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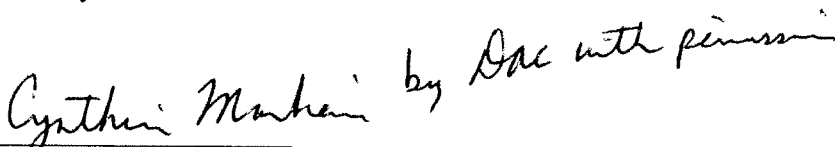
October 10, 2013

Steven King
Executive Director and Secretary
Washington Utilities and Transportation Commission
1300 S. Evergreen Park Drive SW
P.O. Box 47250
Olympia, WA 98504-7250

Re: Docket UT-131239
Rulemaking to consider amending and adopting rules

Enclosed for filing are comments by AT&T Corp., New Cingular Wireless PCS, LLC, and Teleport Communications America, Inc. (collectively "AT&T") in the above mentioned docket. Please let me know should you have any questions.

Sincerely,



Cynthia Manheim
General Attorney

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

Rulemaking to consider amending and)
adopting rules in WAC 480-120,)
telephone companies, and WAC 480-) **Docket UT-131239**
123, universal service, to implement)
legislation establishing a state universal)
communications service program;)
_____)

COMMENTS OF AT&T

AT&T¹ submits these comments in response to the specific issues raised in the *Notice of Opportunity to File Written Comments* issued on September 26, 2013 (“Notice”) and also offers general comments on the draft rules attached to the Notice.

A. Responses to Specific Commission Questions:

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?

The draft rules allow a wireline provider to withdraw from the USP if it demonstrates, among other things, that its rate of return “is at or below the percentage established by the Commission.” As the Commission is likely aware, the Federal Communications Commission (“FCC”) is currently evaluating the authorized rate of return for rate of return carriers.² It has been 23 years since the FCC last prescribed the authorized rate of return, so it is an appropriate time for the FCC to prescribe a new authorized rate of

¹ AT&T Corp., Teleport Communications America, Inc., and New Cingular Wireless PCS, LLC (collectively “AT&T”).

² See Public Notice DA 13-1110, released May 16, 2013, in which the Wireline Competition Bureau seeks comment on the Wireline Competition Staff Report, *Prescribing the Authorized Rate of Return: Analysis of Methods for Establishing Just and Reasonable Rates for Local Exchange Carriers* (released May 16, 2013)(“*Staff Report*”).

return. Assuming the FCC prescribes a new authorized rate of return, the Commission should consider utilizing the FCC's new rate of return.

- 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 the state universal communications service program funding arising out of 2E2SHB 1971 ("Universal Service Program" or "USP").**

As AT&T set forth in its comments filed on August 2, 2013, the Traditional Universal Service Charge ("TUSF") adopted in Docket U-85-23 should be eliminated.³ No party opposes the elimination of the TUSF charge. During the July 15, 2013 workshop in this docket, there was general consensus that the TUSF should be eliminated and funded instead through the USP. In fact, WITA subsequently expressly agreed that the TUSF would be eliminated and instead funded through the USP. "AT&T recommended that part of the new universal service fund would be used to replace the traditional USF rate element applicable to intrastate access minutes. WITA agrees with this aspect of AT&T's Comments. It has clearly been the understanding that the traditional USF access rate element would be replaced by the new universal service fund."⁴

The FCC implemented a number of reforms to access charges in its *ICC/USF Transformation Order*. Indeed the *ICC/USF Transformation Order* eliminated the Washington Interim Terminating Access Charge or ITAC codified in WAC 480-120-540; however, the TUSF was not impacted by the FCC's Order as it was considered to be more akin to a state universal service charge, even though it is discriminatorily assessed only on

³ U-85-23, Eighteenth Supplemental Order (Dec. 30, 1986)

⁴ See Comments of the Washington Independent Telecommunications Association in Reply to Comments of AT&T, UT-131239, August 13, 2013 (internal citations omitted).

long distance minutes. It is consistent with the intent of the legislation to eliminate the TUSF and instead allow eligible companies to receive support through the USP.

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

The Commission can, and should, in this docket eliminate the TUSF – adopted by the Commission over 25 years ago in Docket U-85-23.

