

2000

WWC Holding Co., Inc v. Public Service
Commission of Utah, Stephen F. Mecham, Clark D.
Jones, and Constance B. White, Commissioners of
the Public Service Commission of Utah : Brief of
Appellant

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *WWC Holding Co., Inc v. Public Service Commission of Utah*, No. 20000835.00 (Utah Supreme Court, 2000).
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IN THE UTAH SUPREME COURT

WWC HOLDING CO., INC,)	
)	
Appellant,)	Subject to Assignment to the
)	Utah Court of Appeals
)	
vs.)	Priority No. 14
)	
PUBLIC SERVICE COMMISSION OF)	Supreme Court No.: 20000835-SC
UTAH, STEPHEN F. MECHAM,)	
CLARK D. JONES, and CONSTANCE)	Public Service Commission
B. WHITE, Commissioners of the Public)	Docket No.: 98-2216-01
Service Commission of Utah,)	
)	
Appellees.)	

ADDENDUM TO BRIEF OF THE APPELLANT

On Appeal from the Public Service Commission of Utah
In the Matter of the Petition of WWC Holding Co., Inc.,
for Designation as an Eligible Telecommunications Carrier

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FILED 26 2001

FILED
CLERK SUPREME COURT
UTAH

TABLE OF CONTENTS

In the Matter of the Petition of WWC Holding Co., Inc., for Designation as an Eligible Telecommunications Carrier, Utah Public Service Commission Docket No. 98-2216-01, Report and Order (July 21, 2000)	ADD-1
47 U.S.C. § 214(e).....	ADD-21
47 U.S.C. § 253	ADD-23
47 U.S.C. § 254	ADD-25
47 U.S.C. § 332(c)(3)	ADD-31
Utah Code Ann. Ch. 54-8b.....	ADD-33
Utah Code Ann. § 63-46b-16	ADD-51
Utah Admin. Code Ch. R746-360-1	ADD-53
<u>In the Matter of Western Wireless Corp. Petition for Preemption of Statutes and Rules Regarding the Kansas Universal Serv. Fund,</u> Memorandum Opinion and Order, File No. CWD 98-90, FCC 00-309, ¶ 11 (rel. Aug. 28, 2000)	ADD-63
In the Matter of Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier in the State of Wyoming, CC Docket No. 96-45, Memorandum Opinion and Order, DA 00-2896, (rel. Dec. 26, 2000)	ADD-73

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Petition of WWC)	<u>DOCKET NO. 98-2216-01</u>
Holding Co., Inc., for Designation as an)	
Eligible Telecommunications Carrier)	<u>REPORT AND ORDER</u>

ISSUED: July 21, 2000

<p>SHORT TITLE</p> <p>WWC Holding Co., Inc.'s Request for Designation as an Eligible Telecommunications Carrier</p>

SYNOPSIS

The Public Service Commission of Utah grants WWC Holding Co., Inc.'s conditional ETC status for a portion of the requested area. Specifically, WWC Holding Co., Inc., is granted conditional ETC status for the U.S. West Communications, Inc., exchanges included in its petition.

DOCKET NO. 98-2216-01

-ii-

TABLE OF CONTENTS

	<u>PAGE</u>
APPEARANCES	1
I. PROCEDURAL HISTORY	2
II. STATUTORY PROVISIONS.....	4
III. DISCUSSION AND CONCLUSIONS	5
Federal ETC Designation.....	5
State Level Qualifications for Approval to Draw on the State Fund.....	12
IV. ORDER.....	14
APPENDIX A.....	17

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By The Commission:

I. PROCEDURAL HISTORY

On May 8, 1997, the Federal Communications Commission ("FCC") issued its Universal Service Report and Order, CC Docket 96-45, FCC 97-157 ("Universal Service Order") implementing the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the "Act"). The Universal Service Order provides that only eligible telecommunications carriers designated by a state commission shall receive federal universal service support. Under 47 U.S.C. § 214(e), a state commission shall, upon its own motion or upon request, designate a common carrier that meets the requirements set forth by the FCC as an eligible telecommunications carrier ("ETC") for a service area designated by the state commission. The FCC defines a service area as a geographic area established by a state commission for the purpose of determining universal service obligations and support mechanisms. Together, all of a carrier's calling areas represent the overall area for which the carrier shall receive support from federal universal service support mechanisms.

On August 31, 1998, WWC Holding Co., Inc. ("Western Wireless") filed a Petition with the Public Service Commission ("Commission") for designation as an ETC in Utah to receive federal universal service support under the Act and corresponding FCC regulations, and for the purpose of receiving support from the Utah Universal Service Fund ("State Fund") established by the Commission.

Western Wireless requested ETC designation in the U.S. West local exchanges that are wholly contained in Western Wireless' coverage area as defined in Exhibits WW 1.1 and WW1.2. Western Wireless also requested designation in each rural telephone company's exchanges that are inside Western Wireless' signal coverage area in Utah. WW 1.1 is a listing of the local exchange companies and the exchanges included in Western Wireless' application. WW 1.1 is included as Appendix A to this Order. WW 1.2 is a map of the state of Utah with Western Wireless' coverage area superimposed on it. While the coverage area detailed in WW 1.2 may be accurate, the boundaries of the exchanges and service territories are not. The Commission is relying on WW 1.2 only for a description of Western Wireless' coverage area. A portion of WW 1.2 showing the coverage area is included in Appendix A.

The Utah Rural Telecom Association ("URTA") sought intervention. Five members of URTA are incumbent local exchange carriers ("LEC") and the only designated ETC in their rural study areas in which Western Wireless seeks ETC designation.

U.S. West Communications, Inc. ("U.S. West") similarly sought and was granted intervention. U.S. West is an incumbent LEC providing landline local exchange service in certain areas of Utah for which it holds a certificate of public convenience and necessity from the Commission. U.S. West is the only designated ETC for its non-rural exchanges for which Western Wireless seeks ETC designation.

The Commission sought pre-hearing briefs on certain legal issues presented by Western Wireless' Petition. The Commission heard oral arguments on October 25, 1999.

Evidentiary hearings were then held on this matter on November 30 and December 1, 1999. Western Wireless offered the testimony of James Blundell, Director, External Affairs. The Division of Public Utilities ("Division") offered the testimony of Ingo Henningsen, Peggy Egbert, and Dr. George Compton. The Committee of Consumer Services ("CCS") offered the testimony of Phil Bullock. URTA offered the testimony of Raymond Hendershot. U.S. West offered the testimony of Dr. Barbara M. Wilcox.

II. STATUTORY PROVISIONS

To be designated as a federal ETC under the Act, a carrier must: (1) be a common carrier; (2) demonstrate it will provide the supported services set forth in 47 C.F.R. § 54.101(a) throughout its designated service areas; and (3) present an acceptable plan for advertising its universal service offerings and the charges therefor using media of general distribution. 47 U.S.C. § 214(e); Universal Service Order, ¶ 24.

The FCC's supported services set forth in 47 C.F.R. § 54.101(a) are:

- a. voice grade access to the public switched telephone network;
- b. local usage;
- c. dual tone multi-frequency signaling or its functional equivalent;
- d. single-party service or its functional equivalent;
- e. access to emergency services;
- f. access to operator services;
- g. access to interexchange service;

- h. access to directory assistance;
- i. toll limitation for qualifying low-income consumers.

In areas served by a rural telephone company, 47 U.S.C. § 214(e)(2) further requires the Commission to determine that the designation of an additional ETC is in the public interest.

To obtain funding from the State Fund, the Commission has established the following requirements: (a) a carrier must be designated an ETC under Section 214(e) of the Act; (b) a carrier must be in compliance with applicable Commission orders and rules; (c) a carrier must offer "basic telecommunications service" as defined by Commission Rule R746-360-2; and (d) a carrier must be a facilities-based provider. Utah R746-360-7.

Provision of "basic telecommunications service" requires a carrier to provide access to the public switched network; touch-tone, or its functional equivalent; single-party service with a telephone number listed free in directories that are received free in local calling areas; access to 911 or E911 emergency services (where available); access to long-distance carriers; and access to toll limitation services. Utah R746-360-2(c).

III. DISCUSSION AND CONCLUSIONS

Federal ETC Designation

With its existing network, Western Wireless has testified that it currently provides each of the supported services set forth in 47 U.S.C. § 54.101(a). Each of the FCC's supported services provided by Western Wireless is discussed below:

a. Voice grade access to the public switched telephone network: Western

Wireless provides voice-grade access to the public switched telephone network. Voice-grade access means the ability to make and receive phone calls within a bandwidth of approximately 2700 Hertz between the 300 and 3500 Hertz frequency range. 47 C.F.R. § 54.101(a)(i); Universal Service Order, ¶¶ 63-64. Through its interconnection arrangements with local telephone companies, all Western Wireless customers are able to make and receive calls on the public switched telephone network within the prescribed frequency range.

b. Local usage: The FCC requires that a universal service offering include some level of local usage at a flat rate. 47 C.F.R. § 54.101(a)(2); Universal Service Order, ¶¶ 66-69. The FCC does not currently require any minimum amount of local usage to be provided by an ETC, but has initiated a separate rulemaking proceeding to address this issue. See, Cross-3, Universal Service Further Notice of Proposed Rulemaking, FCC 98-278 (Oct. 26, 1998). Western Wireless provides local usage, and will include unlimited local usage as part of a universal service offering. Western Wireless will also comply with any minimum local usage requirements adopted by the FCC.

The Commission relies on Western Wireless' testimony to conclude that the area of free unlimited local usage offered as part of the basic universal service offer will be at least as comprehensive as the areas currently provided by the local exchange companies providing service in a given area.

c. Dual tone multi-frequency ("DTMF") signaling or its functional equivalent:

DTMF is a method of signaling that facilitates the transportation of call set-up and call detail information. Western Wireless' network uses out-of-band digital signaling and in-band multi-frequency signaling. Western Wireless provides the functional equivalent of DTMF signaling in satisfaction of the FCC's requirement. 47 C.F.R. § 54.101(a)(3); Universal Service Order, ¶ 71.

d. Single-party service or its functional equivalent: Western Wireless provides the functional equivalent of single-party service. Western Wireless provides a dedicated message path for the length of a user's transmission, which the FCC has deemed to be the functional equivalent of single-party service. 47 C.F.R. § 54.101(a)(4); Universal Service Order, ¶ 62.

e. Access to emergency services: Western Wireless provides all of its customers with access to emergency services by dialing 911. The ability to reach a public emergency service provider through dialing 911 is a required universal service offering. In addressing enhanced 911 or E911 Western Wireless testified that:

E911 . . . which includes the capability of providing both automatic numbering information ("ANI") and automatic location information ("ALI"), is only required if a public emergency service provider makes arrangements with the local provider for the delivery of such information. *See Universal Service Order*, ¶¶ 72-73. Moreover, a wireless carrier such as WWC is not required to provide E911 services until a local emergency service provider has made arrangements for the delivery of ALI and ANI from carriers and has established a cost recovery mechanism. *Universal Service Order*, & 73. . . . To date, no public emergency service provider in Utah has made arrangements for the delivery of

ANI or ALI from WWC. (WW 1, DeJordy Direct Testimony, pg 12.)

Western Wireless testified that when it received a bona fide request from an emergency service provider in accordance with the law cited above, it would provide E911 for its wireless local loop customers.

f. Access to operator services: Western Wireless provides access to operator services to arrange for the billing or completion, or both, of a telephone call. The service is provided by either Western Wireless or other entities, including LECs or interexchange carriers, in satisfaction of the FCC's requirements. 47 C.F.R. § 54.101(a)(6); Universal Service Order, ¶ 75.

g. Access to interexchange service: Western Wireless provides access to interexchange service for the purpose of making and receiving toll or interexchange calls in satisfaction of FCC requirements. 47 C.F.R. § 54.101(a)(7); Universal Service Order, ¶ 78. This service is provided through interconnection arrangements Western Wireless has with several interexchange carriers. Western Wireless exceeds the FCC's requirements by providing customers the ability to access their interexchange carrier of choice by dialing an appropriate access code.

h. Access to directory assistance: Western Wireless provides all of its customers with access to directory assistance by dialing "411" or "555-1212" as required by FCC Rule 54.101(a)(8) and Universal Service Order, ¶ 80.

i. Toll limitation for qualifying low-income consumers: Western Wireless currently provides toll blocking services for international calls and will use this same technology to provide a toll blocking service for its qualifying low-income consumers receiving subsidies pursuant to the federal Lifeline program. This satisfies FCC Rule 54.101(a)(9).

Western Wireless advertises its current wireless service offerings to both residential and business customers through different media services of general distribution, including newspaper, television, radio, and billboard advertising. Western Wireless also maintains retail store locations throughout its authorized service areas in Utah. Western Wireless testifies that it will advertise its universal service offerings and rates, using these same media of distribution and in a way that fully informs the general public, and will comply with any form and content requirements adopted by the FCC or the Commission in the future and required of all designated ETCs. Western Wireless thus meets the advertising requirement of 47 U.S.C. § 214(e)(1).

With regard to the U.S. West exchanges within Western Wireless' requested designated service areas listed on late-filed Exhibit WW-1.1, Western Wireless is licensed and presently provides the supported services throughout those exchanges, and once designated as an ETC Western Wireless has testified it can and will offer and advertise universal service throughout each exchange. To the extent there might be a few small and discrete areas not within Western Wireless' existing signal coverage, Western Wireless has testified it can and shall extend its service within a reasonable time to reach any customers who request service.

With regard to the U.S. West exchanges, the Commission will not add further criteria for federal ETC designation to those set forth in Section 214(e)(1) of the Act. Universal Service Order, ¶ 24. Consistent with the Act and FCC Rules, Western Wireless satisfies all criteria for federal ETC designation in exchanges served by U.S. West that are in Western Wireless' signal coverage area.

With regard to the exchanges in the rural, or independent companies, the Commission is also required to consider if the designation of a second ETC in areas already served is consistent with the public interest. This consideration is in addition to the other measures included in the law. Western Wireless seeks ETC designation in the Utah study areas of Gunnison Telephone Company, Manti Telephone Company, Navajo Communications Company-Utah, Skyline Telecom and South Central Utah Telephone Association, Inc. ("URTA Companies"). While Western Wireless is licensed and provides the supported services throughout these companies' study areas in which it seeks designation, the Commission has concerns regarding whether the designation would actually be in the public interest.

The concerns focus primarily on the potential impact of the designation on the State's Universal Public Telecommunications Service Support Fund (the State Fund). The independent companies are currently regulated under rate of return regulation. In a sense the State Fund is the final revenue that makes these companies' rate of return meet the required levels. After all other sources of funds are considered, the State Fund must make up the difference between reasonable costs and all revenues. If, by designating Western Wireless as an

additional ETC in the respective study areas of the URTA Companies, the effect is to reduce the companies' revenue, without an equal reduction in costs, the State Fund would be called upon to make up the difference. Such a situation would cause a significant increase in the burdens placed upon the State Fund (i.e., all Utah telecommunications customers) without corresponding public benefits.

Further, Western Wireless testifies that their prices may well be higher than the incumbent's prices, up to 125% of the incumbent's prices, therefore offering a lower cost service is not a benefit that can be counted on to balance out the public interest equation. In fact the primary potential benefit of designating Western Wireless as a "rural" ETC could have been that areas that are currently not served by any incumbent, but are within Western Wireless' signal coverage area, could now be served by Western Wireless. However since Western Wireless has only asked for designation in areas that are already being served, even this potential benefit is lost in the public interest analysis.

The Commission finds that because of the possible negative impact on Utah's State Fund it is not in the public interest to add a second ETC to the URTA Companies' service areas at this time. However, if Western Wireless is willing, the Commission believes that designating Western Wireless as an ETC in the areas of the state that are not currently served by any telecommunications corporation, which are generally in Western Wireless' signal coverage area, would advance universal service by bringing telecommunications services to Utah's unserved rural citizens.

State Level Qualifications for Approval to Draw on the State Fund

Western Wireless has testified it could qualify to draw from the State Fund for the U.S. West exchanges in its application area. The services supported by the State Fund as set forth in the Commission's definition of "basic telecommunications service" are similar to the FCC's service requirements under FCC Rule 54.101(a). While the Utah and FCC supported services are expressed in slightly different words, there are few substantive differences between them. As mentioned earlier, the Commission is relying on Western Wireless' testimony that the free local calling area in every area served will be as large, or larger, than the calling area currently provided by U.S. West in the exchanges in its signal coverage area if it is granted state level approval. Further, Western Wireless has testified, and we rely on that testimony as well, that they will obey the Commission's Rules with respect to qualifying to receive money from the State Fund. Specifically, Western Wireless will need to charge no more than the Affordable Base Rate for their universal service offering. The Commission has set rates for the U.S. West exchanges dealt with in this order, and presumes that these rates represent the affordable rates for the relevant exchanges or areas.

Western Wireless currently provides within its existing network the following State Fund supported services or their functional equivalents: access to the public switched network; touch-tone; single-party service; access to 911 emergency services; access to long-distance carriers; and access to toll limitation services. Western Wireless testifies that it will provide a free telephone listing in a directory that is distributed without charge and E911

emergency services when properly requested.

We find that Western Wireless qualifies for federal ETC designation as defined by the Act and 47 C.F.R. § 54.1 et seq., in the exchanges set forth on Exhibit WW-1.1 that are part of the U.S. West service territory, for the purpose of receiving federal universal service support. Further, we find that Western Wireless qualifies for the designation of eligible telecommunications carrier for purposes of drawing from the State Fund for the exchanges and study areas as set forth on Exhibit WW-1.1 1 that are part of the U.S. West service territory. We stress that the finding that Western Wireless meets the criteria for federal and state level designation is a recognition only of their potential to provide the service. Western Wireless will be able to draw from the funds only as they provide service to actual customers, and only for so long as they remain in compliance with Commission rules (and federal guidelines) with respect to prices, quality, services, and offerings.

The Commission has jurisdiction and authority to ensure that Western Wireless continues to meet the ETC criteria set forth in Section 214(e)(1) of the Act and the requirements of the State Fund. Nothing prevents the Commission from, on its own motion, modifying, suspending or revoking Western Wireless' ETC designation if it does not meet those obligations.

An ETC's obligation to "offer the services that are supported by Federal universal service support mechanisms," as required by 47 U.S.C. § 214(e)(1), connotes not just willingness to offer the services, but actual performance of the services. Such performance in turn connotes provision of the services at an adequate service level. Whether an ETC (Western Wireless) is

actually performing such services could arise in a proceeding to modify, revoke, or suspend the designation.

IV. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED, that:

1. Western Wireless is designated an ETC under the federal guidelines in the U.S. West Local Exchanges included in their application, conditioned on meeting the requirements of this order. On the same conditions, Western Wireless is also designated as qualifying to receive State Fund disbursements as services are provided, in the same U.S. West exchanges for which federal designation has been granted. The Commission notes that it has recently approved the exchange sales in Docket 99-049-65, and is in the process of preparing an order with respect to that Docket. Therefore, the exchanges included in Docket 99-049-65 are not included in the area approved in this Order.

2. Western Wireless shall provide universal service pursuant to a written service agreement in place with its customers. The Service Agreement shall be filed for review with the Commission, and shall contain provisions which ensure it will provide universal service as defined by 47 U.S.C. § 214(e)(1) and 47 C.F.R. § 54.101(a) and this Order. The required components of this offering are reviewed in this Order above. We note that our approval is conditional on Western Wireless offering unlimited local usage as part of the universal service offering package that covers, at a minimum, all areas currently covered by the incumbent local

exchange provider on an individual calling area basis Western Wireless may offer larger free unlimited local calling areas.

3. Approval to receive money from the State Fund is further conditioned upon Western Wireless providing directory listings as required by state rule, and on their charging a price for basic telecommunications service that is less than or equal to the affordable base rate. At such time as Western Wireless seeks reimbursement from the State Fund, it shall seek reimbursement only for those universal service offerings priced at or below the affordable base rate, as defined in Commission Rule R746-360-7(B), and only for a support area where its total average revenue per line is less than the USF cost proxy model costs as set forth in Commission Rule R746-360-7(B), subject to any future amendments to the Commission's rules for funding from the State Fund.

4. Pursuant to U.C.A. §63-46b-13, an aggrieved party may file, within 20 days after the date of this Report and Order, a written request for rehearing/reconsideration by the Commission. Pursuant to U.C.A. §54-7-15, failure to file such a request precludes judicial review of the Report and Order. If the Commission fails to issue an order within 20 days after the filing of such request, the request shall be considered denied. Judicial review of this Report and Order may be sought pursuant to the Utah Administrative Procedures Act (U.C.A. §§63-46b-1 et seq.).

DOCKET NO. 98-2216-01

-16-

DATED at Salt Lake City, Utah, this 21st day of July, 2000.

