

**BEFORE THE PUBLIC SERVICE COMMISSION OF WYOMING**

IN THE MATTER OF THE PROPOSED )  
ADOPTION OF CHAPTER 5, SECTION ) Docket No. 90000-97-XO-07  
13 OF THE COMMISSION'S ) Record No. 11134  
PROCEDURAL RULES AND SPECIAL )  
REGULATIONS REGARDING THE )  
DESIGNATION OF TELECOMMUNICATIONS )  
CARRIERS FOR ELIGIBILITY FOR FEDERAL )  
UNIVERSAL SERVICE FUNDS )

**Comments of the Wyoming Office of Consumer Advocate**  
(Submitted September 10, 2007)

On April 18, 2007 the Wyoming Public Service Commission (Commission) issued its *Order Commencing Rulemaking* (Order) in Docket Number 90000-97-XO-07, in the matter of the adoption of proposed Section 513 of the Commission's Procedural Rules and Special regulations regarding the designation of telecommunications carriers for eligibility for federal universal service funds. Thereafter, the Commission issued a *Notice of Intent to Adopt ETC Designation Rules* (Notice) specifying, *inter alia*, that any person wishing to comment on the proposed rules must do so in writing on or before September 10, 2007. The Wyoming Office of Consumer Advocate (OCA) appreciates the opportunity to provide further comment regarding the Commission's proposed adoption of rules to provide criteria for designating of telecommunication carriers as eligible to receive federal universal service funds.

**BACKGROUND**

On February 28, 2006 the Commission issued its "Notice of Intent to Adopt Rules and Regulations" in Docket Number 90000-94-XR-06 regarding (1) designation telecommunications carriers for eligibility for federal universal service funds and (2) annual reporting and certification requirements of previously designated telecommunications carriers. The Notice indicated that the rules were being adopted to comply with federal law and regulatory requirements, to provide criteria for designating telecommunications carriers as eligible to receive federal universal service funds, and to provide annual reporting and certification requirements for previously designated carriers. On April 28, 2006 the OCA submitted its comments in that proceeding.

On May 16, 2006 the Commission held a public hearing to take comment on the proposed rules. In addition to the OCA, representatives of Qwest Corporation, Alltel Communications, Inc., Tri-County Telephone Association, TCT West, Bresnan Communications and Sprint appeared and offered comments at the hearing.

On June 1, 2006 the Commission held public deliberations in that proceeding and adopted its proposed rule Section 514 regarding the certification and reporting requirements for telecommunications companies previously designated as eligible to receive federal universal service fund support. However, the Commission determined in its deliberations that it would not adopt the proposed rules related to the designation of telecommunications carriers that had not been previously certified (proposed rule Section 513). By order issued June 14, 2006 the Commission formally adopted the aforementioned rule and ordered the proposed rulemaking related to Section 513 to be abandoned with the proviso that it might reevaluate Section 513 for implementation at a later date.

### **THE PRESENT PROCEEDING**

In the present proceeding the Commission proposes to adopt rules regarding the initial designation of telecommunications carriers as eligible to receive federal universal service funds pursuant to 47 U.S.C. § 214(e) and W.S. § 16-3-101, *et seq.*, and W.S. § 37-2-204. The Commission states that it has the “primary responsibility” for designating ETCs in Wyoming pursuant to 47 U.S.C. § 214(e)(2).

Comparing and contrasting the proposed rules that are the subject of the Notice in this proceeding reveals that they are identical in all material respects to those that were proposed in Docket Number 90000-94-XR-06 as they relate to proposed Section 513 in that proceeding. The OCA has previously commented on proposed ETC designation rules. Those proposed rules were previously abandoned by the Commission and have now been re-noticed without material change and without incorporating a majority of the OCA’s comments. The OCA offers its comments in this proceeding under the assumption that Commission abandonment of the previous rule making, at least in relevant part, wipes the slate clean and necessitates a reiteration of our original concerns that are not addressed in rule Section 513 as it is currently proposed.

It is not the goal of the OCA in this proceeding to recommend revisions to the proposed rule that would lead the Commission to assert jurisdiction over telecommunications providers or telecommunications services where it clearly has no jurisdiction under Wyoming law, as amended, or where its jurisdiction has been preempted by federal law. Nor does the OCA seek changes to the proposed rules that would favor one provider over another or certain technologies over others. The OCA obviously understands that the evolving nature of both state and federal telecommunications law and policy has eroded the traditional authority of the Commission to regulate the prices terms and conditions of telecommunications services offered in Wyoming.