Although the TUSF is not codified as a specific rule, the establishment of the TUSF was plainly an exercise in rulemaking. Under the Administrative Procedure Act, a “rule” includes “any agency order, directive, or regulation of general applicability . . . the violation of which subjects a person to a penalty or administrative sanction.” RCW 34.05.010(16). An agency determination can be a rule even if it is not codified in the Administrative Code. *See, e.g., Simpson Tacoma Kraft Co. v. Dep’t of Ecology*, 835 P.2d 1030 (Wash. 1992) (*en banc*) (holding that agency’s directive establishing numeric standard limiting dioxin emissions was a “rule” under the APA, but invalidating the rule because the agency had not followed rulemaking procedures in adopting the standard).

The Commission’s Eighteenth Supplemental Order in Docket U-85-23 approved and adopted the majority of the Intrastate Telecommunications Plan (“ITP”) as the method of “provid[ing] a reasonable arrangement for the sharing of revenues and expenses to jointly provided intrastate toll services” in accordance with RCW 80.36.160. *See* 1986 WL 215085, Order ¶ 1, Finding of Fact 3, Conclusion of Law 2 (Wash. U.T.C. Dec. 30, 1986). The Commission established a Universal Service Fund that would receive a set amount (the TUSF, now \$0.00152 per minute of use) “from all carriers” to be disbursed to high cost telecommunications carriers, primarily those serving rural areas of the state. *Id.* at § I (Universal Service Fund).

The TUSF is thus a uniform charge that has applied generally, and prospectively, to all LECs providing intrastate toll service in the State of Washington since 1987. Any LEC that fails to pay the TUSF is subject to enforcement action by the Commission. Thus, the TUSF is a “rule” under the Administrative Procedure Act.

There is no question that the Commission can amend or rescind an existing rule in a rulemaking proceeding. Indeed, under the APA, the term rule “includes the amendment or repeal of a prior rule.” RCW 34.05.010(16). The pending docket, UT-131239, is a rulemaking proceeding initiated “to consider amending existing rules and adopting new rules” relating to telephone companies and universal service. *See* Pre-proposal Statement of Inquiry, Docket No. UT-131239, filed July 3, 2013. The Commission has given public notice and allowed for public comment, as required by the APA. *See Yakima County v. Yakima County Law Enforcement Officers’ Guild*, 174 Wash. App. 171, 192, 297 P.3d 745 (Wash. App. Div. 2013) (“Rulemaking requires agencies to give public notice of proposed rules and allow for public comment”).

Because the TUSF is a rule within the meaning of the APA, the Commission can amend or repeal it in Docket UT-131239.⁵ As AT&T described in its August 2, 2013 comments, the mechanism for the collection and remittance of the TUSF is based on an agreement between WECA and the individual LECS. The WECA Agreement entered into by each LEC, including AT&T’s LEC affiliates, and approved by the Commission provides, in relevant 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.”⁶

⁶ For example, see U-85-23, Eighty-Third Supp. Order (Nov. 29, 1995).

Therefore, the Commission should make clear that elimination of the TUSF and funding instead with the USP for eligible wireline providers is in the public interest.

B. Comments on Draft Rules:

AT&T offers the following brief comments on the draft rules attached to the Notice.

Time limit: The statute, 2E2SHB 1971, is clear that the USP will terminate on June 30, 2019 unless additional action is taken by the legislature. The rules should include a similar provision.

Prerequisite for requesting program support – benchmark: The draft rule currently requires as a prerequisite for requesting program support that the provider's rates for residential local exchange service, plus mandatory exchange service charges be XX percent above the local urban rate floor established by the FCC. The FCC rules require that federal high-cost support be reduced to any carrier who sets rates below the FCC determined urban rate floor.⁷ To ensure that wireline companies in Washington are preparing for the future, it is appropriate that, at a minimum, wireline companies in Washington not be able to draw from the state USP unless their rates for residential local exchange service and mandatory exchange service area service are at or above the FCC's urban floor, which will increase over time. Further, as the state USP will sunset in five years, recipients of the USP should be encouraged to raise rates above the urban floor in order to prepare for the time when the USP will no longer be available.

⁷ See ICC/USF Transformation Order, FCC 11-161 (rel. Nov. 18, 2011), ¶¶ 238-240.

Conclusion:

The Commission can and should eliminate the TUSF in this rulemaking docket.

Submitted this 10th day of October, 2013.

Cynthia Manheim by Dac with permission

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