/s/ Stephen F. Mecham, Chairman

/s/ Constance B. White, Commissioner

/s/ Clark D. Jones, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary

DOCKET NO. 98-2216-01

-17-

Western Wireless WW 1.1

APPENDIX A

Locality	Company Name	Coverage by WWC	Entire Study Area of Telco Served
GUNNISON	GUNNISON TEL CO	YES	YES
MANTI	MANTI TEL CO	YES	YES
HALCHITA	NAVAJO COMMUNICAITONS CO - UT	YES	YES
MONTEZUMA	NAVAJO COMMUNICATIONS	YES	YES
MONUMENT V	NAVAJO COMMUNICATION CO - UT	YES	YES
EUREKA	SKYLINE TELECOM	YES	YES
GOSHEN	SKYLINE TELECOM	YES	YES
MORONI	SKYLINE TELECOM	YES	YES
ANTIMONY	SOUTH CENTRAL UTAH TEL ASSN INC	YES	YES
APPLE VALL	SOUTH CENTRAL UTAH TEL ASSN INC	YES	YES
BICKNELL	SOUTH CENTRAL UTAH TEL ASSN INC	YES	YES
BOULDER	SOUTH CENTRAL UTAH TEL ASSN INC	YES	YES
BRYCE CANY	SOUTH CENTRAL UTAH TEL ASSN INC	YES	YES
BERYL	SOUTH CENTRAL UTAH TEL ASSN INC	YES	YES
CANNONVILLE	SOUTH CENTRAL UTAH TEL ASSN INC	YES	YES
CIRCLEVILLE	SOUTH CENTRAL UTAH TEL ASSN INC	YES	YES
SUCK CREEK	SOUTH CENTRAL UTAH TEL ASSN INC	YES	YES
ENTERPRISE	SOUTH CENTRAL UTAH TEL ASSN INC	YES	YES
ESCALANTE	SOUTH CENTRAL UTAH TEL ASSN INC	YES	YES
PANGUITCH	SOUTH CENTRAL UTAH TEL ASSN INC	YES	YES
KANAB	SOUTH CENTRAL UTAH TEL ASSN INC	YES	YES
KOOSHAREM	SOUTH CENTRAL UTAH TEL ASSN INC	YES	YES
LOA	SOUTH CENTRAL UTAH TEL ASSN INC	YES	YES
MILFORD	SOUTH CENTRAL UTAH TEL ASSN INC	YES	YES
MINERSVILLE	SOUTH CENTRAL UTAH TEL ASSN INC	YES	YES
MARYSVALE	SOUTH CENTRAL UTAH TEL ASSN INC	YES	YES
ORDERVILLE	SOUTH CENTRAL UTAH TEL ASSN INC	YES	YES
PANGUITCH	SOUTH CENTRAL UTAH TEL ASSN INC	YES	YES
BEAVER	U.S. West COMMUNICATIONS- MOUNTAIN BELL - UT	YES	N/A
BRIAN HEAD	U.S. West COMMUNICATIONS- MOUNTAIN BELL - UT	YES	N/A
CEDAR CITY	U.S. West COMMUNICATIONS- MOUNTAIN BELL - UT	YES	N/A
EPHRAIM	U.S. West COMMUNICATIONS- MOUNTAIN BELL - UT	YES	N/A
HANKSVILLE	U.S. West COMMUNICATIONS- MOUNTAIN BELL - UT	YES	N/A
HURRICANE	U.S. West COMMUNICATIONS- MOUNTAIN BELL - UT	YES	N/A
MOUNT PLEA	U.S. West COMMUNICATIONS- MOUNTAIN BELL - UT	YES	N/A
MONROE	U.S. West COMMUNICATIONS- MOUNTAIN BELL - UT	YES	N/A
NEPHI	U.S. West COMMUNICATIONS- MOUNTAIN BELL - UT	YES	N/A
PAROWAN	U.S. West COMMUNICATIONS- MOUNTAIN BELL - UT	YES	N/A
PAYSON	U.S. West COMMUNICATIONS- MOUNTAIN BELL - UT	YES	N/A
RICHFIELD	U.S. West COMMUNICATIONS- MOUNTAIN BELL - UT	YES	N/A
SALEM	U.S. West COMMUNICATIONS- MOUNTAIN BELL - UT	YES	N/A
SALINA	U.S. West COMMUNICATIONS- MOUNTAIN BELL - UT	YES	N/A
SPRINGDALE	U.S. West COMMUNICATIONS- MOUNTAIN BELL - UT	YES	N/A
ST GEORGE (1)	U.S. West COMMUNICATIONS- MOUNTAIN BELL - UT	YES	N/A
ST GEORGE (2)	U.S. West COMMUNICATIONS- MOUNTAIN BELL - UT	YES	N/A

DOCKET NO. 98-2216-01

-18-

ST GEORGE (3)	U.S. West COMMUNICATIONS- MOUNTAIN BELL - UT	YES	N/A
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Western Wireless 1.2 (Electronic Version)

See Attached Acrobat file f3997.pdf

(e) Provision of universal service

(1) Eligible telecommunications carriers

A common carrier designated as an eligible telecommunications carrier under paragraph (2), (3), or (6) shall be eligible to receive universal service support in accordance with section 254 of this title and shall, throughout the service area for which the designation is received—

(A) offer the services that are supported by Federal universal service support mechanisms under section 254(c) of this title, either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier); and

(B) advertise the availability of such services and the charges therefor using media of general distribution.

(2) Designation of eligible telecommunications carriers

A State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the State commission. Upon request and consistent with the public interest, convenience, and necessity, the State commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest.

(3) Designation of eligible telecommunications carriers for unserved areas

If no common carrier will provide the services that are supported by Federal universal service support mechanisms under section 254(c) of this title to an unserved community or any portion thereof that requests such service, the Commission, with respect to interstate services or an area served by a common carrier to which paragraph (6) applies, or a State commission, with respect to intrastate services, shall determine which common carrier or carriers are best able to provide such service to the requesting unserved community or portion thereof and shall order such carrier or carriers to provide such service for that unserved community or portion thereof. Any carrier or carriers ordered to provide such service under this paragraph shall meet the requirements of paragraph (1) and shall be designated as an eligible telecommunications carrier for that community or portion thereof.

(4) Relinquishment of universal service

A State commission (or the Commission in the case of a common carrier designated under paragraph (6)) shall permit an eligible telecommunications carrier to relinquish its designation as such a carrier in any area served by more than one eligible telecommunications carrier. An eligible telecommunications carrier that seeks to relinquish its eligible telecommunications carrier designation for an area served by more than one eligible telecommunications carrier shall give advance notice to the State commission (or the Commission in the case of a common carrier designated under paragraph (6)) of such relinquishment. Prior to permitting a telecommunications carrier designated as an eligible telecommunications carrier to cease providing universal service in an area served by more than one eligible telecommunications carrier, the State commission (or the Commission in the case of a common carrier designated under paragraph (6)) shall require the remaining eligible telecommunications carrier or carriers to ensure that all customers served by the relinquishing carrier will continue to be served, and shall require sufficient notice to permit the purchase or construction of adequate facilities by any remaining eligible telecommunications carrier. The State commission (or the Commission in the case of a common carrier designated under paragraph (6)) shall establish a time, not to exceed one year after the State commission (or the Commission in the case of a common carrier designated under paragraph (6)) approves such relinquishment under this paragraph, within which such purchase or construction shall be completed.

(5) Service area defined

The term "service area" means a geographic area established by a State commission (or the Commission under paragraph (6)) for the purpose of determining universal service obligations and support mechanisms. In the case of an area served by a rural telephone company, "service area" means such company's "study area" unless and until the Commission and the States, after taking into account recommendations of a Federal-State Joint Board instituted under section 410(c) of this title, establish a different definition of service area for such company.

(6) Common carriers not subject to state commission jurisdiction

In the case of a common carrier providing telephone exchange service and exchange access that is not subject to the jurisdiction of a State commission, the Commission shall upon request designate such a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the Commission consistent with applicable Federal and State law. Upon request and consistent with the public interest, convenience and necessity, the Commission may, with respect to an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated under this paragraph, so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the Commission shall find that the designation is in the public interest.

(As amended Oct 25, 1994, Pub L 103-414, Title III, § 304(a)(4), 108 Stat 4296, Feb. 8, 1996, Pub L. 104-104, Title I, § 102(a), 110 Stat. 80, Dec. 1, 1997, Pub L 105-125, § 1, 111 Stat 2540)

§ 253. Removal of barriers to entry

(a) In general

No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

(b) State regulatory authority

Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this section, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) State and local government authority

Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of

116

TELEGRAPHS, TELEPHONES, ETC.

47 § 253

Note 2

public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

(d) Preemption

If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

(e) Commercial mobile service providers

Nothing in this section shall affect the application of section 332(c)(3) of this title to commercial mobile service providers.

(f) Rural markets

It shall not be a violation of this section for a State to require a telecommunications carrier that seeks to provide telephone exchange service or exchange access in a service area served by a rural telephone company to meet the requirements in section 214(e)(1) of this title for designation as an eligible telecommunications carrier for that area before being permitted to provide such service. This subsection shall not apply—

(1) to a service area served by a rural telephone company that has obtained an exemption, suspension, or modification of section 251(c)(4) of this title that effectively prevents a competitor from meeting the requirements of section 214(e)(1) of this title; and

(2) to a provider of commercial mobile services.

(Pub.L. 104-104, Title I, § 101(a), Feb. 8, 1996, 110 Stat. 70.)

§ 254. Universal service

(a) Procedures to review universal service requirements

(1) Federal-State Joint Board on universal service

Within one month after February 8, 1996, the Commission shall institute and refer to a Federal-State Joint Board under section 410(c) of this title a proceeding to recommend changes to any of its regulations in order to implement sections 214(e) of this title and this section, including the definition of the services that are supported by Federal universal service support mechanisms and a specific timetable for completion of such recommendations. In addition to the members of the Joint Board required under section 410(c) of this title, one member of such Joint Board shall be a State-appointed utility consumer advocate nominated by a national organization of State utility consumer advocates. The Joint Board shall, after notice and opportunity for public comment, make its recommendations to the Commission 9 months after February 8, 1996.

(2) Commission action

The Commission shall initiate a single proceeding to implement the recommendations from the Joint Board required by paragraph (1) and shall complete such proceeding within 15 months after February 8, 1996. The rules established by such proceeding shall include a definition of the services that are supported by Federal universal service support mechanisms and a specific timetable for implementation. Thereafter, the Commission shall complete any proceeding to implement subse-

quent recommendations from any Joint Board on universal service within one year after receiving such recommendations.

(b) Universal service principles

The Joint Board and the Commission shall base policies for the preservation and advancement of universal service on the following principles.

(1) Quality and rates

Quality services should be available at just, reasonable, and affordable rates

(2) Access to advanced services

Access to advanced telecommunications and information services should be provided in all regions of the Nation.

(3) Access in rural and high cost areas

Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas

(4) Equitable and nondiscriminatory contributions

All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service.

(5) Specific and predictable support mechanisms

There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service

(6) Access to advanced telecommunications services for schools, health care, and libraries

Elementary and secondary schools and classrooms, health care providers, and libraries should have access to advanced telecommunications services as described in subsection (h) of this section

(7) Additional principles

Such other principles as the Joint Board and the Commission determine are necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with this chapter.

(c) Definition

(1) In general

Universal service is an evolving level of telecommunications services that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services. The Joint Board in recommending, and the Commission in establishing, the definition of the services that are supported by Federal universal service support mechanisms shall consider the extent to which such telecommunications services—

(A) are essential to education, public health, or public safety,

(B) have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers,

(C) are being deployed in public telecommunications networks by telecommunications carriers; and

(D) are consistent with the public interest, convenience, and necessity

(2) Alterations and modifications

The Joint Board may, from time to time, recommend to the Commission modifications in the definition of the services that are supported by Federal universal service support mechanisms.

(3) Special services

In addition to the services included in the definition of universal service under paragraph (1), the Commission may designate additional services for such support mechanisms for schools, libraries, and health care providers for the purposes of subsection (h) of this section.

(d) Telecommunications carrier contribution

Every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service. The Commission may exempt a carrier or class of carriers from this requirement if the carrier's telecommunications activities are limited to such an extent that the level of such carrier's contribution to the preservation and advancement of universal service would be de minimis. Any other provider of interstate telecommunications may be required to contribute to the preservation and advancement of universal service if the public interest so requires.

(e) Universal service support

After the date on which Commission regulations implementing this section take effect, only an eligible telecommunications carrier designated under section 214(e) of this title shall be eligible to receive specific Federal universal service support. A carrier that receives such support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended. Any such support should be explicit and sufficient to achieve the purposes of this section.

(f) State authority

A State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service. Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in that State. A State may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms.

(g) Interexchange and interstate services

Within 6 months after February 8, 1996, the Commission shall adopt rules to require that the rates charged by providers of interexchange telecommunications services to subscribers in rural and high cost areas shall be no higher than the rates charged by each such provider to its subscribers in urban areas. Such rules shall also require that a provider of interstate interexchange telecommunications services shall provide such services to its subscribers in each State at rates no higher than the rates charged to its subscribers in any other State.

(h) Telecommunications services for certain providers**(1) In general****(A) Health care providers for rural areas**

A telecommunications carrier shall, upon receiving a bona fide request, provide telecommunications services which are necessary for the provision of health care services in a State, including instruction relating to such services, to any public or nonprofit health care provider that serves persons who reside in rural areas in that State at rates that are reasonably comparable to rates charged for similar services in urban areas in that State. A telecommunications carrier providing service under this paragraph shall be entitled to have an amount equal to the difference, if any, between the rates for services provided

to health care providers for rural areas in a State and the rates for similar services provided to other customers in comparable rural areas in that State treated as a service obligation as a part of its obligation to participate in the mechanisms to preserve and advance universal service.

(B) Educational providers and libraries

All telecommunications carriers serving a geographic area shall, upon a bona fide request for any of its services that are within the definition of universal service under subsection (c)(3) of this section, provide such services to elementary schools, secondary schools, and libraries for educational purposes at rates less than the amounts charged for similar services to other parties. The discount shall be an amount that the Commission, with respect to interstate services, and the States, with respect to intrastate services, determine is appropriate and necessary to ensure affordable access to and use of such services by such entities. A telecommunications carrier providing service under this paragraph shall—

(i) have an amount equal to the amount of the discount treated as an offset to its obligation to contribute to the mechanisms to preserve and advance universal service, or

(ii) notwithstanding the provisions of subsection (e) of this section, receive reimbursement utilizing the support mechanisms to preserve and advance universal service.

(2) Advanced services

The Commission shall establish competitively neutral rules—

(A) to enhance, to the extent technically feasible and economically reasonable, access to advanced telecommunications and information services for all public and nonprofit elementary and secondary school classrooms, health care providers, and libraries; and

(B) to define the circumstances under which a telecommunications carrier may be required to connect its network to such public institutional telecommunications users.

(3) Terms and conditions

Telecommunications services and network capacity provided to a public institutional telecommunications user under this subsection may not be sold, resold, or otherwise transferred by such user in consideration for money or any other thing of value.

(4) Eligibility of users

No entity listed in this subsection shall be entitled to preferential rates or treatment as required by this subsection, if such entity operates as a for-profit business, is a school described in paragraph (5)(A) with an endowment of more than \$50,000,000, or is a library or library consortium not eligible for assistance from a State library administrative agency under the Library Services and Technology Act [20 U.S.C.A. § 9121 et seq.].

(5) Definitions

For purposes of this subsection:

(A) Elementary and secondary schools

The term “elementary and secondary schools” means elementary schools and secondary schools, as defined in paragraphs (14) and (25), respectively, of section 8801 of Title 20.

(B) Health care provider

The term “health care provider” means—

(i) post-secondary educational institutions offering health care instruction, teaching hospitals, and medical schools;

(ii) community health centers or health centers providing health care to migrants;

- (iii) local health departments or agencies;
- (iv) community mental health centers;
- (v) not-for-profit hospitals;
- (vi) rural health clinics; and
- (vii) consortia of health care providers consisting of one or more entities described in clauses (i) through (vi).

(C) Public institutional telecommunications user

The term "public institutional telecommunications user" means an elementary or secondary school, a library, or a health care provider as those terms are defined in this paragraph.

(i) Consumer protection

The Commission and the States should ensure that universal service is available at rates that are just, reasonable, and affordable.

(j) Lifeline assistance

Nothing in this section shall affect the collection, distribution, or administration of the Lifeline Assistance Program provided for by the Commission under regulations set forth in section 69.117 of title 47, Code of Federal Regulations, and other related sections of such title.

(k) Subsidy of competitive services prohibited

A telecommunications carrier may not use services that are not competitive to subsidize services that are subject to competition. The Commission, with respect to interstate services, and the States, with respect to intrastate services, shall establish any necessary cost allocation rules, accounting safeguards, and guidelines to ensure that services included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services.

(Pub.L. 104-104, Title I, § 101(a), Feb. 8, 1996, 110 Stat. 71; Pub.L. 104-208, Div. A, Title I, § 101(e) [Title VII, § 709(a)(8)], Sept. 30, 1996, 110 Stat. 3009-313)

basis for a Commission finding that such regulation (or amendment) is in the public interest.

(D) The Commission shall, not later than 180 days after August 10, 1993, complete a rulemaking required to implement this paragraph with respect to the licensing of personal communications services, including making any determinations required by subparagraph (C).

(2) Non-common carrier treatment of private mobile services

A person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under this chapter. A common carrier (other than a person that was treated as a provider of a private land mobile service prior to the enactment of the Omnibus Budget Reconciliation Act of 1993) shall not provide any dispatch service on any frequency allocated for common carrier service, except to the extent such dispatch service is provided on stations licensed in the domestic public land mobile radio service before January 1, 1992. The Commission may by regulation terminate, in whole or in part, the prohibition contained in the preceding sentence if the Commission determines that such termination will serve the public interest.

(3) State preemption

(A) Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates. Notwithstanding the first sentence of this subparagraph, a State may petition the Commission for authority to regulate the rates for any commercial mobile service and the Commission shall grant such petition if such State demonstrates that—

(i) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or

(ii) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State.

The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition. If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such periods of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory.

(B) If a State has in effect on June 1, 1993, any regulation concerning the rates for any commercial mobile service offered in such State on such date, such State may, no later than 1 year after August 10, 1993, petition the Commission requesting that the State be authorized to continue exercising authority over such rates. If a State files such a petition, the State's existing regulation shall, notwithstanding subparagraph (A), remain in effect until the Commission completes all action (including any reconsideration) on such petition. The Commission shall review such petition in accordance with the procedures established in such subparagraph, shall complete all action (including any reconsideration) within 12 months after such petition is filed, and shall grant such petition if the State satisfies the showing required under subparagraph (A)(i) or (A)(ii). If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such period of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory. After a reasonable period of time, as determined by the Commission, has elapsed from the issuance of an order under subparagraph (A) or this subparagraph, any interested party may petition the Commission for an order that

the exercise of authority by a State pursuant to such subparagraph is no longer necessary to ensure that the rates for commercial mobile services are just and reasonable and not unjustly or unreasonably discriminatory. The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition.

Act of 1968, 49 U.S. Code 1671 et seq. or the Hazardous Liquid Pipeline Safety Act of 1979, 49 App. U.S.C. 2001 et seq.;

(2) an excavator; and

(3) a person who operates an association.

History: C. 1953, 54-8a-11, enacted by L. 993, ch. 87, § 10.

Federal Law. — The federal acts cited Sub-

section (1) may now be found, following a reorganization of Title 49 of the U.S. Code, at 49 U.S.C. § 60101 et seq.

CHAPTER 8b

PUBLIC TELECOMMUNICATIONS LAW

Section	Title.	Section	
1-8b-1.	Legislative policy declarations.	54-8b-11.	Establishing just and reasonable rates.
1-8b-1.1.	Definitions.	54-8b-12.	Repealed.
1-8b-2.	Competitive entry.	54-8b-13.	Rules governing operator assisted services [Effective until July 1, 2001].
1-8b-2.1.	Interconnection.		Rules governing operator assisted services [Effective July 1, 2001].
1-8b-2.2.	Pricing flexibility.		Intrastate interexchange toll service prices.
1-8b-2.3.	Price regulation — Price index — Maximum prices.	54-8b-14.	Universal Public Telecommunications Service Support Fund — Established.
1-8b-2.4.	Report to governor and Legislature.	54-8b-15.	Public Service Commission authority to enforce interconnection service quality standards and interconnection agreements — Grounds for filing complaint.
1-8b-2.5.	Exemptions from requirements.	54-8b-16.	Procedures for enforcement of interconnection service quality — Penalties for violation — Funds collected [Effective until July 1, 2001].
-8b-3.	-8b-3.1, 54-8b-3.2. Repealed.	54-8b-17.	Procedures for enforcement of interconnection service quality — Penalties for violation — Funds collected [Effective July 1, 2001].
-8b-3.3.	Services which must be offered on a nondiscriminatory basis — Tariffed public telecommunications services and price-regulated services to be cost-based — Packaged services — Price floor for all services — Quality of service standards.	54-8b-18.	Definitions — Unauthorized change of telecommunications provider — Unauthorized charges — Procedures for verification — Penalties — Authority of commission [Effective until July 1, 2001].
-8b-4.	Repealed.		Definitions — Unauthorized change of telecommunications provider — Unauthorized charges — Procedures for verification — Penalties — Authority of commission [Effective July 1, 2001].
-8b-4.5.	Commission order — Negotiated provisions of services — Contracts under this section.		
-8b-5.	Repealed.		
-8b-6.	Prohibition on subsidization of telecommunications services.		
-8b-7.	Continuous jurisdiction of commission — Orders.		
-8b-8.	Antitrust and restraint of trade laws not affected by chapter.		
8b-9.	Commission's jurisdiction under other provisions of title not enlarged or reduced by chapter.		
8b-10.	Imposing a surcharge to provide hearing and speech impaired persons with telecommunications devices — Definitions — Procedures for establishing program — Surcharge — Administration and disposition of surcharge moneys.		

54-8b-1. Title.

This chapter is known as the "Public Telecommunications Law."

History: C. 1953, 54-8b-1, enacted by L. 1985, ch. 257, § 1; 1995, ch. 269, § 2.

COLLATERAL REFERENCES

Am. Jur. 2d. — 74 Am. Jur. 2d Telecommunications § 18 et seq.

C.J.S. — 86 C.J.S. Telecommunications §§ 3, 17.

A.L.R. — State regulation of radio paging services, 44 A.L.R.4th 216.

Liability of telephone company for mistakes in or omissions from its directory, 47 A.L.R.4th 882.

Search and seizure of telephone company records pertaining to subscriber as violation of subscriber's constitutional rights, 76 A.L.R.4th 536.

"Caller ID" system, allowing telephone call recipient to ascertain number of telephone from which call originated, as violation of right to privacy, wiretapping statute, or similar protections, 9 A.L.R.5th 553.

54-8b-1.1. Legislative policy declarations.

The Legislature declares it is the policy of the state to:

(1) endeavor to achieve the universal service objectives of the state as set forth in Section 54-8b-11;

(2) facilitate access to high quality, affordable public telecommunications services to all residents and businesses in the state;

(3) encourage the development of competition as a means of providing wider customer choices for public telecommunications services throughout the state;

(4) allow flexible and reduced regulation for telecommunications corporations and public telecommunications services as competition develops;

(5) facilitate and promote the efficient development and deployment of an advanced telecommunications infrastructure, including networks with nondiscriminatory prices, terms, and conditions of interconnection;

(6) encourage competition by facilitating the sale of essential telecommunications facilities and services on a reasonably unbundled basis;

(7) seek to prevent prices for tariffed public telecommunications services or price-regulated services from subsidizing the competitive activities of regulated telecommunications corporations;

(8) encourage new technologies and modify regulatory policy to allow greater competition in the telecommunications industry;

(9) enhance the general welfare and encourage the growth of the economy of the state through increased competition in the telecommunications industry; and

(10) endeavor to protect customers who do not have competitive choice.

History: C. 1953, 54-8b-1.1, enacted by L. 1995, ch. 269, § 3.

54-8b-2. Definitions.

As used in this chapter:

- (1) (a) "Aggregator" means any person or entity that:
 - (i) is not a telecommunications corporation;

(ii) in the ordinary course of its business makes operator assisted services available to the public or to customers and transient users of its business or property through an operator service provider; and

(iii) receives from an operator service provider by contract, tariff, or otherwise, commissions or compensation for calls delivered from the aggregator's location to the operator service provider.