However, within the limited scope of determining a telecommunications carrier’s eligibility to receive federal universal service funds, we agree with the Commission that it has the primary responsibility for making such determinations. We further believe that such determinations should be made in consideration of all relevant information necessary to determine compliance with federal law as referenced *supra*. The Commission should exercise the full measure of its authority in this regard to ensure that there is no ambiguity in what is required of telecommunications carriers to demonstrate

that they are in fact eligible to receive federal universal service funds. This is particularly important in view of the current criticisms of the Federal Universal Service Fund program and its interaction with the Wyoming Universal Service Fund.

Our comments in the earlier proceeding signaled our general support of the Commission's proposed rules. In this proceeding we again generally support the Commission's work and the overall tenor of the proposed rules as we find that they strike an appropriate balance between keeping rates for Wyoming customers affordable, keeping markets competitively neutral, and assuring that the funds are used to benefit customers in high cost areas of the state as required by federal law. Our comments and suggestions in this proceeding are aimed primarily at eliminating any ambiguity in the proposed rules and reducing the need for further clarification of the Commission's intent when ETC applications are considered in the future. With that in mind the OCA offers a modified version of the proposed rule Section 513 attached hereto as Exhibit A. The remainder of our comments explain our rationale in recommending the proposed changes to proposed rule Section 513.

Section 513. Requirements for Wyoming Public Service Commission (Commission) designation of eligible telecommunications carriers (ETCs), for the purpose of qualifying for federal universal service fund receipts. ~~pursuant to section 214 of the federal Telecommunications Act of 1996, as amended, Part 54 of Title 47 of the Code of Federal Regulations, as amended and W. S. § 37-15-104(a)(vi)(B).~~

The OCA suggests that references to the federal rules be eliminated from the title to proposed Section 513.<sup>1</sup> The Commission's proposed language could lead to the belief that the proposed language of the rules is required by Part 54 of Title 47 of the Code of Federal Regulations, which it is not. The states are allowed a great deal of discretion in determining the proper documentation and showing necessary to support an application to be designated as an ETC. While we are pleased that the Commission has chosen to use Part 54 of Title 47 of the Code of Federal Regulations as a guide for the list of proper requirements, we note that the Commission has not made a wholesale adoption of the federal requirements. Therefore, we suggest removing the reference to the federal rules, to avoid confusion.

a. The Commission shall review the carrier's application for ETC designation for compliance with section 214 and section 254 of the federal Act, as amended. In determining

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<sup>1</sup> W.S. § 16-3-103 provides that "An agency may incorporate, by reference in its rules and without publishing the incorporated matter in full, any or any part of a code, standard, rule or regulation that has been adopted by an agency or the United States or of this state, another state or by a nationally recognized organization or association" provided that several conditions are met. The conditions do not appear to be met here. Thus, incorporation of, and references to, the various sections of the Code of Federal Regulations and other organizations and associations is not appropriate.

whether the carrier ~~should~~ will be granted ETC status, the Commission shall determine whether any such designation serves the public interest, convenience and necessity. The Commission's public interest analysis shall consider the carrier's application; the carrier's response to the requirements set forth below; any cost benefit analysis done by the carrier relating to customer choice and any advantages and disadvantages of the carrier's service offering; evidence produced at hearing, if any hearing is held; and, the potential for creamskimming by the carrier in those instances where the carrier seeks ETC designation below the study area level of a rural incumbent LEC. In conducting its analysis, the Commission shall consider the fundamental goals of preserving and advancing universal service; ensuring the availability of quality telecommunications at just, reasonable, and affordable rates; and promoting the deployment of advanced telecommunications and information services to all regions of the state, including rural and high-cost areas.

The OCA is pleased that the Commission chose to adopt its suggestion and eliminate the language related to the NTCA's seven-point test in paragraph a. We continue, however, to recommend that the entire text of the seven-point test be included in the Commission's rules and will discuss our reasoning for its inclusion later in these comments. The OCA suggests two remaining small but substantive changes to this paragraph. First, we suggest that the word "should" be changed to "will" (or "shall," as the Commission wishes) in order to provide clear direction on what needs to happen in order to receive a designation as an ETC. With the adoption of the OCA's suggested change, the rule reads in the style of "if A, B, and C are done, then X, Y, Z happens." It provides for a clear cause and effect. This is not true with the current wording, as "should" is more discretionary and theoretical than "will" or "shall." The current reading indicates that if all of the following is accomplished, the carrier, in theory, should receive an ETC designation, but in practice, may or may not receive such a designation. We encourage the Commission to reject the word "should" in favor of "will" or "shall."

