

**Before the
Federal Communications Commission
Washington, D.C. 20544**

In the Matter of)	
Western Wireless Corporation)	
Petition for Rulemaking to Eliminate)	RM 10822
Rate-of-Return Regulation of)	
Incumbent Local Exchange Carriers)	CC Docket No. 96-45
Federal-State Joint Board on)	
Universal Service)	

**Reply Comments of the Wyoming Office of Consumer Advocate
On
Petition for Rulemaking to Eliminate
Rate-of-Return Regulation
Of Incumbent Local Exchange Carriers**

(Submitted February 13, 2004)

The Wyoming Office of Consumer Advocate (WOCA) hereby submits its Reply Comments in response to Western Wireless Corporation's Petition for Rulemaking to Eliminate Rate-of-Return Regulation of Incumbent Local Exchange Carriers (Western Wireless Petition). Our comments are directed to the need to achieve and maintain affordable rates in all areas of the nation, and the misunderstandings that seem to permeate Western Wireless' Petition and the comments of its supporters. Yet, for reasons far different than those advocated by Western Wireless and its supporters, we too advocate for a review and update of the mechanics of the federal universal service program.

The WOCA is an interested party in this proceeding. Created in 2003¹, the WOCA is charged with representing the interests of Wyoming citizens and all classes of

¹ The WOCA was created in 2003 with the passage of legislation enacting W.S. § 37-2-401 and 404. While the WOCA is a newly created entity, it is not unfamiliar with the issues raised in Western Wireless'

utility customers in matters involving public utilities. In our role of representing the public interest of Wyoming citizens, we are keenly interested in the preservation of the national telecommunications system, particularly in rural communities; the advancement of universal service, particularly in low-density states; and the affordability of telecommunications service, particularly in high-cost areas.

In its Petition, filed on October 30, 2003, Western Wireless proposes to eliminate rate-of-return regulation of rural incumbent local exchange carriers, for the purpose of determining their federal high-cost universal service support and interstate access charges. Instead, Western Wireless proposes that a support model be developed that is the lower of the wireline or wireless forward-looking cost in each geographic area, and that based on the developed forward-looking cost, support be provided only when retail rates exceed a predetermined minimum “affordable” level. Western Wireless further proposes that the new system be phased-in, with a safety net, and furthermore, that access charge reform be implemented.

The WOCA finds portions of Western Wireless petition appealing and worthy of further consideration, but is concerned about the misunderstandings that underlie much of the proposal. While we would like to see the federal universal service support mechanisms revisited – for both rural and non-rural carriers – we are concerned that the correct endpoint from the revisitation is presumed, and thus, Western Wireless attempts to construct a self-fulfilling prophesy. We are concerned that the Western Wireless proposed exercise suggests a predetermined outcome, and will result in unaffordable rates and rural rates not comparable to urban rates. Instead, we would rather see a more global review of the support mechanism(s), with an eye to some finality regarding the means of support, the longer-term sustainability of the funding, and the advancement of competitive-ready markets, while still keeping the goal of affordable rates and quality of

Petition. The members of the WOCA, former members of the staff of the Wyoming Public Service Commission, have been responsible during the past nine years for assisting with the development and implementation of the Wyoming Universal Service Fund, the transition from monopoly to competitive ready telecommunications markets, and recommendations regarding the repricing of telecommunications services to move from implicit to explicit subsidies. Members of the WOCA have also actively met with the Joint Board, the Commission, and the Rural Task Force on federal universal service fund issues.

service at the forefront. It is in this context, that the WOCA wishes to advocate several of the suggestions that have already come forward in the initial round of comments in this proceeding, while also looking to correct several of the misconceptions that have been promoted by Western Wireless and its supporters.