(b) "Aggregator" may include any hotel, motel, hospital, educational institution, government agency, or coin or coinless telephone service provider so long as that entity qualifies under Subsection (1)(a).

(2) "Certificate" means a certificate of public convenience and necessity issued by the commission authorizing a telecommunications corporation to provide specified public telecommunications services within a defined geographic service territory in the state.

(3) "Division" means the Division of Public Utilities established in Section 54-4a-1.

(4) "Essential facility or service" means any portion, component, or function of the network or service offered by a provider of local exchange services:

(a) that is necessary for a competitor to provide a public telecommunications service;

(b) that cannot be reasonably duplicated; and

(c) for which there is no adequate economic alternative to the competitor in terms of quality, quantity, and price.

(5) "Federal Telecommunications Act" means the Federal Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

(6) "Incumbent telephone corporation" means a telephone corporation, its successors or assigns, which, as of May 1, 1995, held a certificate to provide local exchange services in a defined geographic service territory in the state.

(7) "Intrastate telecommunications service" means any public telecommunications service in which the information transmitted originates and terminates within the boundaries of this state.

(8) "Local exchange service" means the provision of telephone lines to customers with the associated transmission of two-way interactive, switched voice communication within the geographic area encompassing one or more local communities as described in maps, tariffs, or rate schedules filed with and approved by the commission.

(9) (a) "New public telecommunications service" means a service offered by a telecommunications corporation which that corporation has never offered before.

(b) "New public telecommunications service" does not include:

(i) a tariff, price list, or competitive contract that involves a new method of pricing any existing public telecommunications service;

(ii) a package of public telecommunications services that includes an existing public telecommunications service; or

(iii) a public telecommunications service that is a direct replacement for:

(A) a price-regulated service;

(B) an existing service offered pursuant to a tariff, price list, or competitive contract; or

(C) an essential facility or an essential service as defined in Section 54-8b-2.

(10) "Operator assisted services" means services which assist callers in the placement or charging of a telephone call, either through live intervention or automated intervention.

(11) "Operator service provider" means any person or entity that provides, for a fee to a caller, operator assisted services.

(12) "Price-regulated service" means any public telecommunications service governed by Section 54-8b-2.3.

(13) "Public telecommunications service" means the two-way transmission of signs, signals, writing, images, sounds, messages, data, or other information of any nature by wire, radio, lightwaves, or other electromagnetic means offered to the public generally.

(14) "Same or substitutable" with reference to a public telecommunications service means that the service is comparable to another service in terms of function, price, and quality to an end user customer.

(15) "Substantial compliance" with reference to a rule or order of the commission means satisfaction of all material obligations in a manner consistent with the rule or order.

(16) "Telecommunications corporation" means any corporation or person, and their lessees, trustees, receivers, or trustees appointed by any court, owning, controlling, operating, managing, or reselling a public telecommunications service.

(17) "Total service long-run incremental cost" means the forward-looking incremental cost to a telecommunications corporation caused by providing the entire quantity of a public telecommunications service, network function, or group of public telecommunications services or network functions, by using forward-looking technology, reasonably available, without assuming relocation of existing plant and equipment. The "long-run" means a period of time long enough so that cost estimates are based on the assumption that all inputs are variable.

History: C. 1953, 54-8b-2, enacted by L. 1985, ch. 257, § 1; 1989, ch. 96, § 1; 1990, ch. 141, § 1; 1995, ch. 269, § 4; 1997, ch. 122, § 1; 2000, ch. 291, § 1.

Amendment Notes. — The 1997 amendment, effective May 5, 1997, added Subsection (4) and redesignated the following subsections accordingly.

The 2000 amendment, effective May 1, 2000, added Subsections (3), (14), and (15), redesignating the following subsections accordingly:

substituted "Section 54-8b-2" for "Subsection 54-8b-2(3)" in Subsection (9)(b)(iii)(C); and made one minor stylistic change.

Federal Law. — The federal Telecommunications Act of 1996, cited in Subsection (5) of this section, amends sections throughout the federal Communications Act, 47 U.S.C. § 151 et seq.

54-8b-2.1. Competitive entry.

(1) Notwithstanding any provision of Section 54-4-25 to the contrary, the commission may issue a certificate to a telecommunications corporation authorizing it to compete in providing local exchange services or other public telecommunications services in all or part of the service territory of an incumbent telephone corporation, except until December 31, 1997, a telecom-

unications corporation may not receive a certificate to compete in providing local exchange service within any local exchange with fewer than 5,000 access lines that is owned or controlled by an incumbent telephone corporation with fewer than 30,000 access lines in the state. The procedure specified in subsection (3)(c) for excluding competition within a local exchange with fewer than 5,000 access lines shall apply on December 31, 1997 or thereafter.

(2) The commission shall issue a certificate to the applying telecommunications corporation if the commission determines that:

(a) the applicant has sufficient technical, financial, and managerial resources and abilities to provide the public telecommunications services applied for; and

(b) the issuance of the certificate to the applicant is in the public interest.

(3) (a) The commission shall process the application in accordance with Title 63, Chapter 46b, Administrative Procedures Act.

(b) Each telecommunications corporation holding a certificate to provide public telecommunications service within the geographic area where an applicant is seeking to provide telecommunications service shall be provided notice of the application and granted automatic status as an intervenor.

(c) An intervening incumbent telephone corporation serving fewer than 30,000 access lines in the state may petition the commission to exclude from an application filed pursuant to Subsection (1) any local exchange with fewer than 5,000 access lines that is owned or controlled by the intervening incumbent telephone corporation. Upon finding that the action is consistent with the public interest, the commission shall order that the application exclude such local exchange.

(d) The commission shall approve or deny the application under this section within 240 days after it is filed. If the commission has not acted on an application within 240 days, the application is considered granted.

(4) If the commission issues a certificate to a competitive telecommunications corporation to provide local exchange services in a local exchange that has fewer than 5,000 lines and that is controlled by an incumbent telephone corporation with fewer than 30,000 access lines in the state, the commission shall impose an obligation upon the competitive telecommunications corporation to provide public telecommunications services to any customer or class of customers who requests service within the local exchange. The competing telecommunications corporation's obligation to serve shall be no greater than that of the incumbent telephone corporation.

(5) An incumbent telephone corporation with fewer than 30,000 access lines in the state may not be required to become a carrier of intrastate toll services.

History: C. 1953, 54-8b-2.1, enacted by L. 1995, ch. 269, § 5.

54-8b-2.2. Interconnection.

(1) (a) (i) The commission may require any telecommunications corporation to interconnect its essential facilities with another telecommunications corporation that provides public telecommunications services in the same, adjacent, or overlapping service territory.

(ii) Interconnecting telecommunications corporations shall permit the mutual exchange of traffic between their networks without unreasonable blocking or other unreasonable restrictions on the flow of traffic. In determining unreasonable blocking or unreasonable restrictions, the commission shall, among other things, take into account the necessity and time required for adapting the network to respond to significant changes in usage patterns.

(b) (i) Whenever the commission grants a certificate to one or more telecommunications corporations to provide public telecommunications services in the same or overlapping service territories, all telecommunications corporations providing public telecommunications services in the affected area shall have the right to interconnect with the essential facilities and to purchase the essential services of all other certificate holders operating in the same area on a nondiscriminatory and reasonably unbundled basis.

(ii) Each telecommunications corporation shall permit access to and interconnection with its essential facilities and the purchase of its essential services on terms and conditions, including price, no less favorable than those the telecommunications corporation provides to itself and its affiliates.

(c) Nothing in this section shall prevent a telecommunications corporation from entering into nondiscriminatory agreements for interconnection with its essential facilities and the purchase and sale of essential services.

(d) (i) A telecommunications corporation shall file with the commission the prices, terms, and conditions of any agreement it makes for the interconnection of essential facilities or the purchase or sale of essential services.

(ii) The agreement shall take effect ten days after filing.

(iii) Each telecommunications corporation shall allow any other telecommunications corporation to obtain interconnection with its essential facilities and to purchase essential services on prices, terms, and conditions no less favorable than those on file with the commission.

(e) If there is a dispute over interconnection of essential facilities, the purchase and sale of essential services, or the planning or provisioning of facilities or unbundled elements, one or both of the disputing parties may bring the dispute to the commission, and the commission, by order, shall resolve the dispute on an expedited basis.

(f) It is not a discriminatory pricing practice to vary prices to reflect genuine cost differences.

(2) (a) The commission shall adopt rules or issue an interim order which implements by December 31, 1996, the competitive provision of facilities-based intraLATA toll and local exchange services.

(b) The rules or interim order shall address those issues the commission determines are essential for a competing telecommunications corporation to provide intraLATA toll and local exchange services and necessary to protect the public interest, including the interconnection with essential facilities and the purchase and sale of essential services of telecommunications corporations authorized to provide public telecommunications services in the same or overlapping service territories on a nondiscriminatory and reasonably unbundled basis.

(a) By December 31, 1997, the commission shall adopt additional rules to issue a final order to implement the competitive provision of facilities-based intraLATA toll and local exchange services.

- (b) The rules or final order shall address other issues relating to:
- (i) competition for intraLATA toll and local exchange services;
 - (ii) blocking, timing of provisioning of unbundled elements, and service quality standards for interconnecting carriers;
 - (iii) the transition to a competitive market; and
 - (iv) the protection of the public interest.

Nothing in this section shall require or prohibit the commission from making changes in dialing patterns for intraLATA toll services.

If the commission, by order, approves the application of a telecommunications corporation to provide public telecommunications services in all or part of the service territory certificated to an incumbent telephone corporation after the adoption of the rules or final order described in Subsection (3), the commission may:

(a) order the interconnection of essential facilities and the purchase and sale of the essential services of a telecommunications corporation with those of a competing telecommunications corporation on such terms and conditions and to the extent necessary to allow the competing telecommunications corporation to operate under authority granted by the commission; and

(b) address and resolve, by order, other issues necessary for the competitive provision of intraLATA toll and local exchange services.

History: C. 1953, 54-8b-2.2. enacted by L. ch. 269, § 6; 1997, ch. 226, § 1. **Amendment Notes.** — The 1997 amendment, effective May 5, 1997, added Subsections (2)(ii) and (3)(b)(ii), making related designa-

tion changes, and in Subsection (1)(e) added "or the planning or the provisioning of facilities or unbundled elements" and "on an expedited basis."

54-8b-2.3. Pricing flexibility.

(1) (a) A telecommunications corporation that obtains a certificate to compete with the incumbent telephone corporation in a defined geographic area pursuant to Section 54-8b-2.1 may price any public telecommunications services it is authorized to offer, or any new public telecommunications service, by means of a price list or competitive contract.

(b) Before the telecommunications corporation begins providing any authorized public telecommunications service, it shall notify the commission of its intent to begin providing the service and the defined geographic area in which it will provide the service.

(2) (a) Notwithstanding other requirements of this chapter relating to pricing flexibility, an incumbent telephone corporation may offer retail end user public telecommunications services by means of a price list or competitive contract as provided in Subsections (2)(b) and (c).

(b) (i) An incumbent telephone corporation may petition the commission for pricing flexibility in:

(A) any proceeding in which another telecommunications corporation has petitioned the commission for a certificate to provide specified public telecommunications services in a defined geographic area that is within the incumbent telephone corporation's service territory; or

(B) an independent proceeding after the other telecommunications corporation has been certificated to provide specified public telecommunications services in a defined geographic area that is within the incumbent telephone corporation's service territory.

(ii) In the proceeding, the commission shall, by order, grant pricing flexibility to the incumbent telephone corporation for the same or substitutable public telecommunications services in the same defined geographic area.

(iii) Pricing flexibility for any public telecommunications service shall become effective in accordance with the procedure in Subsection (2)(b)(iv) when the following conditions are met:

(A) the commission has issued a certificate to the competing telecommunications corporation;

(B) the competing telecommunications corporation has begun providing the authorized public telecommunications service in the defined geographic area;

(C) the incumbent telephone corporation, by written agreement, stipulation, or pursuant to an order of the commission, has allowed the competing telecommunications corporation to interconnect with the essential facilities and to purchase essential services of the incumbent telephone corporation; and

(D) the incumbent telephone corporation is in substantial compliance with the rules and orders of the commission adopted or issued under Section 54-8b-2.2.

(iv) (A) The commission shall enter its final order either granting or denying a petition for pricing flexibility under Subsection (2)(b) within 90 days of the date the incumbent telephone corporation files its petition seeking pricing flexibility.

(B) If the commission has not entered an order within 90 days of the date the petition is filed, the petition shall be considered granted.

(C) Pricing flexibility shall be effective 45 days following the granting of a petition for pricing flexibility under Subsection (2)(b) unless the commission orders an earlier effective date.

(c) An incumbent telephone corporation may price any new public telecommunications service by means of a price list or competitive contract.

(3) The commission may review any new public telecommunications service offered by an incumbent telephone corporation after the applicable tariff, price list, or competitive contract has taken effect.

(4) Each price list shall:

(a) be filed with the commission;

(b) describe the public telecommunications service;

(c) set forth the basic terms and conditions upon which the public telecommunications service is offered; and

(d) list the prices to be charged for the public telecommunications service or the basis on which the services will be priced.

(5) Prices, terms, and conditions offered under price lists or competitive contracts that are different from tariff prices, terms, and conditions for the same services are not considered discriminatory under Section 54-3-8 and Subsection 54-8b-3.3(2).

(6) A price list filed with the commission under this section shall take effect five days after it is filed with the commission.

(7) The prices, terms, and conditions of a public telecommunications service offered by a telecommunications corporation pursuant to a competitive contract with a retail customer shall be filed with the commission.

(8) The commission may, as determined necessary to protect the public interest, set an upper limit on the price that may be charged by telecommunications corporations for public telecommunications services that may be provided by means of a price list or competitive contract.

(9) (a) The commission may revoke the authority of a telecommunications corporation to offer a public telecommunications service pursuant to a price list or competitive contract if the commission finds:

(i) (A) the telecommunications corporation has violated statutes or rules applicable to the specific service;

(B) there has been a material and substantial change in the level of competition; or

(C) competition has not developed; and

(ii) revocation is in the public interest.

(b) The party asserting that revocation should occur shall bear the burden of proof.

(10) The commission shall establish rules or procedures to protect confidential, proprietary, and competitively sensitive information provided to the commission or the division pursuant to this section.

History: C. 1953, 54-8b-2.3, enacted by L. 5, ch. 269, § 7; 1997, ch. 88, § 1; 2000, ch. 2, § 2.

Amendment Notes. — The 1997 amendment, effective May 5, 1997, added Subsection and redesignated the other subsections accordingly.

The 2000 amendment, effective May 1, 2000, changed the language beginning “and the de-

finied” in Subsection (1)(b); added the Subsection (2)(b)(i)(A) designation and added Subsection (2)(b)(i)(B); inserted “in accordance with the procedure in Subsection (2)(b)(iv)” in Subsection (2)(b)(iii); inserted “substantial” in Subsection (2)(b)(iii)(D); added Subsections (2)(b)(iv) and (10); and made related changes and one minor stylistic change.

-8b-2.4. Price regulation — Price index — Maximum prices.

1) The Legislature finds that:

(a) traditional rate of return regulation cannot guarantee that customers who do not have the choice of alternative providers will be protected from the economic responsibility for making up for an incumbent telephone corporation's competitive losses or from providing for the recovery of past, regulated investments;

(b) the method of regulation set forth in this section will provide better protection to customers who lack competitive choices than does traditional rate of return regulation; and

(c) before moving from traditional rate of return regulation, it is essential the commission address issues relating to the movement of prices towards cost and removing subsidies in the existing price structure of incumbent telephone corporations to encourage competition for all telecommunications services.

2) (a) Effective May 1, 1997, any incumbent telephone corporation with more than 30,000 access lines in the state shall be regulated pursuant to

this section and may not be regulated on the basis of rate of return or any similar method of regulation that is based on the earnings of the incumbent telephone corporation, except as provided in this section.

(b) Any incumbent telephone corporation serving fewer than 30,000 access lines in the state may petition the commission to be regulated under price regulation rather than traditional rate of return regulation. In adopting price regulation for incumbent telephone corporations with fewer than 30,000 access lines, the commission may modify the provisions of this section taking into consideration the individual circumstances of the incumbent telephone corporation seeking price regulation.

(3) Any general rate proceeding for an incumbent telephone corporation with more than 30,000 access lines in the state initiated before May 1, 1997, shall be based on a 1996 test period and shall be conducted under the principles of traditional rate of return regulation, even though the final order in the case is not issued until May 1, 1997, or thereafter.

(4) (a) The prices of tariffed telecommunications services offered by an incumbent telephone corporation with more than 30,000 access lines in the state may not increase during the three-year period commencing with the date of the final order in the last rate case initiated before May 1, 1997. The prices of services offered pursuant to a price list or competitive contract shall be governed by Section 54-8b-2.3.

(b) Notwithstanding Subsection (4)(a), prices may increase pursuant to any prices established in a final order of the commission for a rate proceeding initiated before May 1, 1997, or the adjustment of those prices as a result of an appeal or remand of the final order.

(5) (a) Effective at the end of the three-year period specified in Subsection (4), the commission shall adjust the maximum prices for the tariffed public telecommunications services of the incumbent telephone corporation according to an aggregate price index or price indices associated with groups of services. The aggregate price index or price indices shall be adjusted annually to reflect the effects of inflation, productivity, and exogenous factors and to maintain an appropriate level of service quality. The precise manner of annual adjustment of the aggregate price index or price indices shall be developed by the commission after notice and a hearing and before the end of the three-year period.

(b) Factors in the price index or price indices may also include the following:

(i) any removal of subsidies in the existing price structure of the incumbent telephone corporation required by federal or state law or approved by the commission;

(ii) the impact of alteration in asset lives to better reflect changes in the economic lives of plant and equipment approved by the commission consistent with Section 54-7-12.1;

(iii) changes in rules of the Federal Communications Commission, including rules with regard to the separation of interstate and intrastate revenues, expenses, or investments adopted by the commission;

(iv) changes in tax rates applied to the incumbent telephone corporation;

(v) any other change external to the business operations of the incumbent telephone corporation resulting from:

(A) accounting rules adopted by the Financial Accounting Standards Board and approved by the commission; or

b-2.5

PUBLIC UTILITIES

- (B) laws or rules enacted or adopted by a governmental entity having jurisdiction; or
- (vi) any other extraordinary events not reasonably foreseeable as of April 30, 1997.
- (c) If the maximum price of any tariffed public telecommunications service, including residential telephone service:
- is equal to or below the price floor for the service as determined under Subsection 54-8b-3.3(3), the maximum price may not be lowered through application of any price index determined under this Subsection (5); or
 - is above the price floor for the service as determined under Subsection 54-8b-3.3(3), the maximum price may not be lowered below the price floor through application of any price index determined under this Subsection (5).
- (d) The price floor for a service shall be determined in the same manner for purposes of Subsection (5)(c) as it is for other purposes under Subsection 54-8b-3.3(3).
- 6) (a) The incumbent telephone corporation may decrease the price of a tariffed telecommunications service subject to the limitation in Section 54-8b-3.3.
- (b) Any decrease in price shall be made by filing a tariff with the commission. The decrease shall become effective 30 days after filing.

History: C. 1953, 54-8b-2.4, enacted by L. 95, ch. 269, § 8; 1997, ch. 226, § 2; 2000, ch. 291, § 3.

Amendment Notes. — The 1997 amendment, effective May 5, 1997, added “shall be based on a 1996 test period and” in Subsection (a), added Subsections (3)(b) and (5)(b), designating the existing paragraphs as (a), and in Subsection (4)(b) deleted “general” before “rate” and substituted “March 1, 1998” for “May 1, 1997”

The 2000 amendment, effective May 1, 2000, deleted former Subsection (3)(b), detailing the pricing conditions for certain incumbent telephone corporations, and redesignated Subsection (3)(a) as (3), substituted “May 1, 1997” for “March 1, 1998” in Subsection (4)(b), in Subsection (5)(a) substituted “adjust” for “regulate” and inserted “of the aggregate price index or price indices”, and added Subsections (5)(c) and (5)(d)

4-8b-2.5. Report to governor and Legislature.

Beginning October 15, 1998, and annually thereafter, the commission shall submit a report to the governor, Legislature, the Public Utilities and Technology Interim Committee, and Information Technology Commission on the state of the telecommunications industry and make recommendations for any regulatory changes necessary to achieve the policy of the state as set forth in Section 54-8b-1.1. The commission shall determine criteria to be used to evaluate the performance of price regulation and the information necessary to conduct the evaluation.

History: C. 1953, 54-8b-2.5, enacted by L. 1995, ch. 269, § 9; 1998, ch. 18, § 1; 1999, ch. 14, § 1.

Amendment Notes. — The 1998 amendment, effective May 4, 1998, inserted “the Pub-

lic Utilities and Technology Interim Committee” in the first sentence of the provision

The 1999 amendment, effective May 3, 1999, substituted “annually” for “biannually” near the beginning of the provision

54-8b-3. Exemptions from requirements.

- The commission, on its own initiative or in response to an application by a telecommunications corporation, a public agency, or a user of a public telecommunications service, may, after public notice and a hearing, issue an order exempting any telecommunications corporation or public telecommunications service from any requirement of this title, including any requirement or limitation relating to a telecommunication corporation's earnings, rate base, or pricing of public telecommunications services.
- The commission shall specify in the order any requirements, terms, or conditions which may apply to any exemption.
- An exemption may be granted for the entire service territory of a telecommunications corporation or for a specific geographic area of the service territory.
- The commission may issue an order for an exemption only if it finds that:
 - the telecommunications corporation or service is subject to effective competition; and
 - the exemption is in the public interest.
- In determining if the telecommunications corporation or service is subject to effective competition, the commission shall consider all relevant factors, which may include:
 - the extent to which competing telecommunications services are available from alternative telecommunications providers;
 - the ability of alternative telecommunications providers to offer competing telecommunications services that are functionally equivalent or substitutable and reasonably available at comparable prices, terms, quality, and conditions;
 - the market share of the telecommunications corporation for which an exemption is proposed;
 - the extent of economic or regulatory barriers to entry;
 - the impact of potential competition, and
 - the type and degree of exemptions to this title that are proposed
- In determining if the proposed exemption is in the public interest, the commission shall consider, in addition to other relevant factors, the impact the proposed exemption would have on captive customers of the telecommunications corporation.
- (a) The commission shall approve or deny any application for exemption under this section within 240 days, except that the commission may by order defer action for an additional 30-day period.
- If the commission has not acted on any application within the permitted time period, the application is considered granted.