The second OCA suggestion within this paragraph, if adopted, would permit the Commission to consider a wider array of evidence relative to whether or not the granting of ETC designation is appropriate and in the public interest. By permitting consideration of both the advantages, as well as the disadvantages that a carrier may bring to customers and the market, the Commission will gain a more complete understanding of the impact of its decision.

- b. Each carrier seeking designation by the Commission as an ETC throughout a specified service area shall:

(iv) Provide a response, with appropriate supporting documentation and explanation, to each of the following questions:

(A) Will the designation ensure ubiquitous comparable rates and services?

(B) Will the ETC designee actually serve the entire incumbent local exchange carrier's market area?

(C) Will the benefits of granting designation outweigh the burdens on the federal universal service fund?

(D) Will the ETC designee demonstrate its service costs and the use of the fund to assist with recovery of its actual costs of service?

(E) Will the designation cause excessive market support?

(F) Will the designee agree to quality of service standards or other standards?

(G) Will the universal service funds in reality be inciting unnecessary artificial competition?

With these changes the OCA is recommending the inclusion of the NCTA questions, as discussed above. We acknowledge that the relevant subject matter of these questions may already be contained in other requirements within the proposed rules. Again, however, to minimize ambiguity and confusion, and to provide carriers with specific direction regarding what the Commission anticipates will be required to clearly demonstrate a carrier's eligibility to receive federal universal service funds, we see nothing wrong with including these specific questions here.

(vi) Submit a three-year plan describing in detail proposed improvements or upgrades to the carrier's network on a wire center by wire center basis, or some other level disaggregated below the study area level, exchange by exchange (or some other basis) throughout the carrier's proposed designated service area. Each carrier shall demonstrate how signal quality, coverage or capacity will improve due to the receipt of federal high cost support; the projected start date and completion date for each improvement and the estimated amount of investment for each project to be funded by federal high cost support; the specific geographic area where the improvements will be made; and the estimated population to be served as a result of the improvements. If the carrier believes that service improvements in a particular disaggregated area are not needed, it must explain its basis for this determination and demonstrate how funding will otherwise be used to further the provision of supported services in that area.

The first OCA suggested change is to establish some boundaries on the latitude that this subsection gives a carrier in describing its service improvement plan. We agree with the suggestion of the Commission's proposed language – that a wire center by wire center description is not the only meaningful way of dissecting a larger area for more careful examination. Carriers should have some other choices: exchange by exchange or urban-rural zones are two additional options that make sense. However, the Commission proposal goes beyond this and simply indicates that the carrier has the discretion to use “some other basis.” We read this to permit a carrier to provide the information on an aggregated, total study area basis. Permitting this level of aggregation would defeat the desired ability of the Commission to review the work being done in each high cost area. Carriers should be required, rather than simply encouraged, to submit their improvement plans on a disaggregated basis, so the Commission can assure that the universal service funding is being used to support, improve, or maintain service in the high cost areas related to the receipt of support funds.

The other suggested language change to this provision of the proposed rules adds language that requires an explanation of how the universal service funds are proposed to be used if the carrier believes that no network improvements or repairs are required in one of the disaggregated high cost areas. This is important information, since Congress' intended purpose of the fund is for the provisioning, maintenance, and upgrading of facilities and services in designated, high-cost areas. If the federal support is not required for any of these intended purposes, it is critical that the Commission understand to what purpose the support funds will be put.

