on July 1, 2025. RCW 80.36.650(9).

twice the number of locations in the Staff benchmark through a statement signed by a company officer, the company will be entitled to its full distribution from the Program each year without a rate of return review.

- 21 *Criterion Three.* The FCC has established goals for virtually all carriers for the deployment of 25/3 service, which they must meet under timelines that vary by the category of carrier. The chart in paragraph 17 above reflects the number of locations Staff has developed (above and beyond the FCC goals) to which 25/3 service should be deployed for purposes of the Program. Some companies have already constructed broadband infrastructure to the number of locations specified in the FCC goals and Staff's benchmark. For these companies, an officer must certify that the number of locations within the applicant's service area to which 25/3 service can be deployed within 10 business days (and without an extraordinary commitment of resources or construction costs exceeding an ordinary service activation fee) meets or exceeds the FCC goal plus Staff's benchmark. With that certification, a petitioner will be eligible for the full distribution and will not be subject to a rate of return review. This approach recognizes that these companies are making substantial progress in the deployment of broadband consistent with the 25/3 standard.
- 22 *Criterion Four.* Many of the companies have undertaken aggressive construction programs that have resulted in the availability of 25/3 service to the entirety of the company's existing customer base. The only location-based condition for receipt of the Program distribution for these petitioners is that a company officer certify that 25/3 service is available to all active customers who request the service within the company's service area. If a petitioner makes this certification and is otherwise eligible, the company will not be subject to a rate of return review and is eligible for the full amount of its distribution.
- 23 *Other Eligibility Factors.* The statute establishes eligibility requirements which are also included in the proposed rules. Only certain carriers are eligible, and they must file a broadband plan with their petition.⁷ WITA observes that it is very difficult to prepare plans that exceed a 12 to 18 month planning horizon except in very general ways. We generally agree. Accordingly, we expect the broadband plan of petitioners eligible under Criterion One or Two to be detailed as to the coming year, but more general as to the timeframe beyond that period. Carriers eligible under Criterion Three or Four have already deployed 25/3 capable networks to most or all current customer locations so the

⁷ RCW 80.36.650(3)(ii).

Commission expects their broadband plans to be less specific with respect to construction activities. WITA has also expressed concern about the timing for which locations can be counted for Criterion Two and Three eligibility. The Commission adopts January 1, 2018, as the start date to meet Staff location benchmarks.

- 24 *Consolidated Petitions.* Some companies have requested that the Commission allow affiliated companies the option of submitting a collective petition covering all affiliated companies as a means of reducing costs. Staff is concerned that companies filing such petitions might seek to build to Staff location benchmarks in the exchange of the affiliate that has the lowest costs to build, rather than throughout all of their service territories. To address both concerns, we will allow, but not require, affiliated companies to submit a consolidated petition, but the location benchmarks will remain specific to each affiliated operating company.
- 25 *Compliance Reporting.* The rules also require carriers to file broadband availability data. They must file company-specific FCC Form 477 data with the Commission until the Digital Opportunity Data Collection polygons are available.⁸ Carriers are required to file this data annually with the FCC (or the entity the FCC designates).⁹ Companies must file the same data with the Commission within 14 calendar days of the date the data is required to be filed with the FCC (or its designated entity) and in the same format.¹⁰ Upon receiving Program support, a company must also file its broadband availability polygons annually with the Commission throughout the Program's operation, even if the company no longer receives Program support.
- 26 **CHANGES FROM PROPOSAL:** The Commission adopts the proposed rules with the following changes from the text noticed at WSR #20-05-040:

⁸ The FCC requires companies to provide polygons, or shapes, with metadata for geographic areas for which a company makes broadband available at different speeds and technology types.

⁹ The FCC currently requires such data to be filed with USAC, the Universal Service Administrative Company.

¹⁰ After their initial filing, companies must recertify their maps by June 30 each year and update their maps within six months of completing new broadband deployments (buildout or acquisition). Accordingly, a company receiving Program support may file this data more than once in a particular year and each time must file it with both the FCC (or its designated entity) and the Commission.

- 480-123-020 Delete “speed” in the fifth sentence of the definition of “Broadband service.”
- 480-123-110(1)(h) Insert “, or its affiliate, if appropriate,” after “the provider” and before “will continue.”
- 480-123-120(1) Replace “category” with “criterion” and “and” with “or” in the third sentence.
- 480-123-120(6) After the first sentence, add the following sentence: “If there is a pro rata reduction or increase in support, the company’s broadband buildout obligation will be adjusted proportionately.”
- 480-123-130(1)(b) Delete everything after “support” and add “during the preceding year to maintain, provide, or enhance telecommunications services.”
- 480-123-130(1)(c) Replace “United States” with “Universal Service” in the second sentence.

27 **STATEMENT OF ACTION; STATEMENT OF EFFECTIVE DATE:** After reviewing the entire record, the Commission determines that WAC 480-123-020, 480-123-030, 480-123-070, 480-123-100, 480-123-110, 480-123-120, 480-123-130, 480-123-150, and 480-123-160 should be amended to read as set forth in Appendix B, as rules of the Washington Utilities and Transportation Commission, to take effect pursuant to RCW 34.05.380(2) on the thirty-first day after filing with the Code Reviser.

ORDER

THE COMMISSION ORDERS:

- 28 (1) The Commission amends and adopts WAC 480-123-020, 480-123-030, 480-123-070, 480-123-100, 480-123-110, 480-123-120, 480-123-130, 480-123-150, and 480-123-160 to read as set forth in Appendix B, as rules of the Washington Utilities and Transportation Commission, to take effect on the thirty-first day after the date of filing with the Code Reviser pursuant to RCW 34.05.380(2).
- 29 (2) This Order and the rule set out below, after being recorded in the Commission’s register, shall be forwarded to the Code Reviser for filing pursuant to RCW 80.01 and RCW 34.05 and WAC 1-21.

DATED at Olympia, Washington, May 27, 2020.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION



DAVID W. DANNER, Chair



ANN E. RENDAHL, Commissioner



JAY M. BALASBAS, Commissioner

Note: The following is added at the Code Reviser's request for statistical purposes:

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, amended 9, repealed 0; Federal Rules or Standards: New 0, amended 0, repealed 0; or Recently Enacted State Statutes: New 0, amended 9, repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, amended 0, repealed 0.

Number of Sections Adopted on the Agency's own Initiative: New 0, amended 0, repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, amended 0, repealed 0.

Number of Sections Adopted using Negotiated Rule Making: New 0, amended 0, repealed 0; Pilot Rule Making: New 0, amended 0, repealed 0; or Other Alternative Rule Making: New 0, amended 9, repealed 0.

Appendix A
(Comment Summary Matrix)

Appendix B

WAC 480-123 – AMENDED RULES