History: C. 1953, 54-8b-3, enacted by L. 1985, ch. 257, § 1; 1990, ch. 29, § 2; 1995, ch. 269, § 10.

NOTES TO DECISIONS

ANALYSIS

One-way paging services
Scope of chapter

One-way paging services.

The commission's decision construing its authority to exclude one way paging services was

ational and reasonably based and represents a strict construction of the statutes authorizing jurisdiction. *Williams v. Public Serv. Comm'n*, 754 P.2d 41 (Utah 1988).

Scope of chapter.

This chapter does not independently authorize the commission to regulate telecommuni-

cations services, but merely authorizes it, under narrow circumstances, to exempt telecommunications services from otherwise authorized and legitimate regulation. *Williams v. Public Serv. Comm'n*, 754 P.2d 41 (Utah 1988).

54-8b-3.1, 54-8b-3.2. Repealed.

Repeals. — Laws 1995, ch. 269, § 15 repeals §§ 54-8b-3.1 and 54-8b-3.2, as enacted by Laws 1990, ch. 29, §§ 3 and 4, regulating new products or services and providing for recovering

the cost of access services, effective May 1, 1995. For present comparable provisions, see §§ 54-8b-2(9) and 54-8b-2.3.

54-8b-3.3. Services which must be offered on a nondiscriminatory basis — Tariffed public telecommunications services and price-regulated services to be cost-based — Packaged services — Price floor for all services — Quality of service standards.

(1) As used in this section, "cost-based" means that the prices for the telecommunications services shall be established after taking into consideration the total service long-run incremental cost of providing the service. The term "cost-based" does not prevent the establishment of prices that promote the universal availability of service in the state.

(2) Notwithstanding any other provision of this chapter:

(a) no telecommunications corporation with more than 30,000 access lines in the state and which provides a tariffed public telecommunications service or a price-regulated service shall:

(i) as to the pricing and provisioning of the tariffed public telecommunications service or price-regulated service, make or grant any undue or unreasonable preference or advantage to any person, corporation, or locality; or

(ii) in providing services which utilize the local exchange network:

(A) make or give any undue or unreasonable preference or advantage to any person, corporation, or locality; or

(B) subject any person, corporation, or locality to any undue or unreasonable prejudice or disadvantage;

(b) tariffed public telecommunications services and price-regulated services provided by a telecommunications corporation with more than 30,000 access lines in the state shall be nondiscriminatory, cost-based, and subject to resale as determined by the commission; and

(c) tariffed public telecommunications services and price-regulated services may be packaged with other services, so long as they are also offered on a separate, unbundled basis.

(3) An incumbent telephone corporation may not price any public telecommunications service at a level which is less than the sum of:

(a) the total service long-run incremental cost of nonessential facilities used to provide the public telecommunications service in a particular geographic area; and

(b) the price of essential facilities used to provide the public telecommunications service in a particular defined geographic area.

(4) Subsection (3) does not require that the price of residential telephone service which is priced below its total service long-run incremental cost on May 1, 1995, be increased. However, the price of any service that is below its total service long-run incremental cost may be increased annually as provided in Section 54-8b-2.4.

(5) The commission shall examine the total service long-run incremental cost studies of an incumbent telephone corporation's public telecommunications services as needed to insure compliance with this section.

(6) (a) In order to promote continued investment in the public telecommunications network by incumbent telephone corporations and to improve the quality of service for end users in areas where competition has not developed, by September 30, 2000, the commission shall adopt rules governing service quality standards to end users for all tariffed public telecommunications services.

(b) The commission shall have the authority to enforce the rules adopted under this Subsection (6) by granting billing credits to the affected end user where the noncompliance is for reasons within the incumbent telephone corporation's control.

(c) The commission shall report annually to the Legislature concerning investment by incumbent telephone corporations in the public telecommunications network in their service areas and the quality of service to end users of tariffed public telecommunications services.

(d) An incumbent telephone corporation with less than 30,000 access lines in the state is exempt from this Subsection (6).

History: C. 1953, 54-8b-3.3, enacted by L. 1990, ch. 29, § 5; 1995, ch. 269, § 11; 2000, ch. 291, § 4.

Amendment Notes. — The 2000 amendment, effective May 1, 2000, in Subsection (4)

substituted "does not require that the price of" for "does not apply to," added "be increased," and made a stylistic change, and added Subsection (6).

NOTES TO DECISIONS

Cited in *Stewart v. Utah Pub. Serv. Comm'n*, 885 P.2d 759 (Utah 1994).

54-8b-4. Repealed.

Repeals. — Laws 1995, ch. 269, § 15 repeals § 54-8b-4, as last amended by Laws 1987, ch. 161, § 171, relating to commission orders ex-

empting services from requirements relating to rates, tariffs, or fares, effective May 1, 1995. For comparable provisions, see § 54-8b-4.5.

54-8b-4.5. Commission order — Negotiated provisions of services — Contracts under this section.

(1) (a) The commission may enter an order partially or wholly exempting any public telecommunications service from any requirement of this title relating to rates, tariffs, or fares.

(b) The commission may authorize the provision of all or any portion of a public telecommunications service under stated or negotiated terms to any person that is committed to the acquisition of comparable telecommuni-

nications services from an alternative source of supply through construction, lease, or any other form of acquisition.

(2) An incumbent telephone corporation may negotiate with the person or entity within the incumbent telephone corporation's service territory for the provision of retail end user public telecommunications services without regard to the provisions of any tariffs on file and approved by the commission, or any price list or competitive contract filed under Section 54-8b-2.3 with the commission but any rate, toll, fare, rental, charge, or classification of service in such contracts shall comply with Subsection 54-8b-3.3(3).

(3) (a) Within ten days after the conclusion of the negotiations and prior to the execution of a contract under this section, the incumbent telephone corporation shall file with the commission the proposed final agreements and other evidence of the public telecommunications services to be provided, together with the charges and other conditions of the service.

(b) (i) The commission may approve or deny an application, or begin adjudicative proceedings to consider approval of a contract under this section within 30 days of the filing of the application by the incumbent telephone corporation.

(ii) If the commission begins adjudicative proceedings, the contract is effective when the commission orders that it is effective.

(iii) If the commission fails to approve a contract under this section, or fails to begin adjudicative proceedings within 30 days, the final contract is effective.

(c) In determining whether or not to approve a contract under this section, the commission shall consider all relevant factors, including, whether or not the contract for any rate, toll, fare, rental, charge, or classification of service:

(i) complies with Subsection 54-8b-3.3(3);

(ii) provides for adequate service at just and reasonable rates.

(d) After a contract under this section has become effective, if the incumbent telephone corporation is not subject to maximum price regulation for tariffed public telecommunications services under Section 54-8b-2.4, the commission shall in the next general rate case for that incumbent telephone corporation:

(i) review the contract for consistency with the factors stated in this subsection; and

(ii) make any adjustment in its rate order, including retroactive adjustments, that are necessary to avoid cross subsidization from other regulated intrastate telecommunications services.

(4) Any incumbent telephone corporation that provides public telecommunications services pursuant to a contract under this section may not offer the services under contract in a manner that unfairly discriminates between similarly situated customers.

(5) Subject to Subsection (4), terms and conditions offered in contracts under this section that are different from tariff terms and conditions for the same services are not considered discriminatory under Section 54-3-8 and Subsection 54-8b-3.3(2).

History: C. 1953, 54-8b-4.5, enacted by L. 1997, ch. 88, § 2.

Effective Dates. — Laws 1997, ch. 88 be-

came effective on May 5, 1997, pursuant to Utah Const., Art. VI, Sec. 25.

54-8b-5. Repealed.

Repeals. — Laws 1995, ch. 269, § 15 repeals 161, § 172, requiring notice of applications for § 54-8b-5, as last amended by Laws 1987, ch. approval of contracts, effective May 1, 1995.

54-8b-6. Prohibition on subsidization of telecommunications services.

A telecommunications corporation providing intrastate public telecommunications services may not subsidize its intrastate telecommunications services which are exempted from regulation or offered pursuant to a price list or competitive contract under authority of this chapter with proceeds from its other intrastate telecommunications services not so exempted or made subject to a price list or competitive contract. Similarly, proceeds from intrastate telecommunications services which are exempted from regulation or offered pursuant to a price list or competitive contract as authorized by this chapter may not subsidize other intrastate telecommunications services not so exempted or made subject to a price list or competitive contract.

History: C. 1953, 54-8b-6, enacted by L. 1985, ch. 257, § 1; 1995, ch. 269, § 12.

54-8b-7. Continuous jurisdiction of commission — Orders.

The commission shall retain continuous jurisdiction over every telecommunications corporation or public telecommunications service exempted under this chapter and may exercise any statutory grant of power pertaining thereto, including the power to revoke or modify any order approving an exemption from regulation. The commission may, after notice and hearing, revoke or modify an order approving exemption, if after considering the factors in Subsection 54-8b-3(5), the commission finds such modification or revocation to be in the public interest.

History: C. 1953, 54-8b-7, enacted by L. 1985, ch. 257, § 1; 1992, ch. 30, § 96.

54-8b-8. Antitrust and restraint of trade laws not affected by chapter.

Nothing in this chapter shall in any way preempt, modify, exempt, abrogate, or otherwise affect any right, cause of action, liability, duty, or obligation arising from any federal, state, or local law governing unfair business practices or antitrust, restraint of trade, or other anti-competitive activity.

History: C. 1953, 54-8b-8, enacted by L. 1985, ch. 257, § 1.

54-8b-9. Commission's jurisdiction under other provisions of title not enlarged or reduced by chapter.

(1) **Nothing** in this chapter shall be construed to enlarge or reduce the commission's jurisdiction over the services and entities for which jurisdiction is provided or **excluded** by other provisions of this title.

(2) **Nothing** in this chapter shall be construed to enlarge the commission's jurisdiction over:

(a) providers of:

(i) cellular or wireless telecommunications services; or

(ii) the one-way transmission to subscribers of video programming and the subscriber interaction, if any, which is required for the selection of the video programming; or

(b) telecommunications companies classified as cooperatives.

(3) **Nothing** in this chapter shall diminish the commission's authority to regulate the quality of telecommunications services provided by telecommunications corporations.

History: C. 1953, 54-8b-9, enacted by L. 1985, ch. 257, § 1; 1995, ch. 269, § 13.

54-8b-10. Imposing a surcharge to provide hearing and speech impaired persons with telecommunication devices — Definitions — Procedures for establishing program — Surcharge — Administration and disposition of surcharge moneys.

(1) As used in this section:

(a) "Certified deaf or severely hearing or speech impaired person" means any state resident who is so certified by a licensed physician, otolaryngologist, speech language pathologist, audiologist, or qualified state agency and who also qualifies for assistance under any low income public assistance program administered by a state agency.

(b) "Telecommunication device" means any mechanical telephone adaptation device which enables a deaf or severely hearing or speech impaired person to use the telephone and which includes, but is not limited to:

(i) telecommunication devices for the deaf (TDD);

(ii) telephone amplifiers;

(iii) telephone signal devices;

(iv) artificial larynxes; and

(v) adaptive equipment for TDD keyboard access.

(2) The commission shall hold hearings to establish a program whereby any certified deaf or severely hearing or speech impaired customer of a telephone corporation which provides service through a local exchange may obtain a telecommunication device capable of serving the customer at no charge to him beyond the rate for basic service.

(3) The program shall provide a dual party relay system using third party intervention to connect a certified deaf or severely hearing or speech impaired person with a normal hearing person by way of telecommunication devices designed for that purpose.

(4) The commission shall impose a surcharge on each residence and business access line of each customer to the local exchange of any telephone

corporation providing such lines in this state to cover the costs of the program. The commission shall establish by rule the amount to be charged, which may not exceed 25 cents per residence and business access line. The telephone corporation shall collect the surcharge from its customers and transfer the money collected to the commission under rules adopted by the commission. The surcharge shall be separately identified on customer bills.

(5) Any money collected from the surcharge imposed under Subsection (4) shall be deposited in the state treasury as nonlapsing dedicated credits to be administered as determined by the Public Service Commission. These dedicated credits may be used only:

(a) for the purchase, maintenance, repair, and distribution of the devices for telecommunication;

(b) for the acquisition, operation, maintenance, and repair of a dual party relay system;

(c) to reimburse telephone corporations for the expenses incurred in collecting and transferring to the commission the surcharge imposed by the commission;

(d) for the general administration of the program; and

(e) to train persons in the use of the devices.

(6) The telephone surcharge need not be collected by a local exchange company if the amount collected would be less than the actual administrative costs of the collection. In that case, the local exchange company shall submit to the commission, in lieu of the revenue from the surcharge collection, a breakdown of the anticipated costs and the expected revenue from the collection, showing that the costs exceed the revenue.

(7) The commission shall solicit the advice, counsel, and physical assistance of severely hearing or speech impaired persons and the organizations serving them in the design and implementation of the program.

History: C. 1953, 54-8b-10, enacted by L. 1987, ch. 185, § 1; 1989, ch. 159, § 1; 1990, ch. 150, § 1; 1990, ch. 183, § 20; 1991, ch. 2, § 1; 1991, ch. 223, § 1; 1994, ch. 292, § 1; 1997, ch. 174, § 50; 1997, ch. 375, § 281.

Amendment Notes. — The 1997 amendments by ch. 174 and by ch. 375, effective July 1, 1997, both substituted "a state agency" for "the Department of Human Services" in Subsection (1)(a).

54-8b-11. Establishing just and reasonable rates.

In administering this title, the commission shall endeavor to make available high-quality, universal telecommunications services at just and reasonable rates for all classes of customers throughout this state.

History: C. 1953, 54-8b-11, enacted by L. 1989, ch. 96, § 2.

NOTES TO DECISIONS

Cited in Stewart v. Utah Pub. Serv. Comm'n, 885 P.2d 759 (Utah 1994)

54-8b-12. Repealed.

Repeals. — Laws 2000, ch 291, § 5 repeals § 54-8b-12, as last amended by Laws 1997, ch 122, § 2, establishing a trust fund to maintain the universal availability of intrastate telecommunications services at just and reasonable

rates, effective May 1, 2000. Laws 2000 ch 352, § 36 also repeals this section, that repeal would have been effective July 1, 2001, if not for the earlier repeal by ch 291

54-8b-13. Rules governing operator assisted services [Effective until July 1, 2001].

(1) The commission shall make rules to implement the following requirements pertaining to the provision of operator assisted services

(a) Rates, surcharges, terms, or conditions for operator assisted services shall be provided to customers upon request without charge

(b) A customer shall be made aware, prior to incurring any charges, of the identity of the operator service provider handling the operator assisted call by a form of signage placed on or near the telephone or by verbal identification by the operator service provider

(c) Any contract between an operator service provider and an aggregator shall contain language which assures that any person making a telephone call on any telephone owned or controlled by the aggregator or operator service provider can access

(i) where technically feasible, any other operator service provider operating in the relevant geographic area, and

(ii) the public safety emergency telephone numbers for the jurisdiction where the aggregator's telephone service is geographically located

(d) No operator service provider shall transfer a call to another operator service provider unless that transfer is accomplished at, and billed from, the call's place of origin. If such a transfer is not technically possible, the operator service provider shall inform the caller that the call cannot be transferred as requested and that the caller should hang up and attempt to reach another operator service provider through the means provided by that other operator service provider

(2) (a) The Division of Public Utilities shall be responsible for enforcing any rule adopted by the commission under this section

(b) If the Division of Public Utilities determines that any person, or any officer or employee of any person, is violating any rule adopted under this section, the division shall serve written notice upon the alleged violator which

(i) specifies the violation,

(ii) alleges the facts constituting the violation, and

(iii) specifies the corrective action to be taken

(c) After serving notice as required in Subsection (b), the division may request the commission to issue an order to show cause. After a hearing, the commission may impose penalties and, if necessary, may request the attorney general to enforce the order in district court

(3) (a) Any person who violates any rule made under this section or fails to comply with any order issued pursuant to this section is subject to a penalty not to exceed \$2,000 per violation

(b) In the case of a continuing violation, each day that the violation continues constitutes a separate and distinct offense

(4) A penalty assessment under this section does not relieve the person assessed from civil liability for claims arising out of any act which was a violation of any rule under this section

Rules governing operator assisted services [Effective July 1, 2001].

(1) The commission shall make rules to implement the following requirements pertaining to the provision of operator assisted services

(a) Rates, surcharges, terms, or conditions for operator assisted services shall be provided to customers upon request without charge

(b) A customer shall be made aware, prior to incurring any charges, of the identity of the operator service provider handling the operator assisted call by a form of signage placed on or near the telephone or by verbal identification by the operator service provider

(c) Any contract between an operator service provider and an aggregator shall contain language which assures that any person making a telephone call on any telephone owned or controlled by the aggregator or operator service provider can access

(i) where technically feasible, any other operator service provider operating in the relevant geographic area and

(ii) the public safety emergency telephone numbers for the jurisdiction where the aggregator's telephone service is geographically located

(d) No operator service provider shall transfer a call to another operator service provider unless that transfer is accomplished at, and billed from, the call's place of origin. If such a transfer is not technically possible, the operator service provider shall inform the caller that the call cannot be transferred as requested and that the caller should hang up and attempt to reach another operator service provider through the means provided by that other operator service provider

(2) (a) The Office of the Public Advocate shall be responsible for enforcing any rule adopted by the commission under this section

(b) If the Office of the Public Advocate determines that any person or any officer or employee of any person, is violating any rule adopted under this section, the Office of the Public Advocate shall serve written notice upon the alleged violator which

(i) specifies the violation,

(ii) alleges the facts constituting the violation, and

(iii) specifies the corrective action to be taken

(c) After serving notice as required in Subsection (2)(b), the Office of the Public Advocate may request the commission to issue an order to show cause. After a hearing, the commission may impose penalties and, if necessary, may request the attorney general to enforce the order in district court

(3) (a) Any person who violates any rule made under this section or fails to comply with any order issued pursuant to this section is subject to a penalty not to exceed \$2,000 per violation

(b) In the case of a continuing violation, each day that the violation continues constitutes a separate and distinct offense

(4) A penalty assessment under this section does not relieve the person assessed from civil liability for claims arising out of any act which was a violation of any rule under this section

History: C. 1953, 54-8b-13, enacted by L. 1990, ch. 141, § 2; 2000, ch. 352, § 24.

Amendment Notes. — The 2000 amendment, effective July 1, 2000, substituted refer-

ences to the Office of the Public Advocate for references to the Division of Public Utilities, and made stylistic changes.

54-8b-14. Intrastate interexchange toll service prices.

(1) Prices for intrastate interexchange message toll services transmitted between two specific points shall be the same regardless of the point of origin.

(2) Subsection (1) applies only to services provided by telecommunications corporations subject to the jurisdiction of the commission.

History: C. 1953, 54-8b-14, enacted by L. 1995, ch. 269, § 14.

54-8b-15. Universal Public Telecommunications Service Support Fund — Established.

(1) For purposes of this section:

(a) "Basic telephone service" means local exchange service and may include such other functions and elements, if any, as the commission determines to be eligible for support by the fund.

(b) "Fund" means the Universal Public Telecommunications Service Support Fund established in this section.

(2) The commission shall establish an expendable trust fund known as the Universal Public Telecommunications Service Support Fund, which is to be implemented by January 1, 1998.

(3) The commission shall:

(a) institute a proceeding within 30 days of the effective date of this section to establish rules governing the administration of the fund; and

(b) issue those rules by October 1, 1997.

(4) The rules in Subsection (3) shall:

(a) include rules governing the mechanics of phasing out the trust fund established under Section 54-8b-12;

(b) specify the relationship between the payments made to the trust fund in Section 54-8b-12 and the payments made to the fund established in this section; and

(c) be consistent with the Federal Telecommunications Act.

(5) Operation of the fund shall be nondiscriminatory and competitively and technologically neutral in the collection and distribution of funds, neither providing a competitive advantage for, nor imposing a competitive disadvantage upon, any telecommunications provider operating in the state.

(6) The fund shall be designed to:

(a) promote equitable cost recovery of basic telephone service through the imposition of just and reasonable rates for telecommunications access and usage; and

(b) preserve and promote universal service within the state by ensuring that customers have access to affordable basic telephone service.

(7) To the extent not funded by a federal universal service fund or other federal jurisdictional revenues or by the fund established pursuant to Section 54-8b-12, the fund shall be used to defray the costs, as determined by the

commission, of any qualifying telecommunications corporation in providing public telecommunications services to:

(a) customers that qualify for a commission-approved lifeline program; and

(b) customers, where the basic telephone service rate considered affordable by the commission in a particular geographic area is less than the costs, as determined by the commission for that geographic area, of basic telephone service.

(8) The fund shall be portable among qualifying telecommunications corporations. Requirements to qualify for funds under this section shall be defined by rules established by the commission.

(9) As necessary to accomplish the purposes of this section, the fund shall provide a mechanism for specific, predictable, and sufficient funds in addition to those provided under the federal universal service fund.

(10) (a) Each telecommunications corporation that provides intrastate public telecommunication service shall contribute to the fund on an equitable and nondiscriminatory basis.

(b) For purposes of funding the fund, the commission shall have the authority to require all corporations that provide intrastate telecommunication services in this state to contribute monies to the fund through explicit charges determined by the commission.

(c) Any charge in Subsection (b) shall not apply to wholesale services, including access and interconnection. Charges associated with being a provider of public telecommunications service shall be in the form of end-user surcharges applied to intrastate retail rates.

(d) In establishing any surcharge under this section, the commission is not limited by the restrictions in Subsection 54-8b-12(2).

(11) Nothing in this section shall be construed to enlarge or reduce the commission's jurisdiction or authority, as provided in other provisions of this title.

(12) Any telecommunications corporation failing to make contributions to this fund or failing to comply with the directives of the commission concerning its books, records, or other information required to administer this section shall be subject to applicable penalties.

(13) The commission shall have a bill prepared for the 1998 General Session of the Legislature to place in statute as much of the regulation implemented by rule pursuant to the act the commission believes is practicable.

History: C. 1953, 54-8b-15, enacted by L. 1997, ch. 122, § 3. became effective on May 5, 1997, pursuant to Utah Const. Art. VI, Sec. 25

Effective Dates. -- Laws 1997, ch. 122

54-8b-16. Public Service Commission authority to enforce interconnection service quality standards and interconnection agreements — Grounds for filing complaint.

(1) For purposes of this section, "interconnection service quality standards" means specific, measurable criteria that shall be applied to a telecommunications corporation, including obligations pursuant to Section 251 of the Federal

Telecommunications Act, regarding the telecommunications corporation's provision of or request for:

- (a) interconnection services;
- (b) services for resale;
- (c) unbundled network elements; and
- (d) access to operations support systems that support those services and elements.