- (vii) Demonstrate the carrier's commitment and technical, financial and managerial ability to remain functional in all emergency situations. Evidence of the ability to remain functional in emergencies includes, but is not limited to: demonstration of a reasonable amount of back-up power to ensure functionality without an external power source; the ability to reroute traffic around damaged facilities; and the capability to manage traffic spikes resulting from emergency situations.<sup>2</sup>

The OCA is suggesting one deletion and one addition in this subsection of the proposed rules. We propose to delete the word “all” when discussing the ETC's obligation to show that it can remain functional in emergency situations. As much as we would like to support the Commission in a requirement that customers be able to receive service at all times, emergency or not, we do not believe that such a requirement is realistic. Either it would be disingenuous on the part of a carrier to make such a commitment, or it would

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<sup>2</sup> According to a May, 2003 press release issued by the Cellular Telecommunications & Internet Association (CTIA, immediately after the terrorist attacks of September 11, 2001 many wireless networks were overloaded. For example, in New York City, wireless phone traffic increased 1300% over peak usage, while in Washington, D.C., traffic increased 400%. As many as 95% of wireless calls could not be completed due to network congestion. While a disruption of the scale that created this failure could not occur in Wyoming, we assume that the New York City and Washington, D.C. systems were appropriately scaled for their locations. Therefore, we conclude that significant failure of the wireless system might be expected in a disaster situation in Wyoming, and that disaster functionality is an important consideration.

likely be so costly to the carrier and its customers to try to fulfill such a promise as to contradict the public interest. Instead, the Commission should encourage the carriers to commit to a certain described or defined level of functionality. This brings us to the second OCA suggested change for this subsection.

The OCA encourages the Commission to adopt some reasonable minimum standards relative to functionality during emergencies. It is important that the Commission spell out the type of emergencies to which the rule refers, or an explanation of what is meant by functionality during an emergency. In our suggestion, we borrow from the Federal Communications Commission's (FCC's) order establishing minimum requirements for ETC designation.<sup>3</sup>

- (viii) Demonstrate the carrier's commitment to comply with applicable Wyoming service quality standards, and consumer protection rules or standards, such as those found in ~~and~~ the Cellular Telecommunications and Internet Association (CTIA) Consumer Code, ~~as applicable.~~ including but not limited to:
  - (A) The disclosure of rates and terms of service to customers;
  - (B) Making available to customers maps showing where service is generally available;
  - (C) Providing contract terms to customers and confirming changes in service;
  - (D) Allowing a trial period for new service;
  - (E) Providing specific disclosures in advertising;
  - (F) Separately identifying carrier charges from taxes on billing statements;
  - (G) Providing customers the right to terminate service for changes to contract terms;
  - (H) Providing ready access to customer service;
  - (I) Promptly responding to customer inquiries and complaints received from government agencies; and
  - (J) Abiding by policies for protection of consumer privacy.

Similar to our earlier suggestion in reference to the NTCA questions, we suggest in this provision of the proposed rules that the Commission directly insert a list of the major

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<sup>3</sup> Report and Order in CC Docket No. 96-45, adopted February 25, 2005, released March 17, 2005, *In the Matter of Federal-State Joint Board on Universal Service*.

provision of the CTIA Consumer Code to provide more clarity as to the specific compliance requirements, rather than inviting varied interpretations of the Code. This also avoids having to assume that all the parties are considering the same requirements – especially if the Code changes over time. Furthermore, as the rule is proposed by the Commission, it appears to presume that the ETC applicants will all be cellular or wireless providers, given the reference to a cellular industry consumer code. The Commission’s proposed language fails to recognize that consumer protections are important even in situations where the ETC designee is not a cellular or wireless service provider. We suggest language that is technology neutral, and therefore applicable to a wider range of service providers. The OCA encourages the Commission to craft these ETC rules so that they apply to a wide array of current and future technologies. Whether service is provided using wireline, wireless, cable, DSL, or some other technology yet to emerge, the rules should apply consistently.

### **CONCLUSION**

Once again, as stated in our comments in the earlier proceeding, the OCA takes this opportunity to commend the Commission’s efforts in developing what we consider to be robust and effective rules regarding what is expected of telecommunications carriers who seek designation by the Commission as eligible to receive federal universal service funds.

The comments that we offer here are limited to the adoption of proposed rule Section 513 and are aimed solely at reducing any perceived ambiguity and reducing the need for future clarification and interpretation of the Commission’s intent in adopting these rules. We therefore respectfully request that the Commission not adopt the rules as contained in its notice in this proceeding and instead adopt the OCA’s suggested rules as found in Attachment A to these comments.

In the event that the OCA’s suggestions are not adopted, we also request pursuant to W.S. § 16-3-103(a)(ii)(D), that the Commission state its reasons for overruling the recommended modifications to the proposed rules recommended by the OCA in this proceeding.

Respectfully Submitted,

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