In its Petition, Western Wireless states that there is a need to “release rural customers from the grips of the RLECs whose dominant position in the local market threatens the ability of rural America to have access to basic and advanced services comparable to those available in urban areas.”² The WOCA does not advocate that the Commission or any Joint Board to whom this matter may be referred adopt the Western Wireless statement as a legitimate reason to reexamine the current universal service support mechanism. The Wyoming Public Service Commission currently has before it a petition requesting that it declare that Chugwater Telephone’s³ basic local exchange services are competitive, based solely on the other non-landline carriers serving in the area (i.e., wireless providers and internet providers). While this matter is still pending in Wyoming, the record on that case shows that there are many customers in that one small Wyoming exchange who have chosen wireless for either their primary or secondary line. Whether or not the Wyoming statutory definition of effective competition has been met, it is clear that wireless carriers are making competitive inroads in even some of the most rural states in the nation, such as Wyoming.

Rather than advocating that rural incumbent carriers have an impenetrable market share that must be attacked by completely revamping the federal support program, we think that the better question is whether wireless companies will be held to the same standards as the incumbent landline companies, such that competition can proceed on an equitable basis, without the advantage being tipped to the side of the wireless companies. For example, in December 2000, Western Wireless was given eligible telecommunications carrier (ETC) status by the FCC in December 2000 for its Wyoming

² Page 1 of Western Wireless’ Petition for Rulemaking to Eliminate Rate-of-Return Regulation of Incumbent Local Exchange Carriers.

³ Chugwater Telephone Company, Inc. is one of the smallest incumbent local exchange carriers in Wyoming, with less than 300 access lines.

operations. This ETC status was granted based on an application wherein Western Wireless indicated that it would make a universal service offering that met the entirety of the list of supported services to be provided by an ETC carrier. Yet, as of today, Western Wireless is not offering this promised service in Wyoming, in spite of projections that Western Wireless will receive more than \$9 million⁴ in federal universal service fund support in 2004 based on its self-reported Wyoming line counts. This is more than the amount estimated to be received by any other ETC in Wyoming, with the exception of Qwest.⁵ Thus, the WOCA believes that wireless carriers have neither a barrier to entry in the rural areas nor a disadvantage when it comes to receiving federal support – especially given the self-reporting nature of their line counts.

Western Wireless also advocates that forward-looking costs are the only true measure of the factors that drive economic decision-making.⁶ What Western Wireless fails to explain is that regardless of whether forward-looking costs or historical costs are used to determine rates and support levels, the true driver of the need for subsidies is the same: the elimination of implicit subsidies. Wyoming has undertaken a systematic process of moving its local exchange rates to or above cost with the cost being defined as total service long-run incremental cost (TSLRIC). While doing so, we have also continued to look at earnings levels based on traditional measures of earned rates-of-return on historical costs. For several providers who had recently made major upgrades and modernized their networks, we found that the historical and forward-looking costs were not significantly different. However, we found that there were very large rate increases necessary in order to bring the local service rates to or above either the historical or the forward-looking cost.⁷ We are concerned that Western Wireless' comments may be misunderstood as suggesting that the use of forward-looking costs

⁴ See Universal Service Administrative Company High Cost Loop Support Projected by State by Study Area for First Quarter 2004.

⁵ Based on the same USAC report, Qwest is expected to receive about \$12.6 million in Wyoming.

⁶ Page 4 of Western Wireless' Petition.

⁷ Some customers in exchanges of United Telephone Company of the West have rates prior to state universal service fund support, but after federal support, that are more than eight times their previously authorized rate due to the elimination of implicit subsidies.

would somehow limit or eliminate the need for a sizable federal universal service fund. Clearly, the Wyoming experience is that the use of forward-looking costs, accompanied by the elimination of implicit subsidies, very clearly drives the need for a sustainable, predictable, and adequately sized federal universal service fund.

Western Wireless also argues⁸ that rate-of-return regulation is the “true cause of the growth of the high-cost universal service fund, which threatens the long-term viability of the fund.” Yet, there is a lack of discussion in either Western Wireless’ petition, or the comments of its supporters, about the impact that the proposals might have on the long-term viability of an affordable, ubiquitous, national telephone network. For instance, T-Mobile has suggested that the Commission should immediately cap total distributions for USF support to carriers serving rural areas so universal service in non-rural areas is not jeopardized.⁹ Rather than capping the size of the fund, the WOCA suggests developing a funding method that will allow for the preservation and advancement of affordable rates and markets that are competition-ready and allows for the long-term sustainability of the fund. We acknowledge that all of those requirements may not be met with the current method, and thus, agree that it would be useful to review the current funding method for both rural and non-rural carriers. But again, we do not wish in the meantime to impact the funding for customers in states who have already taken broad steps to prepare for competition, as Wyoming has. Thus, we do not support a freeze or dramatic change in the current funding until a new, acceptable, tested method is in place and is ready for implementation.