(2) To serve the public interest and to enable the development and growth of competition within the telecommunications market in the state, the commission shall, by order when considered necessary by the commission, enforce:

- (a) rules regarding interconnection service quality standards adopted by the commission under authority of this chapter;
- (b) a commission approved interconnection agreement pursuant to Sections 251 and 252 of the Federal Telecommunications Act; and
- (c) a statement of generally available terms under Section 252(f) of the Federal Telecommunications Act.

(3) An aggrieved party may file a complaint under Subsection 54-8b-2.2(1)(e) with the commission for a violation of:

- (a) the terms of the commission's interconnection service quality rules;
- (b) the terms or conditions of an interconnection agreement;
- (c) a statement of generally available terms; or
- (d) a telecommunications corporations' obligations under the Federal Telecommunications Act.

(4) In a proceeding described in Subsection (3), the commission shall have the power to enforce:

- (a) the terms of the interconnection agreement;
- (b) the commission's interconnection service quality rules;
- (c) the statement of generally available terms; or
- (d) the telecommunications corporation's obligations pursuant to the Federal Telecommunications Act.

History: C. 1953, 54-8b-16, enacted by L. 1998, ch. 96, § 1.

Federal Law. — Sections 251 and 252 of the Federal Telecommunications Act, cited throughout this section, are compiled as 47 U.S.C. §§ 251 and 252.

Effective Dates. — Laws 1998, ch. 96 became effective on May 4, 1998, pursuant to Utah Const., Art. VI, Sec. 25

54-8b-17. Procedures for enforcement of interconnection service quality — Penalties for violation — Funds collected [Effective until July 1, 2001].

(1) Proceedings under Subsection 54-8b-2.2(1)(e) shall be conducted in accordance with the following procedure:

(a) The complaint shall be served upon the defendant telecommunications corporation and filed with the commission. A copy of the complaint shall also be served upon the Division of Public Utilities.

(b) An answer or other responsive pleading to the complaint shall be filed with the commission not more than ten days after receipt of service of the complaint. Copies of the answer or responsive pleading shall be served on the complainant and the Division of Public Utilities.

(c) A prehearing conference shall be held not later than ten days after the complaint is filed.

(d) (i) The commission shall commence a hearing on the complaint not later than 25 days after the complaint is filed, unless the commission finds that extraordinary conditions exist that warrant postponing the hearing date, in which case the commission shall commence the hearing as soon as practicable.

(ii) Parties shall be entitled to present evidence as provided by the commission's rules.

(e) The commission shall take final action on a complaint not more than 45 days after the complaint is filed unless:

(i) the commission finds that extraordinary conditions exist that warrant extending final action, in which case the commission shall take final action as soon as practicable; or

(ii) the parties agree to an extension of final action by the commission.

(2) The commission shall have the enforcement powers listed in Subsection (3) if, in the proceeding, the commission finds that:

(a) the telecommunications corporation has violated the terms of the commission's interconnection service quality rules;

(b) the telecommunications corporation has breached its obligations under the provisions of the Federal Telecommunications Act;

(c) either party to an approved interconnection agreement has violated the terms of the agreement; or

(d) either party has violated the terms of a statement of generally available terms.

(3) If the commission makes any of the findings described in Subsection (2), the commission shall:

(a) order the telecommunications corporation to:

(i) remedy the violation; and

(ii) comply, as applicable, with the terms of the commission's interconnection service quality rules, the interconnection agreement, or statement of generally available terms;

(b) if considered appropriate by the commission, prescribe the specific actions that the telecommunications corporation must take to remedy its violation, including a time frame for compliance and the submission of a plan to prevent future violations;

(c) if considered appropriate by the commission, impose a penalty on the defendant telecommunications corporation subject to the following:

(i) if the violation is of the duties imposed under Section 54-8b-2.2 or 54-8b-16, the commission may impose a penalty for such violation as provided in Section 54-7-25; or

(ii) if the violating telecommunications corporation is other than an incumbent telephone corporation with fewer than 50,000 access lines in this state, and the violation is of a duty imposed under an interconnection agreement, a statement of generally available terms, or the obligations of Section 251 of the Federal Telecommunications Act, the commission may impose a penalty subject to the following:

(A) if the commission finds that the violation was willful or intentional, the penalty may be in an amount of up to \$5,000 per day and the period for which the penalty is levied shall commence on the date the commission finds the violation to have first occurred through and including the date the violation is corrected; or

(B) if the commission finds that the violation was not willful or intentional, the penalty may be in an amount prescribed by Section 54-7-25 and the period for which the penalty is levied shall commence on the day after the deadline for compliance in the commission's order.

(4) (a) The commission shall have the authority, on its own or at the request of the injured telecommunications corporation, to investigate a party's compliance with the commission's order under Subsection (3)(c)(ii).

(b) If corrective or remedial action acceptable to the commission is not completed:

(i) 45 days after the deadline set by the commission, the commission may increase the penalty up to \$10,000 per violation per day for a willful or intentional violation; or

(ii) 90 days after the deadline set by the commission, the commission may increase the penalty up to \$4,000 per violation per day for a violation that is not willful or intentional.

(5) (a) The penalty under Subsection (3)(c) shall be in addition to, and not in lieu of, civil damages or other remedies that may be available to the injured party.

(b) In determining the amount of the penalty or the amount agreed to in compromise, the commission shall consider:

(i) the appropriateness of the penalty to the size of the violating party;

(ii) the gravity of the violation;

(iii) the good faith of the defendant telecommunications corporation in attempting to achieve compliance after notification of the violation;

(iv) the impact of the violation to the establishment of competition; and

(v) the actual economic harm incurred by the plaintiff telecommunications corporation.

(c) Each day of a continuing violation or a failure to comply is a separate offense for purposes of levying a penalty under this section.

(6) All funds collected under this section shall go into the Universal Public Telecommunications Service Support Fund established under Section 54-8b-15, and shall be in addition to any contributions required of a telecommunications corporation under that section.

Procedures for enforcement of interconnection service quality — Penalties for violation — Funds collected [Effective July 1, 2001].

(1) Proceedings under Subsection 54-8b-2.2(1)(e) shall be conducted in accordance with the following procedure:

(a) The complaint shall be served upon the defendant telecommunications corporation and filed with the commission. A copy of the complaint shall also be served upon the Office of the Public Advocate.

(b) An answer or other responsive pleading to the complaint shall be filed with the commission not more than ten days after receipt of service of the complaint. Copies of the answer or responsive pleading shall be served on the complainant and the Office of the Public Advocate.

(c) A prehearing conference shall be held not later than ten days after the complaint is filed.

(d) (i) The commission shall commence a hearing on the complaint not later than 25 days after the complaint is filed, unless the commission finds that extraordinary conditions exist that warrant postponing the hearing date, in which case the commission shall commence the hearing as soon as practicable.

(ii) Parties shall be entitled to present evidence as provided by the commission's rules.

(e) The commission shall take final action on a complaint not more than 45 days after the complaint is filed unless:

(i) the commission finds that extraordinary conditions exist that warrant extending final action, in which case the commission shall take final action as soon as practicable; or

(ii) the parties agree to an extension of final action by the commission.

(2) The commission shall have the enforcement powers listed in Subsection (3) if, in the proceeding, the commission finds that:

(a) the telecommunications corporation has violated the terms of the commission's interconnection service quality rules;

(b) the telecommunications corporation has breached its obligations under the provisions of the Federal Telecommunications Act;

(c) either party to an approved interconnection agreement has violated the terms of the agreement; or

(d) either party has violated the terms of a statement of generally available terms.

(3) If the commission makes any of the findings described in Subsection (2), the commission shall:

(a) order the telecommunications corporation to:

(i) remedy the violation; and

(ii) comply, as applicable, with the terms of the commission's interconnection service quality rules, the interconnection agreement, or statement of generally available terms;

(b) if considered appropriate by the commission, prescribe the specific actions that the telecommunications corporation must take to remedy its violation, including a time frame for compliance and the submission of a plan to prevent future violations;

(c) if considered appropriate by the commission, impose a penalty on the defendant telecommunications corporation subject to the following:

(i) if the violation is of the duties imposed under Section 54-8b-2.2 or 54-8b-16, the commission may impose a penalty for such violation as provided in Section 54-7-25; or

(ii) if the violating telecommunications corporation is other than an incumbent telephone corporation with fewer than 50,000 access lines in this state, and the violation is of a duty imposed under an interconnection agreement, a statement of generally available terms, or the obligations of Section 251 of the Federal Telecommunications Act, the commission may impose a penalty subject to the following:

(A) if the commission finds that the violation was willful or intentional, the penalty may be in an amount of up to \$5,000 per day and the period for which the penalty is levied shall commence on the date the commission finds the violation to have first occurred through and including the date the violation is corrected; or

(B) if the commission finds that the violation was not willful or intentional, the penalty may be in an amount prescribed by Section 54-7-25 and the period for which the penalty is levied shall commence on the day after the deadline for compliance in the commission's order.

(4) (a) The commission shall have the authority, on its own or at the request of the injured telecommunications corporation, to investigate a party's compliance with the commission's order under Subsection (3)(c)(ii).

(b) If corrective or remedial action acceptable to the commission is not completed:

(i) 45 days after the deadline set by the commission, the commission may increase the penalty up to \$10,000 per violation per day for a willful or intentional violation; or

(ii) 90 days after the deadline set by the commission, the commission may increase the penalty up to \$4,000 per violation per day for a violation that is not willful or intentional.

(5) (a) The penalty under Subsection (3)(c) shall be in addition to, and not in lieu of, civil damages or other remedies that may be available to the injured party.

(b) In determining the amount of the penalty or the amount agreed to in compromise, the commission shall consider:

(i) the appropriateness of the penalty to the size of the violating party;

(ii) the gravity of the violation;

(iii) the good faith of the defendant telecommunications corporation in attempting to achieve compliance after notification of the violation;

(iv) the impact of the violation to the establishment of competition; and

(v) the actual economic harm incurred by the plaintiff telecommunications corporation.

(c) Each day of a continuing violation or a failure to comply is a separate offense for purposes of levying a penalty under this section.

(6) All funds collected under this section shall go into the Universal Public Telecommunications Service Support Fund established under Section 54-8b-15, and shall be in addition to any contributions required of a telecommunications corporation under that section.

History: C. 1953, 54-8b-17, enacted by L. 1998, ch. 96, § 2; 2000, ch. 352, § 25.

Amendment Notes. — The 2000 amendment, effective July 1, 2001 substituted "Office of the Public Advocate" for "Division of Public Utilities" in Subsections (1)(a) and (1)(b).

Federal Law. — The Federal Telecommunications Act, cited throughout this section, is compiled as 47 U.S.C. § 151 et seq.

Effective Dates. — Laws 1998, ch. 96 became effective on May 4, 1998, pursuant to Utah Const., Art. VI, Sec. 25.

54-8b-18. Definitions — Unauthorized change of telecommunications provider — Unauthorized charges — Procedures for verification — Penalties — Authority of commission [Effective until July 1, 2001].

(1) For purposes of this section:

(a) "Agents" includes any person, firm, or corporation representing a

telecommunications corporation for purposes of requesting a change in a subscriber's telecommunications provider, but does not include a local service provider when executing a request submitted by another service provider or its agents.

(b) "Freeze" means a directive from a subscriber to retain the provider of public telecommunications services selected by the subscriber until the subscriber provides authorization for a change to another provider of public telecommunications services through any means by which a freeze is implemented.

(c) "Small commercial subscriber" is a person or entity conducting a business, agriculture, or other enterprise in the state having less than five telecommunications lines.

(d) "Subscriber" means a corporation, person, or government, or a person acting legally on behalf of a corporation, person, or government who has purchased public telecommunications services from a telecommunications corporation.

(2) No telecommunications corporation or its agents shall make any change or authorize a different telecommunications corporation to make any change in the provider of any public telecommunications service to a subscriber unless it complies, at a minimum, with Subsections (2)(a) through (e). This Subsection (2) does not apply to a telecommunications corporation that effectuates a change in service provider pursuant to a change authorization submitted or requested by another telecommunications corporation.

(a) The telecommunications corporation or its agents shall, at a minimum, inform the subscriber of the nature, extent, and rates of the service being offered and any charges associated with the change.

(b) Notwithstanding Section 13-26-4, changes in provider of telecommunication service accomplished through telephone solicitation shall comply with the Telephone Fraud Prevention Act, Sections 13-26-2, 13-26-8, 13-26-10, and 13-26-11.

(c) For sales of residential service or small commercial subscriber service, the telecommunications corporation or its agents shall confirm that the subscriber is aware of any charges that the subscriber must pay associated with the change and that the subscriber authorizes the change of provider. The subscriber's authorization to change the provider shall be confirmed by any one of the following methods:

(i) obtaining the subscriber's written authorization;

(ii) having the subscriber's oral authorization verified by an independent third party; or

(iii) any means provided by rule of the Federal Communications Commission or the commission.

(d) If the subscriber is not an individual, an authorization shall be valid only if given by an authorized representative of the subscriber.

(e) (i) The written authorization to change the provider shall be signed by the subscriber and shall contain a clear, conspicuous, and unequivocal request by the subscriber for a change of telecommunications provider.

(ii) A written authorization is not valid if it is presented to the subscriber for signature in connection with a sweepstakes, game of chance, or any other means prohibited by commission rule.

- (iii) Nothing in this section shall be construed to prohibit any person from offering a premium, incentive, or a thing of value to another as consideration for authorizing a change of telecommunications service provider, provided that no element of chance or skill is associated with the offer of the premium, incentive, or thing of value or its receipt.
- (3) The confirmation by a third-party verifier shall, at a minimum:
 - (a) confirm the subscriber's identity with information unique to the customer, unless the customer refuses to provide identifying information, then that fact shall be noted;
 - (b) confirm that the subscriber agrees to the requested change in telecommunications service providers; and
 - (c) confirm that the subscriber has the authority to select the provider as the provider of that service.
- (4) A third-party verifier shall meet each of the following criteria:
 - (a) any criteria for third-party verifiers set by the Federal Communications Commission;
 - (b) not be directly or indirectly managed, controlled, directed, or owned wholly or in part:
 - (i) by the telecommunications corporation or its agents that seek to provide the telecommunications service or by any corporation, firm, or person who directly or indirectly manages, controls, directs, or owns more than 5% of the telecommunications corporation; or
 - (ii) by the marketing entity that seeks to market the telecommunications service or by any corporation, firm, or person who directly or indirectly manages, controls, directs, or owns more than 5% of the marketing entity;
 - (c) operate from facilities physically separated from:
 - (i) those of the telecommunications corporation or its agents that seek to provide the subscriber's telecommunications service; or
 - (ii) those of the marketing entity that seeks to market a telecommunications service to the subscriber; and
 - (d) not derive commissions or compensation based upon the number of change authorizations verified.
- (5) A telecommunications corporation or its agents seeking to verify the change authorization shall connect the subscriber to the third-party verifier or arrange for the third-party verifier to call the subscriber to verify the change authorization.
- (6) A third-party verifier that obtains the subscriber's oral verification regarding the change shall record that verification by obtaining appropriate verification data.
- (7) (a) The record verifying a subscriber's change of provider shall be available to the subscriber upon request.
 - (b) Information obtained from the subscriber through verification may not be used for any other purpose.
 - (c) Any intentional unauthorized release of the information in Subsection (7)(b) is grounds for penalties or other action by the commission or remedies provided by law to the aggrieved subscriber against the telecommunications corporation, third-party verifier, their agents, or their employees who are responsible for the violation.
- (8) The third-party verification shall occur in the same language as that in which the change was solicited.

- (9) The verification requirements described in this section shall apply to all changes in the provider of any public telecommunications service.
- (10) The commission may promulgate rules:
 - (a) necessary to implement this section;
 - (b) consistent with any rules promulgated by the Federal Communications Commission; and
 - (c) in a nondiscriminatory and competitively neutral manner.
- (11) (a) Each subscriber may elect to require the telecommunications corporation providing the subscriber's local exchange service to implement a freeze until the subscriber provides authorization for a change to another provider of public telecommunications services.
 - (b) Once a subscriber has elected the freeze option under Subsection (11)(a), the telecommunications corporation providing the subscriber's local exchange service may not process a request to change the subscriber to another provider of telecommunications services without prior authorization directly from the subscriber.
- (12) (a) Whenever the subscriber's provider of a telecommunications service changes, the new provider shall:
 - (i) retain a record of the verified change authorization consistent with requirements of the Federal Communications Commission or rules issued by the commission; and
 - (ii) be responsible for providing a conspicuous notice of the change within 30 days of the effective date of the change of service.
- (b) At a minimum, the notice in Subsection (12)(a)(ii) shall identify the new provider, contain a general description of the service and price, and provide information necessary for the subscriber to have questions answered or to rescind the change.
- (13) Any bill shall identify each telecommunications service provider of telecommunication service for which billing is rendered.
- (14) (a) Any person or provider of telecommunications service inadvertently or knowingly designating or changing the subscriber's telecommunications service provider in violation of this section shall refund to the subscriber any amounts required by the rules of the Federal Communications Commission and the commission.
 - (b) The unauthorized provider in Subsection (14)(a) additionally shall:
 - (i) bear all costs of restoring the customer to the service of the subscriber's original service provider; and
 - (ii) pay to any other telecommunications provider any fees set by the commission for the designation or change.
- (15) Proceedings for violations of this section may be commenced by request for agency action filed with the commission by a subscriber, a telecommunications corporation, the Division of Public Utilities, or by the commission on its own motion.
- (16) Any telecommunications corporation, its agents, or a third-party verifier who violates this section or rules adopted to implement this section shall be subject to the provisions of Sections 54-7-23 through 54-7-29.
- (17) The commission is granted authority to enforce provisions relating to an unauthorized telecommunication service provider change in interstate and intrastate telecommunication service involving telecommunications corporations operating in the state.

Definitions — Unauthorized change of telecommunications provider — Unauthorized charges — Procedures for verification — Penalties — Authority of commission [Effective July 1, 2001].

(1) For purposes of this section:

(a) "Agents" includes any person, firm, or corporation representing a telecommunications corporation for purposes of requesting a change in a subscriber's telecommunications provider, but does not include a local service provider when executing a request submitted by another service provider or its agents.

(b) "Freeze" means a directive from a subscriber to retain the provider of public telecommunications services selected by the subscriber until the subscriber provides authorization for a change to another provider of public telecommunications services through any means by which a freeze is implemented.

(c) "Small commercial subscriber" is a person or entity conducting a business, agriculture, or other enterprise in the state having less than five telecommunications lines.

(d) "Subscriber" means a corporation, person, or government, or a person acting legally on behalf of a corporation, person, or government who has purchased public telecommunications services from a telecommunications corporation.

(2) No telecommunications corporation or its agents shall make any change or authorize a different telecommunications corporation to make any change in the provider of any public telecommunications service to a subscriber unless it complies, at a minimum, with Subsections (2)(a) through (e). This Subsection (2) does not apply to a telecommunications corporation that effectuates a change in service provider pursuant to a change authorization submitted or requested by another telecommunications corporation.

(a) The telecommunications corporation or its agents shall, at a minimum, inform the subscriber of the nature, extent, and rates of the service being offered and any charges associated with the change.

(b) Notwithstanding Section 13-26-4, changes in provider of telecommunications service accomplished through telephone solicitation shall comply with the Telephone Fraud Prevention Act, Sections 13-26-2, 13-26-8, 13-26-10, and 13-26-11.

(c) For sales of residential service or small commercial subscriber service, the telecommunications corporation or its agents shall confirm that the subscriber is aware of any charges that the subscriber must pay associated with the change and that the subscriber authorizes the change of provider. The subscriber's authorization to change the provider shall be confirmed by any one of the following methods:

- (i) obtaining the subscriber's written authorization;
- (ii) having the subscriber's oral authorization verified by an independent third party; or
- (iii) any means provided by rule of the Federal Communications Commission or the commission.

(d) If the subscriber is not an individual, an authorization shall be valid only if given by an authorized representative of the subscriber.

(e) (i) The written authorization to change the provider shall be signed by the subscriber and shall contain a clear, conspicuous, and unequivocal request by the subscriber for a change of telecommunications provider.

(ii) A written authorization is not valid if it is presented to the subscriber for signature in connection with a sweepstakes, game of chance, or any other means prohibited by commission rule.

(iii) Nothing in this section shall be construed to prohibit any person from offering a premium, incentive, or a thing of value to another as consideration for authorizing a change of telecommunications service provider, provided that no element of chance or skill is associated with the offer of the premium, incentive, or thing of value or its receipt.

(3) The confirmation by a third-party verifier shall, at a minimum:

(a) confirm the subscriber's identity with information unique to the customer, unless the customer refuses to provide identifying information, then that fact shall be noted;

(b) confirm that the subscriber agrees to the requested change in telecommunications service providers; and

(c) confirm that the subscriber has the authority to select the provider as the provider of that service.

(4) A third-party verifier shall meet each of the following criteria:

(a) any criteria for third-party verifiers set by the Federal Communications Commission;

(b) not be directly or indirectly managed, controlled, directed, or owned wholly or in part:

(i) by the telecommunications corporation or its agents that seek to provide the telecommunications service or by any corporation, firm, or person who directly or indirectly manages, controls, directs, or owns more than 5% of the telecommunications corporation; or

(ii) by the marketing entity that seeks to market the telecommunications service or by any corporation, firm, or person who directly or indirectly manages, controls, directs, or owns more than 5% of the marketing entity;

(c) operate from facilities physically separated from:

(i) those of the telecommunications corporation or its agents that seek to provide the subscriber's telecommunications service; or

(ii) those of the marketing entity that seeks to market a telecommunications service to the subscriber; and

(d) not derive commissions or compensation based upon the number of change authorizations verified.

(5) A telecommunications corporation or its agents seeking to verify the change authorization shall connect the subscriber to the third-party verifier or arrange for the third-party verifier to call the subscriber to verify the change authorization.

(6) A third-party verifier that obtains the subscriber's oral verification regarding the change shall record that verification by obtaining appropriate verification data.

(7) (a) The record verifying a subscriber's change of provider shall be available to the subscriber upon request

(b) Information obtained from the subscriber through verification may not be used for any other purpose.

(c) Any intentional unauthorized release of the information in Subsection (7)(b) is grounds for penalties or other action by the commission or remedies provided by law to the aggrieved subscriber against the telecommunications corporation, third-party verifier, their agents, or their employees who are responsible for the violation.