In its Petition, at pages 6 and 7, Western Wireless lists the pending and soon to be initiated cases that are closely related to what it seeks in its petition, that is, a new proceeding to review the universal service funding and access rates for rural carriers. Yet, in spite of admitting that there are already a number of proceedings in the works or on the way to addressing these issues, Western Wireless wants still yet another proceeding addressing these matters. In this regard, we agree with the comments of

⁸ See page 5 of Western Wireless Petition.

⁹ See page 12 of T-Mobile’s Comments filed January 16, 2004.

USTA, et al., who state at pages 2-3 of their comments, “Opening a new proceeding to consider issues that are already considered in other contexts is contrary to basic administrative law principles and would be a waste of the Commission’s time and industry resources.” We further agree with the USTA et al. Joint Comments that the Western Wireless petition can be boiled down to a request for the review of universal service funding for rural carriers and for access charges to be based on forward looking costs.¹⁰ As we have already stated, the WOCA advocates a review of these issues but there is no need to do so with the presumption of eliminating the use of historical costs as any basis or factor for either ratemaking or funding universal service support. We also believe that such a reexamination of these issues is best done straightforwardly as a universal service related matter, rather than under the guise of rejecting historical regulatory practices.¹¹

At page 22 of its Petition, Western Wireless cites a U.S. Court of Appeals for the D.C. Circuit decision, and specifically refers to the cite “because a firm can pass any cost along to ratepayers (unless it is identified as imprudent), its incentive to innovate is less sharp than if it were unregulated.” Western Wireless then uses this statement to determine that the disincentives and inefficiencies related to rate-of-return regulation would not be present if its proposal to use forward-looking costs as part of the regulation were adopted. Yet, this is not consistent with the statement of the Court. The Court discusses the differences in incentives and efficiency when comparing regulated and unregulated situations. That is not the situation to be addressed here. Because of the lack of universal, proven, effective competition in American telephone markets, the choice at hand is the type of regulation to be used – not whether to regulate or deregulate. Hence, there should be no reliance on the concept that markets *will* be more efficient or

¹⁰ The Joint Comments state at pages 2-3, “In the end, however, its *Petition* amounts to nothing more than a request that the Commission base universal service support and access charge revenue requirements for ROR ILECs on forward-looking economic cost (FLEC) models rather than historical revenue requirements.”

¹¹ There is no need to discuss the flaws, disincentives, benefits or other related aspects or rate-of-return regulation when determining this matter. Instead, the Commission only needs to concentrate on affordable rates and a sustainable fund in order to address the issues that clearly underlie the filing of the Petition. To go further would create opportunities for unnecessary arguments for or against rate-of-return regulation, a traditional regulatory practice used by many states and non-federal jurisdictions.

innovative or technologically advanced if forward-looking costs replace the historical costs. There are other factors that will have a significant impact on market efficiencies and innovation, including access to capital, the ability for existing and new firms to fund network upgrades and replacements, the willingness of customers to pay the going-rate for new services, and even technological advances.¹²

In its comments supporting the Western Wireless Petition, T-Mobile states, at page 9:

The Commission has already determined that (1) the current Rural Task Force plan is an “interim” plan only that will end in mid-2006; (2) carriers serving rural areas should “shift gradually to a forward-looking economic cost methodology;” and (3) the Joint Board should develop a more targeted, long-term USF support plan before the current interim plan expires. In fact, the Commission had stated that it would “refer these [long-term] issues to the Joint Board no later than January 1, 2002.”

T-Mobile then continues by advocating “the Commission should now expeditiously refer this matter to the Joint Board. Any additional delay will simply mean that the Joint Board – and the Commission – will have even less time to evaluate and develop a long-term plan.”

The WOCA agrees that now is the time to refer this matter to the Joint Board and begin a meaningful and complete review of the funding method. We also agree that any future plan should be targeted to those who need it according to all of the principles contained in Section 254 of the federal Telecommunications Act of 1996 – and not just selective principles advocated by individual parties.

We further agree with T-Mobile that the review of the funding method should look for a method that will facilitate the eventual consolidation of the rural and non-rural

¹² For instance, the deployment of telephony related broadband has historically had deployment problems due to its distance limitations. This engineering problem will not be resolved with a change in regulatory schemes.

USF programs.¹³ Wyoming recognized years ago that the inequities between rural and non-rural funding needed to be resolved, as it pointed to adjoining, sparsely populated, non-dense exchanges served by rural and non-rural companies with very different funding results. The Wyoming Public Service Commission at the time expressed grave concern about how disparities in the funding were impacting the competitiveness of these exchanges. We still find the example relevant and a reason that eventual consolidation of the two funding mechanisms must be a stated goal for any new universal service investigations.

However, we disagree with both Western Wireless and T-Mobile that there should be a stated goal of basing the rural carrier funding on models that use forward-looking costs. We are concerned that if this is the pre-stated answer to the problem, there will be an attempt to place a square peg in a round hole. It is not clear that the model, as it currently stands or as it could be modified, would allow for appropriate, sufficient, or adequate funding for the rural areas. Leaving aside the philosophical arguments of whether forward-looking costs are better used than historical, actual costs, there are a number of concerns about rural geo-coding and customer location placement in the model that are yet to be resolved satisfactorily. There are different facts and circumstances that must be considered when it comes to line loops, size of customer premises and location of demarcation points, and other similar items that need to be revisited as part of a decision to use the synthesis or related cost model. These challenges require time for adequate study and testing. Until this occurs, there should be no presumption that the forward-looking costs will provide a better solution to rural funding and achieving urban/rural rate comparability than some other method might.

To presume that forward-looking costs are best also eliminates any creative solutions that might have been developed since the last look at the rural funding method several years ago. For example, there might be a solution that would rely neither on forward-looking nor historical costs, but might be based on rates and prices themselves, with some parameters stated as to the development or level of those rates. Perhaps there

¹³ See T-Mobile Comments of January 16, 2004 at pages 11-12.

is a solution waiting to be presented that relies on forward-looking costs for basic support with historical costs for a safety net. Or, there could be a solution in the development stage that has a tiered based plan (such as that advocated in earlier proceedings by Qwest) that would designate sharing between state and federal funds. None of these ideas should be foreclosed prior to the commencement of the proceeding.

Finally, Western Wireless requests further access reform based on the use of forward-looking costs. While the WOCA does not conceptually oppose further access reform, we are concerned about the form that such access pricing changes have taken in recent days. The general nature of access reform has been to reduce the per-minute charges that have been previously billed to long-distance providers, and increase flat rates paid directly by end-users. The effect of this is to increase the end-user's total bill, whether he/she benefits from accompanying reductions in long-distance rates or not, and this is particularly true for those who do not make many toll calls. But, all this has happened without a complete recognition that these additional flat-rated surcharges impact the affordability of the overall bill paid by end users. As the Wyoming Public Service Commission has pointed out in many of its previous universal service comments, customers who take nothing but plain-old-telephone-service may have taxes and surcharges of \$10 or more added to their basic service charge. This must enter into the formula for determining whether rates are affordable and whether urban/rural rates are comparable – especially if the Commission accepts Western Wireless' suggestion to do even more of this kind of rate restructuring.

In conclusion, the WOCA appreciates the opportunity to submit reply comments in response to Western Wireless' Petition. While disagreeing with many of the reasons stated by Western Wireless for its request to reexamine rural universal service funding, we agree with the overall concept that this issue again be reviewed. However, the review should begin with a blank slate, and not based on unjustified presumptions that could become self-fulfilling prophecies that jeopardize the continuation of nationwide affordable telephone service. The WOCA would be pleased to further discuss these

issues with the Commission and looks forward to participating in future proceedings on this matter.

Respectfully Submitted,

Bryce J. Freeman
Administrator
Wyoming Office of Consumer Advocate
2515 Warren Avenue, Suite 304
Cheyenne, WY 82002
(307) 777-5742