(8) The third-party verification shall occur in the same language as that in which the change was solicited.

(9) The verification requirements described in this section shall apply to all changes in the provider of any public telecommunications service.

(10) The commission may promulgate rules:

(a) necessary to implement this section;

(b) consistent with any rules promulgated by the Federal Communications Commission; and

(c) in a nondiscriminatory and competitively neutral manner.

(11) (a) Each subscriber may elect to require the telecommunications corporation providing the subscriber's local exchange service to implement a freeze until the subscriber provides authorization for a change to another provider of public telecommunications services.

(b) Once a subscriber has elected the freeze option under Subsection (11)(a), the telecommunications corporation providing the subscriber's local exchange service may not process a request to change the subscriber to another provider of telecommunications services without prior authorization directly from the subscriber.

(12) (a) Whenever the subscriber's provider of a telecommunications service changes, the new provider shall:

(i) retain a record of the verified change authorization consistent with requirements of the Federal Communications Commission or rules issued by the commission; and

(ii) be responsible for providing a conspicuous notice of the change within 30 days of the effective date of the change of service.

(b) At a minimum, the notice in Subsection (12)(a)(ii) shall identify the new provider, contain a general description of the service and price, and provide information necessary for the subscriber to have questions answered or to rescind the change.

(13) Any bill shall identify each telecommunications service provider of telecommunication service for which billing is rendered.

(14) (a) Any person or provider of telecommunications service inadvertently or knowingly designating or changing the subscriber's telecommunications service provider in violation of this section shall refund to the subscriber any amounts required by the rules of the Federal Communications Commission and the commission.

(b) The unauthorized provider in Subsection (14)(a) additionally shall:

(i) bear all costs of restoring the customer to the service of the subscriber's original service provider; and

(ii) pay to any other telecommunications provider any fees set by the commission for the designation or change.

(15) Proceedings for violations of this section may be commenced by request for agency action filed with the commission by a subscriber, a telecommunications corporation, the Office of the Public Advocate, or by the commission on its own motion.

(16) Any telecommunications corporation, its agents, or a third-party verifier who violates this section or rules adopted to implement this section shall be subject to the provisions of Sections 54-7-23 through 54-7-29.

(17) The commission is granted authority to enforce provisions relating to an unauthorized telecommunication service provider change in interstate and intrastate telecommunication service involving telecommunications corporations operating in the state.

History: C. 1953, 54-8b-18, enacted by L. 1999, ch. 113, § 1; 2000, ch. 352, § 26.

Amendment Notes. — The 2000 amendment, effective July 1, 2001, substituted "Office of the Public Advocate" for "Division of Public

Utilities" in Subsection (15).

Effective Dates. — Laws 1999, ch. 113 became effective on May 3, 1999, pursuant to Utah Const., Art. VI, Sec. 25.

CHAPTER 8c

HIGH VOLTAGE OVERHEAD LINES

Section	Definitions.	Section	Violation.
54-8c-1	Notification to public utility —	54-8c-4	Exemptions.
54-8c-2	Protective measures — Procedures — Payment.	54-8c-5	Association for mutual receipt of
54-8c-3	Information filed with county clerk.	54-8c-6	notification of activities close to high voltage overhead lines.

54-8c-1. Definitions.

As used in this chapter:

(1) "Authorized person" means an employee or agent:

(a) of a public utility that:

(i) generates, transmits, or delivers electricity; or

(ii) provides and whose work relates to communication services;

(b) of an industrial plant whose work relates to the electrical system of the industrial plant;

(c) of a cable television or communication services company, or of a contractor of cable television or communication services company, if specifically and expressly authorized by the owner of the poles to make cable television or communication services attachments; or

(d) of a state, county, or municipal agency which has or whose work relates to:

(i) overhead electrical lines;

(ii) overhead lighting systems;

(iii) authorized overhead circuit construction;

(iv) conductors on poles; or

(v) structures of any type.

(2) "Business day" means any day other than Saturday, Sunday, or a legal holiday.

(3) "High voltage" means voltage in excess of six hundred volts measured between:

(a) conductors; or

(b) a conductor and the ground

63-46b-16. Judicial review — Formal adjudicative proceedings.

(1) As provided by statute, the Supreme Court or the Court of Appeals has jurisdiction to review all final agency action resulting from formal adjudicative proceedings.

(2) (a) To seek judicial review of final agency action resulting from formal adjudicative proceedings, the petitioner shall file a petition for review of agency action with the appropriate appellate court in the form required by the appellate rules of the appropriate appellate court.

(b) The appellate rules of the appropriate appellate court shall govern all additional filings and proceedings in the appellate court.

(3) The contents, transmittal, and filing of the agency's record for judicial review of formal adjudicative proceedings are governed by the Utah Rules of Appellate Procedure, except that:

(a) all parties to the review proceedings may stipulate to shorten, summarize, or organize the record;

(b) the appellate court may tax the cost of preparing transcripts and copies for the record:

(i) against a party who unreasonably refuses to stipulate to shorten, summarize, or organize the record; or

(ii) according to any other provision of law.

(4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

(a) the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied;

(b) the agency has acted beyond the jurisdiction conferred by any statute;

(c) the agency has not decided all of the issues requiring resolution;

(d) the agency has erroneously interpreted or applied the law;

(e) the agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure;

(f) the persons taking the agency action were illegally constituted as a decision-making body or were subject to disqualification;

(g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;

(h) the agency action is:

(i) an abuse of the discretion delegated to the agency by statute;

(ii) contrary to a rule of the agency;

(iii) contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency; or

(iv) otherwise arbitrary or capricious.

History: C. 1953, 63-46b-16, enacted by L. 1987, ch. 161, § 272; 1988, ch. 72, § 26.

Cross-References. -- Review of proceed-

ings before State Tax Commission, jurisdiction and standard, §§ 59-1-601, 59-1-610

Rule R746-360. Universal Public Telecommunications Service Support Fund.

As in effect on January 1, 2001

Table of Contents

- R746-360-1. General Provisions.
- R746-360-2. Definitions.
- R746-360-3. Transition From 54-8b-12 to 54-8b-15.
- R746-360-4. Duties of Administrator.
- R746-360-5. Application of Fund Surcharges to Customer Billings.
- R746-360-6. Fund Remittances and Disbursements.
- R746-360-7. Eligibility for Fund Distributions.
- R746-360-8. Calculation of Fund Distributions in Non-rate-of-Return Regulated Incumbent Telephone Corporation Territories.
- R746-360-9. Calculation of Fund Distributions in Rate-of-Return Incumbent Telephone Corporation Territories.
- R746-360-10. One-Time Distributions From the Fund.
- R746-360-11. Altering the USF Charges and the End-User Surcharge Rates.
- R746-360-12. Support for Schools, Libraries, and Health Care Facilities. Calculation of Fund Distributions.
- KEY
- Date of Enactment or Last Substantive Amendment
- Authorizing, Implemented, or Interpreted Law

R746-360-1. General Provisions.

A. Authorization -- Section 54-8b-15 authorizes the Commission to establish an expendable trust fund, known as the Universal Public Telecommunications Service Support Fund, the "universal service fund," "USF" or the "fund," to promote equitable cost recovery and universal service by ensuring that customers have access to basic telecommunications service at just, reasonable and affordable rates, consistent with the Telecommunications Act of 1996.

B. Purpose -- The purposes of these rules are:

1. to govern the methods, practices and procedures by which:

a. the USF is created, maintained, and funded by end-user surcharges applied to retail rates paid by service end-users;

b. funds are collected for and disbursed from the USF to qualifying telecommunications corporations so that they will provide basic telecommunications service at just, reasonable and affordable rates; and,

2. to govern the relationship between the fund and the trust fund established under 54-8b-12,

and establish the mechanism for the phase-out and expiration of the latter fund.

C. Application of the Rules -- The rules apply to all retail providers that provide intrastate public telecommunications services.

R746-360-2. Definitions.

A. Affordable Base Rate (ABR) -- means the monthly per line retail rates, charges or fees for basic telecommunications service which the Commission determines to be just, reasonable, and affordable for a designated support area. The Affordable Base Rate shall be established by the Commission. The Affordable Base Rate does not include the applicable USF retail surcharge, municipal franchise fees, taxes, and other incidental surcharges.

B. Average Revenue Per Line -- means the average revenue for each access line computed by dividing the sum of all revenue derived from a telecommunications corporation's provision of public telecommunications services, including, but not limited to, revenues received from the provision of services in both the interstate and intrastate jurisdictions, whether designated "retail", "wholesale", or some other categorization, all revenues derived from providing network elements, services, functionalities, etc. required under the Federal Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 or the Utah Telecommunications Reform Act, Laws of Utah 1995, Chapter 269, all support funds received from the Federal Universal Service Support Fund, and each and every other revenue source or support or funding mechanism used to assist in recovering the costs of providing public telecommunications services in a designated support area by that telecommunications corporation's number of access lines in the designated support area.

C. Basic Telecommunications Service -- means a local exchange service consisting of access to the public switched network; touch-tone, or its functional equivalent; local flat-rated, unlimited usage, exclusive of extended area service; single-party service with telephone number listed free in directories that are received free; access to operator services; access to directory assistance, lifeline and telephone relay assistance; access to 911 and E911 emergency services; access to long-distance carriers; access to toll limitation services; and other services as may be determined by the Commission.

D. Designated Support Area -- means the geographic area used to determine USF support distributions. A designated support area, or "support area," need not be the same as a USF proxy model's geographic unit. The Commission will determine the appropriate designated support areas for determining USF support requirements. Unless otherwise specified by the Commission, the designated support area for a rate-of-return regulated incumbent telephone corporation shall be its entire certificated service territory located in the State of Utah.

E. Facilities-Based Provider -- means a telecommunications corporation that uses its own facilities, a combination of its own facilities and essential facilities or unbundled network elements purchased from another telecommunications corporation, or a telecommunications corporation which solely uses essential facilities or unbundled network elements purchased from another telecommunications corporation to provide public telecommunications services.

F. Geographic Unit -- means the geographic area used by a USF proxy cost model for calculating costs of public telecommunications services. The Commission will determine the appropriate geographic area to be used in determining public telecommunications service costs.

G. Net Fund Distributions -- means the difference between the gross fund distribution to which a qualifying telecommunications corporation is entitled and the gross fund surcharge revenues generated by that company, when the former amount is greater than the latter amount.

H. Net Fund Contributions -- means the difference between the gross fund distribution to which a qualifying telecommunications corporation is entitled and the gross fund surcharge revenues generated by that company, when the latter amount is greater than the former amount.

I. Retail Provider -- means telecommunications corporations, interexchange carriers, resellers, alternate operator service providers, commercial mobile radio service providers, radio common carriers, aggregators or any other person or entity providing telecommunications services that are used or consumed by an consumer or end-user.

J. Trust Fund -- means the Trust Fund established by 54-8b-12.

K. USF Proxy Model Costs -- means the total, jurisdictionally unseparated, cost estimate for public telecommunications services, in a geographic unit, based on the forward-looking, economic cost proxy model(s) chosen by the Commission. The level of geographic cost disaggregation to be used for purposes of assessing the need for and the level of USF support within a geographic unit will be determined by the Commission. These models shall be provided by the Commission by January 2, 2001.

L. Universal Service Fund (USF or fund) -- means the Universal Public Telecommunications Service Support Fund established by 54-8b-15 and set forth by this rule.

R746-360-3. Transition From 54-8b-12 to 54-8b-15.

A. Phase out of 54-8b-12 Trust Fund and Transfer of Trust Fund Funds -- In order to permit telecommunications corporations to make the transition to the fund created by 54-8b-15 and this rule:

1. The 54-8b-12 Trust Fund mechanisms shall continue until May 31, 1998, upon which date they shall cease. Funds derived from these funding mechanisms will be deposited in the USF.
2. Balances remaining in the 54-8b-12 Trust Fund as of June 1, 1998, plus remittances of any funds pursuant to the 54-8b-12 Trust Fund shall be transferred to the USF.

B. Two-Year Continuation of Equivalent Trust Fund Funding -- Upon written notification to the Commission, telecommunications corporations that received 54-8b-12 Trust Fund support in 1997 may elect to receive support equivalent to what they would have received from the 54-8b-12 Trust Fund rather than support pursuant to the 54-8b-15 USF. These companies may continue to receive this Trust Fund equivalent support until December 31, 1999. During this time period, these companies may elect to end this equivalent support and begin to receive support pursuant to the 54-8b-15 USF by submitting a written notification to the Commission 30 days prior to the beginning of the 54-8b-15 USF support. Funds for equivalent Trust Fund support will be provided from the USF.

R746-360-4. Duties of Administrator.

A. Selection of Administrator -- The Division of Public Utilities will be the fund administrator. If the Division is unable to fulfill that responsibility, the administrator, who must be a neutral third party, unaffiliated with any fund participant, shall be selected by the Commission.

B. Cost of Administration -- The cost of administration shall be borne by the fund; unless administered by a state agency.

C. Access to Books -- Upon reasonable notice, the administrator shall have access to the books of account of all telecommunications corporations and retail providers, which shall be used to verify the intrastate retail revenue assessed in an end-user surcharge, to confirm the level of eligibility for USF support and to ensure compliance with this rule.

D. Maintenance of Records -- The administrator shall maintain the records necessary for the operation of the USF and this rule.

E. Report Forms -- The administrator shall develop report forms to be used by telecommunications corporations and retail providers to effectuate the provisions of this rule and the USF. An officer of the telecommunications corporation or retail provider shall attest to and sign the reports to the administrator.

F. Administrator Reports -- The administrator shall file reports with the Commission containing information on the average revenue per line calculations, projections of future USF needs, analyses of the end-user surcharges and Affordable Base Rates, and recommendations for calculating them for the following 12-month period. The report shall include recommendations for changes in determining basic telecommunications service, designated support areas, geographic units, USF proxy cost models and ways to improve fund collections and distributions.

G. Annual Review -- The administrator, under the direction of the Commission, shall perform an annual review of fund recipients to verify eligibility for future support and to verify compliance with all applicable state and federal laws and regulations.

H. Proprietary Information -- Information received by the administrator which has been determined by the Commission to be proprietary shall be treated in conformance with Commission practices.

I. Information Requested -- Information requested by the administrator which is required to assure a complete review shall be provided within 45 days of the request. Failure to provide information within the allotted time period may be a basis for withdrawal of future support from the USF or other lawful penalties to be applied.

R746-360-5. Application of Fund Surcharges to Customer Billings.

A. Commencement of Surcharge Assessments -- Commencing June 1, 1998, end-user surcharges shall be the source of revenues to support the fund. Surcharges will be applied to intrastate retail rates, and shall not apply to wholesale services.

B. Surcharge Based on a Uniform Percentage of Retail Rates -- The retail surcharge shall be a uniform percentage rate, determined and reviewed annually by the Commission and billed and collected by all retail providers.

C. Surcharge -- The surcharge to be assessed beginning January 1, 2000, shall equal 0.67 percent of billed intrastate retail rates.

R746-360-6. Fund Remittances and Disbursements.

A. Remitting Surcharge Revenues --

1. Retail providers, not eligible for USF support funds, providing telecommunications services subject to USF surcharges shall collect and remit surcharge revenues to the Commission within 45 days after the end of each month.

2. Retail providers eligible for USF support funds shall make remittances as follows:

a. Prior to the end of each month, the fund administrator shall inform each qualifying telecommunications corporation of the estimated amount of support that it will be eligible to receive from the USF for that month.

b. Net fund contributions shall be remitted to the Commission within 45 calendar days after the end of each month. If the net amount owed is not received by that date, remedies, including withholding future support from the USF, may apply.

3. The Commission will forward remitted revenues to the Utah State Treasurer's Office for deposit in a USF account.

B. Distribution of Funds -- Net Fund distributions to qualifying telecommunications corporations for a given month shall be made 60 days after the end of that month, unless withheld for failure to maintain qualification or failure to comply with Commission orders or rules.

R746-360-7. Eligibility for Fund Distributions.

A. Qualification --

1. To qualify to receive USF support funds, a telecommunications corporation shall be designated an "eligible telecommunications carrier," pursuant to 47 U.S.C. Section 214(e), and shall be in compliance with Commission orders and rules. Each telecommunications corporation receiving support shall use that support only to provide basic telecommunications service and any other services or purposes approved by the Commission.

2. Additional qualification criteria for Incumbent telephone corporations - In addition to the qualification criteria of R746-360-7A.1.,

a. Non-rate-of-return Incumbent telephone corporations shall make Commission approved, aggregate rate reductions for public telecommunications services, provided in the State of Utah, equal to each incremental increase in USF distribution amounts received after December 1, 1999.

b. Rate-of-return Incumbent telephone corporations shall complete a Commission review of their revenue requirement and public telecommunications services' rate structure prior to any change in their USF distribution which differs from a prior USF distribution, beginning with the USF distribution for December, 1999.

B. Rate Ceiling -- To be eligible, a telecommunications corporation may not charge retail rates in excess of the Commission determined Affordable Base Rates for basic telecommunications service or vary from the terms and conditions determined by the Commission for other telecommunications services for which it receives Universal Service Fund support.

C. Lifeline Requirement -- A telecommunications corporation may qualify to receive distributions from the fund only if it offers Lifeline service on terms and conditions prescribed by the Commission.

D. Exclusion of Resale Providers -- Only facilities-based providers, will be eligible to receive support from the fund. Where service is provided through one telecommunications corporation's resale of another telecommunications corporation's service, support may be received by the latter only.

R746-360-8. Calculation of Fund Distributions in Non-rate-of-Return Regulated Incumbent Telephone Corporation Territories.

A. Use of Proxy Cost Models -- The USF proxy cost model(s) selected by the Commission and average revenue per line will be used to determine fund distributions within designated support areas.

B. Use of USF Funds -- Telecommunications corporations shall use USF funds to support each primary residential line in active service which it furnishes in each designated area.

C. Determination of Support Amounts --

1. Incumbent telephone corporation - Monies from the fund will equal the numerical difference between USF proxy model cost estimates and the product of the Incumbent telephone corporation's Average Revenue per line, for the designated support area, times the number of Incumbent telephone corporation's active primary residential access lines in the designated support area.

2. Telecommunications corporations other than Incumbent telephone corporations - Monies from the fund will equal the Incumbent telephone corporation's average primary residential access line support amount for the respective designated support area, determined by dividing the Incumbent telephone corporation's USF monies for the designated support area by the Incumbent telephone corporation's active primary residential access lines in the designated support area, times the eligible telecommunications corporation's number of active primary residential access lines.

D. Lifeline Support -- Eligible telecommunications corporations shall receive additional USF funds to recover any discount granted to lifeline customers, participating in a Commission approved Lifeline program, that is not recovered from federal lifeline support mechanisms.

E. Exemptions -- Telecommunications corporations may petition to receive an exemption for any provision of this rule or to receive additional USF support, for use in designated support areas, to support additional services which the Commission determines to be consistent with universal service purposes and permitted by law.

R746-360-9. Calculation of Fund Distributions in Rate-of-Return Incumbent

Telephone Corporation Territories.

A. Determination of Support Amounts --

1. Incumbent telephone corporation - Monies from the fund will equal the numerical difference between the Incumbent telephone corporation's total embedded costs of providing public telecommunications services, for a designated support area, less the product of the Incumbent telephone corporation's Average Revenue Per Line, for the designated support area, times the Incumbent telephone corporation's active access lines in the designated support area.

2. Telecommunications corporations other than incumbent telephone corporations - Monies from the fund will equal the respective Incumbent telephone corporation's average access line support amount for the designated support area, determined by dividing the Incumbent telephone corporation's USF monies for the designated support area by the Incumbent telephone corporation's active access lines in the designated support area, times the eligible telecommunications corporation's number of active access lines in the designated support area.

B. Lifeline Support -- Eligible telecommunications corporations shall receive additional USF funds to recover any discount granted to lifeline customers, participating in a Commission-approved Lifeline program, that is not recovered from federal lifeline support mechanisms.

C. Exemptions -- Telecommunications corporations may petition to receive an exemption for any provision of this rule or to receive additional USF support, for use in designated support areas, to support additional services which the Commission determines to be consistent with universal service purposes and permitted by law.

R746-360-10. One-Time Distributions From the Fund.

A. Applications for One-Time Distributions - - Telecommunications corporations or potential customers not presently receiving service may apply to the Commission for one-time distributions from the fund for extension of service to a customer, or customers, not presently served. These distributions are to be made only in extraordinary circumstances, when traditional methods of funding and service provision are infeasible.

1. In considering the one-time distribution application, the Commission will examine relevant factors including the type and grade of service to be provided, the cost of providing the service, the demonstrated need for the service, whether the customer is within the service territory of a telecommunications corporation, the provisions for service or line extension currently available, and whether the one-time distribution is in the public interest.

B. Maximum Amount -- The maximum one-time distribution will be no more than that required to make the net investment equivalent to the relevant proxy model cost estimate for non-rate-of-return regulated telecommunications corporations or the relevant cost estimate for rate-of-return regulated telecommunications corporations.

C. Impact of Distribution on Rate of Return Companies -- A one-time distribution from the fund shall be recorded on the books of a rate base, rate of return regulated LEC as an aid to construction and treated as an offset to rate base.

D. Notice and Hearing -- Following notice that a one-time distribution application has been filed, a LEC may request a hearing or seek to intervene to protect its interests

E Bidding for Unserved Areas -- A telecommunications corporation will be selected to serve in an unserved area on the basis of a competitive bid. The estimated amount of the one-time distribution will be considered in evaluating each bid. Fund distributions in that area will be based on the winning bid.

R746-360-11. Altering the USF Charges and the End-User Surcharge Rates.

The uniform surcharge shall be adjusted periodically to minimize the difference between amounts received by the fund and amounts disbursed.

R746-360-12. Support for Schools, Libraries, and Health Care Facilities. Calculation of Fund Distributions.

The Universal Service Fund rules for schools, libraries and health care providers, as prescribed by the Federal Communications Commission in Docket 96-45, 97-157 Sections X and XI, paragraphs 424 - 749, of Order issued May 8, 1996, and CFR Sections 54.500 through 54.623 inclusive, incorporated by this reference, is the prescribed USF method that shall be employed in Utah. Funding shall be limited to funds made available through the federal universal service fund program.

KEY

public utilities, telecommunications, universal service*

Date of Enactment or Last Substantive Amendment

December 7, 1999

Authorizing, Implemented, or Interpreted Law

54-7-25, 54-7-26, 54-8b-12, 54-8b-15

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Western Wireless Corporation
Petition for Preemption of
Statutes and Rules Regarding the
Kansas State Universal Service Fund
Pursuant to Section 253
of the Communications Act of 1934

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File No. CWD 98-90

MEMORANDUM OPINION AND ORDER

Adopted: August 18, 2000

Released: August 28, 2000

By the Commission: Commissioner Furchtgott-Roth concurring in part, dissenting in part, and issuing a statement.

I. INTRODUCTION

1. Kansas has enacted the Kansas Telecommunications Act (Kansas Act) and the Kansas Corporation Commission (KCC) has promulgated regulations to implement local exchange competition and promote universal service in the state. On July 20, 1998, Western Wireless Corporation (Western Wireless), a provider of commercial mobile radio service (CMRS) in Kansas, filed a Petition for Preemption asking the Commission to preempt those provisions of the Kansas Act and regulations that limited the ability of carriers other than incumbent local exchange carriers ("non-ILECs") to receive universal service support. Subsequent to Western Wireless' filing, the KCC adopted new regulations for determining and allocating universal service support that, among other things, make all such support fully portable among competing carriers in Kansas. With this Memorandum Opinion and Order, we therefore dismiss the Western Wireless petition as moot. However, in order to provide guidance on these critical universal service issues, which may well arise in other contexts, we briefly discuss certain concerns that similarly structured programs may easily run afoul of Section 253 of the Communications Act.

II. BACKGROUND

2. On May 17, 1996, Kansas enacted the Kansas Act to implement local exchange competition and promote universal service in that state.¹ Section 66-2005(c) of the Kansas Act requires all local exchange carriers in Kansas to reduce their intrastate access charges to interstate rate levels. The statute authorizes the KCC to offset the access charge and toll charge reductions required by the Kansas Act through rebalancing of local residential and business rates, with any remaining portion initially being paid out from the Kansas Universal Service Fund (KUSF or Fund).² Section 66-2008(a) of the Kansas Act states that "[t]he initial amount of the KUSF shall be comprised of local exchange carrier revenues

¹ K.S.A. 1996 Supp. 66-2001 *et seq.* The Kansas Act went into effect on July 1, 1996.

² K.S.A. 1996 Supp. 66-2005(c).

lost as a result of rate rebalancing" pursuant to section 66-2005(c) and that such revenues shall be recovered on a revenue-neutral basis.³ Section 66-2008(d) requires the KCC to periodically review whether changes in the cost of providing service justify modification of the KUSF, and, if so, modify the KUSF accordingly.⁴ Section 66-2008(b) also requires all telecommunications providers, including wireless providers, to contribute to the KUSF on an equitable and nondiscriminatory basis.⁵ Section 66-2008(c) states that distributions from the KUSF shall be made in a competitively neutral manner to qualified telecommunications public utilities, telecommunications carriers, and wireless telecommunications providers that are deemed eligible under section 214(e)(1) of the Communications Act by the KCC.⁶ Sections 66-2008(e) and (f) allow "[a]ny qualified telecommunications carrier, telecommunications public utility or wireless telecommunications service provider" to request supplemental funding from the KUSF.⁷

3. On December 27, 1996, the KCC issued an Order which, among other things, implemented the Kansas Act and established the KUSF.⁸ Pursuant to section 66-2008(a), the KCC initially sized the KUSF at \$111.6 million, the amount of revenues it found that the ILECs lost as a result of intrastate access rate reductions mandated by the Kansas Act.⁹ As explained by the KCC in its comments in this proceeding, the KUSF, at least initially, was comprised of two components -- a High Cost Funding program and a Rate Cut Funding program. Under the High Cost Funding program, all ETCs were eligible to receive support up to \$36.88 for each residential or single business line they serve in rural areas, defined by the KCC as exchange areas with 10,000 or fewer access lines.¹⁰ In addition, in

³ K.S.A. 1996 Supp. 66-2008(a).

⁴ K.S.A. 1996 Supp. 66-2008(d).

⁵ K.S.A. 1996 Supp. 66-2008(b). Wireless carriers, however, do not have to make contributions from the intrastate revenue derived from calls that originate and terminate entirely over a wireless network. K.S.A. 1996 Supp. 66-2008(b); *see also* Order No. 5, "Establishing Carrier Assessment Rate for Year 2000 KUSF Contributions," KCC Docket No. 00-GIMT-236-GIT at 10, ¶¶ 18-19 (January 19, 2000) (January 2000 KCC Order).

⁶ K.S.A. 1996 Supp. 66-2008(c). Under section 214(e)(1), 47 U.S.C. § 214(e)(1), carriers that are designated as eligible telecommunications carriers (ETCs) under section 214(e) shall be eligible to receive universal service support.

⁷ Section 66-2008(e) provides for supplemental funding based on an increase in a carrier's access lines. K.S.A. 1996 Supp. 66-2008(e). Section 66-2008(f) provides that the KCC may, at its discretion, provide supplemental funding for other reasons. K.S.A. 1996 Supp. 66-2008(f).

⁸ General Investigation Into Competition Within the Telecommunications Industry in the State of Kansas, Docket No. 190,492-U, 94-GIMT-478-GIT, *Order* (KCC, rel. Dec. 27, 1996) (1996 KCC Order), *aff'd in pertinent part on recon.* (KCC, rel. Feb. 3, 1997) (1997 KCC Reconsideration Order). Several parties, including wireless carriers, appealed these orders in the Kansas state court system. Although the Kansas Court of Appeals reversed the orders, the Kansas Supreme Court affirmed these orders in their entirety. *See Citizens' Util. Ratepayer Bd v. State Corp. Comm'n*, 943 P.2d 494 (Kan. Ct. App. 1997); *Citizens' Util. Ratepayer Bd v. State Corp. Comm'n*, 956 P.2d 685, 700 (Kan. 1998).

⁹ KCC Order, ¶¶ 106, 112. The size of the KUSF has subsequently been adjusted and was estimated to be \$96.3 million for the March 1999 to February 2000 period. *See* Letter from James H. Lister, counsel for KCC, to David H. Krech, FCC, dated May 4, 1999 at 2; Letter from James H. Lister, counsel for KCC, to David H. Krech, FCC, dated May 11, 1999.

¹⁰ 1996 KCC Order, ¶¶ 123-125. The KCC used rural areas as a proxy for high cost areas.

order to implement the revenue neutrality requirement of the Kansas Act,¹¹ the Rate Cut Funding program provided ILECs additional support based on their revenues lost due to intrastate access charge reform. This support was based on the ILECs' statewide lines, and was thus not limited to "high cost" areas but was available to the ILECs - - and only the ILECs - - for lines they serve anywhere in the state.¹² The KCC also stated that a portion of the revenue-neutral support for ILECs would be designated as the amount per residential loop or "high cost" support.¹³ Thus, the high cost support payment, according to the KCC, was "not in addition to the Rate Cut Funding."¹⁴ In the first two years of the Fund, the KUSF distributed approximately \$158 million, of which approximately \$152 million, or 96 percent, was distributed to ILECs to offset the revenues they lost due to intrastate access charge reform.¹⁵

4. On July 20, 1998, Western Wireless filed a Petition for Preemption asking the Commission to declare that section 253 of the Communications Act of 1934, as amended,¹⁶ preempted the provisions of the Kansas Act and the accompanying rules adopted by the KCC that served to limit the ability of carriers other than ILECs to receive universal service support under the Rate Cut Funding program in exchange areas with more than 10,000 access lines.¹⁷ Western Wireless alleged that the Kansas Act and 1996 KCC Order violated sections 253(a) and 254(f) of the Communications Act because the KUSF's Rate Cut Funding program discriminated against new entrants and deterred competitive entry.¹⁸ Western Wireless further alleged that the Kansas Act and 1996 KCC Order were not protected by section 253(b) because the Rate Cut Funding program was not competitively neutral and not related to the cost of providing universal service.¹⁹ Fifteen parties filed comments on the Western Wireless petition and 11 parties filed reply comments.²⁰

¹¹ See K.S.A. 1996 Supp. 66-2008(c). The KCC interpreted this provision to require that funds should be distributed so that the ILECs would not initially lose revenue as a result of access charge reform. 1996 KCC Order, ¶ 124.

¹² KCC Comments at 3.

¹³ 1996 KCC Order, ¶ 124.

¹⁴ KCC Comments at 4.

¹⁵ See *Performance Audit Report: Reviewing Payments from the Kansas Universal Service Fund*, Legislative Division of Post Audit, State of Kansas, August 1999, at 6, 7, 17-20. See also Letter from James H. Lister, counsel for KCC, to David H. Krech, FCC, dated May 4, 1999 at 2; Letter from James H. Lister, counsel for KCC, to David H. Krech, FCC, dated May 11, 1999 (projecting that for the March 1999 to February 2000 period, 84 percent of KUSF funding would go exclusively to ILECs under the Rate Cut Funding program).

¹⁶ 47 U.S.C. § 253.

¹⁷ Petition for Preemption, Pursuant to Section 253 of the Communications Act, of Kansas Statutes and Rules that Discriminate Against New Entrants, filed by Western Wireless Corporation July 20, 1998 (Western Wireless Petition).

¹⁸ Western Wireless Petition at 1 (citing 47 U.S.C. §§ 253(a), 254(f)).

¹⁹ Western Wireless Petition at 1 (citing 47 U.S.C. § 253(b)).

²⁰ The following parties filed comments in response to the Public Notice: Aerial Communications, Inc. (Aerial); AT&T Corp. and AT&T Wireless Services, Inc. (AT&T); Bell Atlantic Mobile, Inc. (BAM); Cellular Telecommunications Industry Association (CTIA); Independent Telecommunications Group (ITG); Kansas Corporation Commission (KCC); Liberty Cellular, Inc. (Liberty); MCI Telecommunications Corp. (MCI); Nextel

5. In late 1999 and early 2000, the KCC adopted a series of orders that substantially changed the operation of the KUSF. First, on September 30, 1999, the KCC adopted a forward-looking cost model for purposes of determining KUSF support for non-rural carriers (SWBT and Sprint).²¹ This new mechanism replaces the previous mechanism with respect to these carriers, eliminating the "transitional" Rate Cut Funding program intended to offset reductions in intrastate access charges. Then, on December 29, 1999, the KCC affirmed its forward-looking cost model with some modifications, applied the model to SWBT and Sprint, and made several other decisions relating to the KUSF. Most relevant for purposes of the Western Wireless petition, the KCC held that on a going-forward basis, all KUSF funding would be fully portable to competing carriers; *i.e.*, if a competing carrier obtained a customer that was previously served by an ILEC, all funding that would previously have gone to the ILEC as a result of serving that line would instead be paid to the competing carrier. This principle of portability applies not only to the funding calculated for SWBT and Sprint under the new cost model, but also to the funding for rural ILECs that continues to be calculated under the High Cost Funding program and the previously non-portable Rate Cut Funding program.²² Finally, on January 19, 2000, the KCC released an Order which, among other things, established a carrier assessment rate for SWBT that provides for universal service support at a level somewhat higher than would be calculated under the forward-looking cost model, but that preserves the principle of portability for all funding.²³ A similar settlement proceeding with Sprint remains pending.²⁴

III. DISCUSSION

6. We conclude that Western Wireless' petition has been rendered moot by the December 1999 KCC Order. The gravamen of Western Wireless' complaint is that the Rate Cut Funding program, as previously structured, effectively prohibited the ability of non-ILECs to provide a telecommunications

Communications, Inc. (Nextel); Omnipoint Communications, Inc. (Omnipoint); Personal Communications Industry Association (PCIA); Southwestern Bell Telephone company (SWBT); Sprint Corporation (Sprint); Sprint Spectrum L.P.; State Independent Alliance (SIA); and United States Cellular Corp. (USCC). The following parties filed reply comments: Aerial; AirTouch Communications, Inc. (AirTouch); KCC; MCI WorldCom, Inc. (MCI WorldCom); Nextel; Omnipoint; SWBT; Sprint Spectrum; SIA; United States Telephone Association (USTA); and Western Wireless. In addition, the Local and State Government Advisory Committee (LSGAC) of the Commission recommended at its March 4, 1999 meeting that the Commission not preempt the provisions of the Kansas Act and 1996 KCC Order challenged by Western Wireless. FCC Local and State Government Advisory Committee, Advisory Recommendation Number 14, Petition of Western Wireless Corp., File No. CWD 98-90, adopted March 12, 1999. *Cf.* Letter from Michele C. Farquhar, counsel for Western Wireless, to Magalie Roman Salas, FCC, dated April 8, 1999 (responding to the LSGAC recommendation); Letter from Ken Fellman, LSGAC Chairman, to FCC Commissioners, dated May 11, 1999 (reaffirming LSGAC's recommendation).

²¹ Order 10: "Establishing Assessment Rates for Year 2000 KUSF Contributions" KCC Docket No. 99-GIMT-326-GIT (September 30, 1999). The KCC based its new model on the Commission's forward-looking Proxy Cost Model, making some modifications to account for conditions specific to telecommunications providers in Kansas. *See* December 1999 KCC Order at 17, ¶ 26.

²² December 1999 KCC Order at 84, ¶¶ J, K.

²³ Order 5: "Establishing Carrier Assessment Rate for Year 2000 KUSF Contributions" KCC Docket No. 00-GIMT-236-GIT (January 19, 2000).

²⁴ *See* Kansas Docket No. 00-UTDT-455-GIT.

service by rendering them ineligible for the substantial support that was available only to ILECs in exchanges with more than 10,000 access lines.²⁵ The December 1999 KCC Order rectified this feature of the KUSF by making all funding, including Rate Cut Funding, fully portable. We therefore dismiss the Western Wireless Petition as moot.

7. In order to provide guidance on these critical universal service issues which may well arise in other contexts, however, we briefly discuss our concern that programs structured like the original Rate Cut Funding program could easily run afoul of section 253.²⁶ Section 253 provides the legal framework for preemption of a state statute or regulation that prohibits or has the effect of prohibiting the competitive provision of telecommunications service, which we have applied on a number of occasions.²⁷ In order to determine whether a section 253(a) violation has occurred, we must consider whether the challenged law, regulation or legal requirement "prohibit[s] or has the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."²⁸

8. We would be concerned about a universal service fund mechanism that provides funding only to ILECs.²⁹ A new entrant faces a substantial barrier to entry if its main competitor is receiving substantial support from the state government that is not available to the new entrant. A mechanism that makes only ILECs eligible for explicit support would effectively lower the price of ILEC-provided service relative to competitor-provided service by an amount equivalent to the amount of the support provided to ILECs that was not available to their competitors. Thus, non-ILECs would be left with two choices -- match the ILEC's price charged to the customer, even if it means serving the customer at a loss, or offer the service to the customer at a less attractive price based on the unsubsidized cost of providing such service.³⁰ A mechanism that provides support to ILECs while denying funds to eligible prospective competitors thus may give customers a strong incentive to choose service from ILECs rather than competitors. Further, we believe that it is unreasonable to expect an unsupported carrier to enter a high-cost market and provide a service that its competitor already provides at a substantially supported price. In fact, such a carrier may be unable to secure financing or finalize business plans due to uncertainty surrounding its state government-imposed competitive disadvantage. Consequently, such a program may well have the effect of prohibiting such competitors from providing telecommunications service, in violation of section 253(a).

9. If we find that a state requirement violates section 253(a), then we must determine whether it

²⁵ See Western Wireless Petition at 10-11.

²⁶ 47 U.S.C. § 253.

²⁷ See, e.g., *Classic Telephone, Inc.*, 11 FCC Rcd 13082 (1996); *New England Public Communications Council*, 11 FCC Rcd 19713 (1996), *recon. denied*, 12 FCC Rcd 5215 (1997); *Pittencrieff Communications, Inc.*, 13 FCC Rcd 1735 (1997), *aff'd sub nom CTIA v. FCC*, 168 F.3d 1332 (D.C. Cir. 1999) (*Pittencrieff*); *Silver Star Telephone Company*, 12 FCC Rcd 15639 (1997) (*Silver Star*), *recon. denied*, 13 FCC Rcd 16356 (1998), *aff'd sub nom. RT Communications, Inc. v. FCC*, 201 F.3d 1264 (10th Cir. 2000); *Public Utility Commission of Texas*, CCB Pol 96-13 et al., FCC 97-346, 9 CR (P&F) 958 (released Oct. 1, 1997) (*Texas PUC*); *California Payphone Association*, 12 FCC Rcd 14191 (1997).

²⁸ 47 U.S.C. § 253(a).

²⁹ See *Pittencrieff*, 13 FCC Rcd at 1751, ¶ 31.

³⁰ See Western Wireless reply comments at 11.

is nevertheless permissible under section 253(b).³¹ The criteria set forth in section 253(b) preserve the states' ability "to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service . . ."³² We have held that a state program must meet all three of these criteria – it must be "competitively neutral," "consistent with section 254," and "necessary to preserve and advance universal service" -- to fall within the "safe harbor" of section 253(b).³³ We have preempted state regulations for failure to satisfy even one of the three criteria.³⁴ If a requirement violates section 253(a) and does not fall within the safe harbor of section 253(b), the Commission must preempt the enforcement of the requirement in accordance with section 253(d).³⁵

10. It appears doubtful that a program which limits eligibility for universal service funding to ILECs would be found competitively neutral, and thus within the authority reserved to the states in section 253(b). "[S]ection 253(b) cannot save a state legal requirement from preemption pursuant to sections 253(a) and (d) unless, *inter alia*, the requirement is competitively neutral with respect to, and as between, *all* of the participants and potential participants in the market at issue."³⁶ Because, as discussed above, a mechanism that offers non-portable support may give ILECs a substantial unfair price advantage in competing for customers, it is difficult to see how such a program could be considered competitively neutral. Moreover, a state requirement which otherwise violates section 253(b) cannot be saved merely because it is transitional.³⁷

11. We further note that a program that provides universal service funding only to ILECs could well be found invalid under traditional preemption doctrine. A state or local provision may be preempted when, for instance, it conflicts with federal law or "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."³⁸ Preemption may result not only from

³¹ 47 U.S.C. § 253(b). *See, e.g., Silver Star*, 13 FCC Rcd at 15655-56, ¶ 37; *Texas PUC* at ¶ 42. Section 253(c) sets forth additional situations, which are not present here, in which a state or local government requirement that violates section 253(a) may still be acceptable. 47 C.F.R. § 253(c).

³² 47 U.S.C. § 253(b). Section 253(b) also preserves the states' ability to impose competitively neutral requirements that are necessary to protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers. *Id.* These provisions are not at issue here.

³³ *Pittencreeff*, 13 FCC Rcd at 1752, ¶ 33; *accord Silver Star*, 12 FCC Rcd at 15655-57, ¶¶ 37, 40.

³⁴ For example, in *Silver Star*, we preempted a Wyoming statute for its failure to satisfy the "competitive neutrality" criterion. 12 FCC Rcd at 15658-60, ¶¶ 42, 45.

³⁵ 47 U.S.C. § 253(d). ("If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.").

³⁶ *Silver Star Reconsideration*, 13 FCC Rcd at 16361, ¶ 11 (emphasis in original).

³⁷ *See Silver Star*, 12 FCC Rcd at 15657, ¶ 39. We also would be concerned that non-portable support available only to ILECs may not be consistent with section 254 and necessary to preserve and advance universal service. Given the current posture of the case, however, we will not discuss these issues.

³⁸ *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699 (1984), citing *Hines v. Davidowitz*, 312 U.S. 57, 67 (1941); *State Corporation Commission of Kansas v. FCC*, 787 F.2d 1421, 1425 (10th Cir. 1986). *See also Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 368-69 (1986) (*Louisiana PSC*).

action taken by Congress, but also from a federal agency acting within the scope of its congressionally delegated authority.³⁹ We have previously held, in interpreting section 254 of the Communications Act,⁴⁰ that "competitive neutrality in the collection and distribution of funds and determination of eligibility in universal service support mechanisms is consistent with congressional intent and necessary to promote a procompetitive, de-regulatory national policy framework."⁴¹ As discussed above, it is doubtful that a universal service funding program that restricts eligibility to ILECs could be considered competitively neutral. Thus, a program of this nature may well be found to be inconsistent with and to impede the achievement of important Congressional and Commission goals.

12 We decline to address in this order the other challenges to provisions of the KUSF that the parties raised.⁴² These issues were not raised by Western Wireless in its petition and are beyond the scope of this proceeding.⁴³

IV. CONCLUSION

13 In conclusion, we find that the orders adopted and implemented by the KCC in late 1999 and early 2000 have effectively rendered moot the significant issues of lawfulness raised by Western Wireless regarding the operation of the previously structured program. We therefore dismiss Western Wireless' petition as moot.

V. ORDERING CLAUSE

14. Accordingly, IT IS ORDERED that, pursuant to section 4(i) of the Communications Act of

³⁹ *Louisiana PSC*, 476 U.S. at 368-69, citing *Fidelity Federal Savings and Loan Assn. v. De la Cuesta*, 458 U.S. 141 (1982), *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691.

⁴⁰ 47 U.S.C. § 254.

⁴¹ *Federal-State Joint Board on Universal Service*, Report and Order, CC Docket No. 96-45, 12 FCC Rcd 8776, 8801-02, ¶ 48 (1997), corrected by *Federal-State Joint Board on Universal Service*, Erratum, CC Docket No. 96-45, FCC 97-157 (rel. June 4, 1997), *aff'd in part, rev'd in part, remanded in part sub nom. Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999). To the extent that a state's universal service program, that is structured like the KUSF, involves matters properly within the state's intrastate jurisdiction under section 2(b) of the Act, those matters, if inseparable from the federal interest in promoting universal service in section 254, remain subject to federal preemption. See *Louisiana PSC, AT&T v. Iowa Utilities Board*, 119 S.Ct. 721, 730 (1999), *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d at 423.

⁴² See Bell Atlantic Mobile comments at 4-5 (arguing that the Kansas Act provision limiting the amount of a carrier's KUSF contribution that it may collect from its customers to 8.89% of the carrier's intrastate retail revenues violates section 332(c)(3) as applied to CMRS providers), CTIA comments at 8-9 (similar), AT&T comments at 1, 3-4 (arguing that KUSF conflicts with section 214(e) of the Communications Act), CTIA comments at 5-6 (similar).

⁴³ We do note, however, that the limitation on passing through contributions to a carrier's retail customers expired on January 1, 2000. K.S.A. 1996 Supp. 66-2008(b). We further note that we have recently addressed in another proceeding issues concerning the application of section 214(e). *Federal State Joint Board on Universal Service Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas*, Report and Order, CC Docket No. 96-45, FCC 00-208 (released June 30, 2000).

1934, as amended, 47 U.S.C. § 154(i), and section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, that this Memorandum Opinion and Order IS ADOPTED.

15. IT IS FURTHER ORDERED that the Petition for Preemption filed by Western Wireless Corporation IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

**STATEMENT OF COMMISSIONER HAROLD FURCHTGOTT-ROTH,
CONCURRING IN PART AND DISSENTING IN PART**

Re: Western Wireless Corporation Petition for Preemption of Statutes and Rules Regarding the Kansas State Universal Service Fund Pursuant to Section 253 of the Communications Act of 1934, File No. CWD 98-90.

As the Commission correctly recognizes, Western Wireless's petition is moot. The Kansas Corporation Commission has completely altered its regulatory scheme for determining and allocating universal service support to carriers in Kansas. Western Wireless's petition must therefore be dismissed as moot, and I concur in this aspect of the order.

Why the Commission thinks it necessary to devote an additional five or six pages of this order to a discussion of why it would preempt the Kansas regulations if they were still in effect is beyond me. The Commission vaguely asserts its advisory opinion is necessary "to provide guidance" on universal service issues, based on its wholly unsupported assertion that these issues "might well arise elsewhere." Tellingly, the Commission cannot point to a single state commission that has even suggested it would adopt requirements similar to the Kansas Commission's.

I therefore dissent from those aspects of this order that purport to interpret section 253(d). Although this agency – unlike Article III federal courts – may have the power to render advisory opinions in some circumstances, I think it exceedingly unwise for it to make such determinations in connection with section 253(d). In my view, in making this statement, the Commission disregards basic principles of federal-state comity and insults the Kansas Commission, which has itself corrected whatever infirmity may have existed in its previous rules.

The 1996 Act contemplates that state commissions will play an important part in bringing competition to the local exchange markets, and it gives states freedom to fashion regulatory approaches that supplement the Act's federal requirements. *See, e.g.,* 47 U.S.C. § 253(b). This Commission may interfere with a state commission's requirements only pursuant to section 253(d). An examination of that provision is instructive. It states that if the Commission "determines that a State or local government *has permitted or imposed* any statute, regulation, or legal requirement that violates [section 253(a) or (b)], the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency." 47 U.S.C. § 253(d) (emphasis added). The provision is drafted in the present tense, and I therefore question whether we may legally make section 253(d) determinations on state commission rulings that do not exist. Moreover, given that no regulation currently exists, a Commission ruling is most assuredly not "necessary to correct" the Kansas Commission's approach to implementing the Act's universal service provisions.

In any event, I believe that comity concerns alone are enough to prevent us from reaching out to strike down nonexistent state regulations, simply in order to dictate to states the "proper" way for them to conduct their business. We must not forget that Congress charged both this Commission *and* the state commissions with implementing the 1996 Act, and we should keep our interference in the business of the states to a minimum.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Federal-State Joint Board on)	
Universal Service)	CC Docket No. 96-45
)	
Western Wireless Corporation)	
Petition for Designation as an)	
Eligible Telecommunications Carrier)	
In the State of Wyoming)	

MEMORANDUM OPINION AND ORDER

Adopted: December 22, 2000

Released: December 26, 2000

By the Common Carrier Bureau:

I. INTRODUCTION

1. In this Order, we grant the petition of Western Wireless Corporation (Western Wireless) to be designated as an eligible telecommunications carrier (ETC) in designated service areas within Wyoming pursuant to section 214(e)(6) of the Communications Act of 1934, as amended (the Act).¹ In so doing, we conclude that Western Wireless has satisfied the statutory eligibility requirements of section 214(e)(1).² Specifically, we conclude that Western Wireless has demonstrated that it will offer and advertise the services supported by the federal universal service support mechanism throughout the designated service areas.³ In addition, we find that the designation of Western Wireless as an ETC in those areas served by rural telephone companies serves the public interest by promoting competition and the provision of new technologies to consumers in high-cost and rural areas of Wyoming. We conclude that consumers in Wyoming will benefit as a result of Western Wireless' designation as an ETC.

II. BACKGROUND

A. The Act

2. Section 254(e) of the Act provides that "only an eligible telecommunications

¹ *Western Wireless Petition for Designation as an Eligible Telecommunications Carrier in the State of Wyoming*, filed October 25, 1999 (Western Wireless Petition). See 47 U.S.C. § 214(e)(6).

² 47 U.S.C. § 214(e)(1).

³ 47 U.S.C. § 214(e)(1).

carrier designated under section 214(e) shall be eligible to receive specific Federal universal service support.”⁴ Section 214(e)(1) requires that a common carrier designated as an ETC must offer and advertise the services supported by the federal universal service mechanisms throughout the designated service area.⁵

3. Pursuant to section 214(e)(2), state commissions have the primary responsibility for designating carriers as ETCs.⁶ Section 214(e)(6), however, directs the Commission, upon request, to designate as an ETC “a common carrier providing telephone exchange service and exchange access that is not subject to the jurisdiction of a State Commission.”⁷ Under section 214(e)(6), upon request and consistent with the public interest, convenience, and necessity, the Commission may, with respect to an area served by a rural telephone company, and shall, in all other cases, designate more than one common carrier as an ETC for a designated service area, so long as the requesting carrier meets the requirements of section 214(e)(1).⁸ Before designating an additional ETC for an area served by a rural telephone company, the Commission must find that the designation is in the public interest.⁹ On December 29, 1997, the Commission released a Public Notice establishing the procedures that carriers must use when seeking Commission

⁴ 47 U.S.C. § 254(e)

⁵ Section 214(e)(1) provides that

A common carrier designated as an eligible telecommunications carrier under [subsections 214(e)(2), (3), or (6)] shall be eligible to receive universal service support in accordance with section 254 and shall throughout the service area for which the designation is received --

(A) offer the services that are supported by Federal universal service support mechanisms under section 254(c) either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier), and

(B) advertise the availability of such services and the charges therefor using media of general distribution

47 U.S.C. § 214(e)(1)

⁶ 47 U.S.C. § 214(e)(2)

⁷ 47 U.S.C. § 214(e)(6) *See Fort Mojave Telecommunications, Inc., Gila River Telecommunications, Inc., San Carlos Telecommunications, Inc., and Tohono O'odham Utility Authority as Eligible Telecommunications Carriers Pursuant to Section 214(e)(6) of the Communications Act*, Memorandum Opinion and Order, CC Docket No. 96-45, 13 FCC Rcd 4547 (Com. Car. Bur. 1998), *Petition of Saddleback Communications for Designation as an Eligible Telecommunications Carrier Pursuant to Section 214(e)(6) of the Communications Act*, CC Docket No. 96-45, 13 FCC Rcd 22433 (Com. Car. Bur. 1998)

⁸ 47 U.S.C. § 214(e)(6)

⁹ *See* 47 U.S.C. § 214(e)(6)

designation as an ETC pursuant to section 214(e)(6)¹⁰

B. The Western Wireless Petition and *Twelfth Report and Order*

4 On September 1, 1998, Western Wireless petitioned the Wyoming Public Service Commission (Wyoming Commission) for designation as an ETC pursuant to section 214(e)(2) for service to be provided in Wyoming. On August 13, 1999, the Wyoming Commission dismissed Western Wireless' request for designation on the grounds that the Wyoming Telecommunications Act denies the Wyoming Commission the authority to regulate "telecommunications services using . . . cellular technology," except for quality of service.¹¹ The Wyoming Commission interpreted this prohibition as preventing it from designating Western Wireless as an ETC because Western Wireless provides service using cellular technology.¹²

5 On September 29, 1999, Western Wireless filed with this Commission a petition pursuant to section 214(e)(6) seeking designation of eligibility to receive federal universal service support for service to be provided in parts of Wyoming.¹³ In its petition, Western Wireless contends that the Commission should assume jurisdiction and designate Western Wireless as an ETC pursuant to section 214(e)(6) given the Wyoming Commission's determination that it lacked jurisdiction under applicable state law to designate wireless carriers

¹⁰ *Procedures for FCC Designation of Eligible Telecommunications Carriers Pursuant to Section 214(e)(6) of the Communications Act* Public Notice FCC 97-419 (rel. Dec. 29, 1997) (*Section 214(e)(6) Public Notice*). In this Public Notice, the Commission delegated authority to the Chief of the Common Carrier Bureau to designate carriers as ETCs pursuant to section 214(e)(6). The Commission instructed carriers seeking designation to, among other things, set forth the following information in a petition: (1) a certification and brief statement of supporting facts demonstrating that the petitioner is "not subject to the jurisdiction of a state commission," (2) a certification that the petitioner offers all services designated for support by the Commission pursuant to section 254(c), (3) a certification that the petitioner offers the supported services "either using its own facilities or a combination of its own facilities and resale of another carrier's services," (4) a description of how the petitioner "advertise[s] the availability of [supported] services and the charges therefor using media of general distribution." In addition, if the petitioner meets the definition of a "rural telephone company" pursuant to section 3(37) of the Act, the petitioner must identify its study area. If the petitioner is not a rural telephone company, the petitioner must include a detailed description of the geographic service area for which it requests a designation for eligibility from the Commission.

¹¹ *The Amended Application of WWC Holding Co., Inc., (Western Wireless) For Authority To Be Designated As An Eligible Telecommunications Carrier*, Order Granting Motion to Dismiss Amended Application, Docket No. 70042-TA-98-1 (Record No. 4432) (Aug. 13, 1999) (*Wyoming Order*), citing Wyoming Telecommunications Act of 1995.

¹² *Wyoming Order* at 2-4.

¹³ See Western Wireless Petition. The petition contains a list of the specific rural telephone company study areas and non-rural incumbent local exchange carrier (LEC) exchanges for which Western Wireless is seeking designation. Western Wireless Petition, App. D. See also Letter from David L. Sieradzki, Counsel for Western Wireless Corp., to Magalie Roman Salas, FCC, dated Dec. 20, 2000 – Proposed Designated ETC Service Areas (Western Wireless Dec. 20 *ex parte*).

as ETCs.¹⁴

6. In the *Twelfth Report and Order*, the Commission concluded that only in those instances where a carrier provides the Commission with an “affirmative statement”¹⁵ from the state commission or a court of competent jurisdiction that the state lacks jurisdiction to perform the designation will the Commission consider section 214(e)(6) designation requests from carriers serving non-tribal lands.¹⁶ Consistent with this framework, the Commission concluded that it has authority under section 214(e)(6) to consider the merits of Western Wireless’ petition for designation as an ETC in Wyoming.¹⁷

III. DISCUSSION

7. We find that Western Wireless has met all the requirements set forth in sections 214(e)(1) and (e)(6) to be designated as an ETC by this Commission for the designated service areas in the state of Wyoming. As discussed above, the Commission previously concluded in the *Twelfth Report and Order* that Western Wireless is a common carrier not subject to the jurisdiction of the Wyoming Commission. We conclude that Western Wireless has demonstrated that it will offer and advertise the services supported by the federal universal service support mechanism throughout the designated service areas upon designation as an ETC. In addition, we find that the designation of Western Wireless as an ETC in those areas served by rural telephone companies serves the public interest by promoting competition and the provision of new technologies to consumers in high-cost and rural areas of Wyoming. We therefore designate Western Wireless as an ETC for the requested service areas within Wyoming.

8. Offering the Service Designated for Support. We conclude that Western Wireless has demonstrated that it will offer the services supported by the federal universal service mechanism upon designation as an ETC. We therefore conclude that Western Wireless complies with the requirement of section 214(e)(1)(A) to “offer the services that are supported by Federal universal service support mechanisms under section 254(c).”¹⁸

9. As noted in its petition, Western Wireless is a commercial mobile radio service

¹⁴ See generally Western Wireless Petition.

¹⁵ The Commission defined an “affirmative statement” as “any duly authorized letter, comment, or state commission order indicating that [the state commission] lacks jurisdiction to perform the designation over a particular carrier.” See *Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas*, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, CC Docket No. 96-45, FCC 00-208 (rel. June 30, 2000) at para. 113 (*Twelfth Report and Order*).

¹⁶ *Twelfth Report and Order* at para. 113.

¹⁷ *Twelfth Report and Order* at para. 137.

¹⁸ 47 U.S.C. § 214(e)(1)(A).

(CMRS) provider with operations in 17 states, including the eastern portion of Wyoming.¹⁹ Western Wireless states that it currently offers each of the supported services enumerated in section 54.101(a) of the Commission's rules throughout its existing cellular service area.²⁰ Once designated as an ETC, Western Wireless "intends (and commits) to make available a 'universal service' offering that includes all of the supported services, for consumers in the designated services areas in Wyoming."²¹ Western Wireless indicates that it will make available its universal service offering over its existing cellular network infrastructure and spectrum. Western Wireless also commits to provide service to any requesting customer within the designated service areas, and if necessary, will deploy any additional facilities to do so.²²

10. No party disputes that Western Wireless has the capability to offer single-party service, voice-grade access to the public network, the functional equivalent to DTMF signaling, access to operator services, access to interexchange services, access to directory assistance, and toll limitation for qualifying low-income consumers.²³ Nor does any party dispute that Western Wireless complies with state law and Commission directives on providing access to emergency services.²⁴ In addition, although the Commission has not set a minimum local usage requirement, Western Wireless currently offers varying amounts of local usage in its monthly service plans.²⁵ In fact, Western Wireless intends to offer its universal service customers a rate plan that includes unlimited local usage.²⁶ In sum, we conclude that Western Wireless has demonstrated that it will offer each of the supported services upon designation as an ETC in the requested service areas in Wyoming.²⁷ Several state commissions have examined Western

¹⁹ Western Wireless Petition at 2. See also Letter from David L. Sieradzki, Counsel for Western Wireless, to Magalie Roman Salas, FCC, dated October 24, 2000 (Western Wireless Oct. 24 *ex parte*).

²⁰ Western Wireless Petition at 3, 7-10. See also Western Wireless Petition, App. C – Affidavit of Gene DeJordy.

²¹ Western Wireless Petition at 7.

²² Western Wireless Petition at 3.

²³ Pursuant to section 254(c), the Commission has defined those services that are to be supported by the federal universal service mechanism to include: (1) single-party service; (2) voice grade access to the public switched network; (3) local usage; (4) Dual Tone Multifrequency (DTMF) signaling or its functional equivalent; (5) access to emergency services, including 911 and enhanced 911; (6) access to operator service; (7) access to interexchange services; (8) access to directory assistance; and, (9) toll limitation for qualifying low-income customers. 47 C.F.R. § 54.101(a).

²⁴ See 47 C.F.R. § 54.101(a)(5) ("Access to emergency services includes access to 911 and enhanced 911 to the extent the local government in an eligible carrier's service area has implemented 911 or enhanced 911 systems"). Western Wireless currently offers access to emergency services throughout its cellular service area by dialing 911. Western Wireless indicates that no public emergency service provider in Wyoming has made arrangements for the delivery of E911 to Western Wireless. Western Wireless indicates that it is capable and ready to provide E911 upon request. Western Wireless Petition at 9.

²⁵ Western Wireless Petition at 8.

²⁶ Western Wireless Petition at 8.

²⁷ AT&T Comments at 3; CTIA Comments at 3; PCIA Comments at 3-4.

Wireless' proposed service offering and reached the same conclusion in designating Western Wireless as an ETC.²⁸

11. We reject the suggestion that Western Wireless' proposed service offering lacks the requisite specificity to satisfy the eligibility requirements of section 214(e).²⁹ Western Wireless has provided supplemental information relating to the services offered, the charges for those services, and availability of customer assistance services.³⁰ We also reject the contention that Western Wireless has not sufficiently specified whether it intends to use its fixed or mobile service to fulfill its ETC obligations.³¹ In so doing, we reject the implication that service offered by CMRS providers is ineligible for universal service support.³² In the *Universal Service Order*, the Commission concluded that universal service support mechanisms and rules should be competitively neutral.³³ The Commission concluded that the principle of competitive neutrality includes technological neutrality.³⁴ Thus, a common carrier using any technology, including CMRS, may qualify for designation so long as it complies with the section 214(e) eligibility criteria. Western Wireless indicates that it has the ability to offer the supported services using its existing facilities.

12. We reject the contention of a few commenters that it is necessary to adopt eligibility criteria beyond those set forth in section 214(e) to prevent competitive carriers from attracting only the most profitable customers, providing substandard service, or subsidizing

²⁸ See, e.g., Minnesota Public Utilities Commission, *Minnesota Cellular Corporation's Petition for Designation as an Eligible Telecommunications Carrier*, Order Granting Preliminary Approval and Requiring Further Filings, Docket No. P-5695/M-98-1285 (Oct. 27, 1999); Public Utilities Commission of Nevada, *Application of WWC License LLC d/b/a CELLULAR ONE to be designated as an Eligible Telecommunications Carrier in the State of Nevada pursuant to NAC 704.680461 and Section 254 of the Telecommunications Act of 1996*, Compliance Order, Docket No. 00-6003 (Aug. 17, 2000); Public Service Commission of Utah, *Petition of WWC Holding Co., Inc., for Designation as an Eligible Telecommunications Carrier*, Report and Order, Docket No. 98-2216-01 (July 21, 2000).

²⁹ Wyoming Telecommunications Association Comments at 7; US West Comments at 2; Coalition of Rural Telephone Companies Reply Comments at 11.

³⁰ Western Wireless indicates that the charge for its basic universal service offering, excluding taxes and regulatory assessments, will be \$14.99 per month. In addition, Western Wireless indicates its intention to make reasonable arrangements to resolve service disruptions. Customer service personnel will also be available 24 hours per day, 7 days per week. See Western Wireless Oct. 24 *ex parte* - Attachment 1 (Information Sheet).

³¹ Coalition of Rural Telephone Companies Comments at 11; Wyoming Telecommunications Association Comments at 11, 14.

³² Coalition of Rural Telephone Companies Comments at 5-7; Wyoming Telecommunications Association Comments at 11-14.

³³ *Universal Service Order*, 12 FCC Rcd 8776, 8801, para. 46.

³⁴ *Universal Service Order*, 12 FCC Rcd at 8802, para. 49 ("We anticipate that a policy of technological neutrality will foster the development of competition and benefit certain providers, including wireless, cable, and small businesses, that may have been excluded from participation in universal service mechanisms . . .").

unsupported services with universal service funds.³⁵ As the Commission noted in the *Universal Service Order*, section 214(e) prevents eligible carriers from attracting only the most desirable customers by limiting eligibility to “common carriers”³⁶ and by requiring eligible carriers to offer and advertise the supported services “throughout the service area.”³⁷ We also note that section 254(e) requires that “[a] carrier that receives [universal service] support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended.”³⁸

13. We find that these statutory provisions are sufficient to ensure that competitive carriers use universal service funds to make the supported services available to all requesting customers throughout the service area. We also believe that the forces of competition will provide an incentive to maintain affordable rates and quality service to customers. Competitive ETCs will receive universal service support only to the extent that they acquire customers. In order to do so, it is reasonable to assume that competitive ETCs must offer a service package comparable in price and quality to the incumbent carrier. In addition, we emphasize that a carrier’s ETC designation may be revoked if the carrier fails to comply with the statutory ETC and common carrier obligations.

14. Offer the Supported Services Using a Carrier’s Own Facilities. We conclude that Western Wireless has satisfied the requirement of section 214(e)(1)(A) that it offer the supported services using either its own facilities or a combination of its own facilities and resale of another carrier’s services.³⁹ Western Wireless states that it intends to provide the supported services using its “existing cellular network infrastructures, consisting of switching, trunking, cell sites, and network equipment, together with any expansions and enhancements to the network.”⁴⁰ We find this certification sufficient to satisfy the requirements of section 214(e)(1)(A).

15. Advertising the Supported Services. We conclude that Western Wireless has demonstrated that it satisfies the requirement of section 214(e)(1)(B) to advertise the availability of the supported services and the charges therefor using media of general distribution. Western Wireless certifies that it intends to advertise the availability of its universal service offering, and the charges therefor, using media of general distribution.⁴¹ Specifically, Western Wireless

³⁵ US West Comments at 12-14; Wyoming Telecommunications Association Comments at 7.

³⁶ The Act requires common carriers to furnish “communications services upon reasonable request,” 47 U.S.C. § 201(a), and states that “[i]t shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services. . . .” 47 U.S.C. § 202(a).

³⁷ See *Universal Service Order*, 12 FCC Rcd at 8855-56, paras. 142-43.

³⁸ 47 U.S.C. § 254(e).

³⁹ 47 U.S.C. § 214(e)(1)(A).

⁴⁰ Western Wireless Petition at 10-11.

⁴¹ Western Wireless Petition at 11.

indicates that it will expand upon its existing advertising media, including television, radio, newspaper, and billboard advertising, as necessary, to ensure that consumers within its designated service area are fully informed of its universal service offering.⁴² Moreover, given that ETCs receive universal service support only to the extent that they serve customers, we believe that strong economic incentives exist, in addition to the statutory obligation, to advertise the universal service offering in Wyoming.

16. Public Interest Analysis. We conclude that it is in the public interest to designate Western Wireless as an ETC in Wyoming in those designated service areas that are served by rural telephone companies.⁴³ Western Wireless has made a threshold demonstration that its service offering fulfills several of the underlying federal policies favoring competition. We find that there is no empirical evidence on the record to support the contention that the designation of Western Wireless as an ETC in those designated service areas served by rural telephone companies in Wyoming will harm consumers.⁴⁴ In fact, we conclude that those consumers will benefit from the provision of competitive service and new technologies in high-cost and rural areas.

17. We note that an important goal of the Act is to open local telecommunications markets to competition.⁴⁵ Designation of competitive ETCs promotes competition and benefits consumers in rural and high-cost areas by increasing customer choice, innovative services, and new technologies. We agree with Western Wireless that competition will result not only in the deployment of new facilities and technologies, but will also provide an incentive to the incumbent rural telephone companies to improve their existing network to remain competitive, resulting in improved service to Wyoming consumers.⁴⁶ In addition, we find that the provision of competitive service will facilitate universal service to the benefit of consumers in Wyoming by creating incentives to ensure that quality services are available at "just, reasonable, and affordable rates."⁴⁷

18. Although we recognize the substantial benefits of competition to consumers, we conclude that additional factors may be taken into consideration in the public interest examination required by section 214(e)(6) prior to the designation of an additional ETC in an

⁴² Western Wireless Petition at 11.

⁴³ See 47 U.S.C. § 214(e)(6).

⁴⁴ See Coalition of Rural Telephone Companies Comments at 9-11; Wyoming Telecommunications Association Comments at 7-8.

⁴⁵ According to the Joint Explanatory Statement, the purpose of the 1996 Act is "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly the private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition. . . ." Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. at 113 (Joint Explanatory Statement).

⁴⁶ Western Wireless Petition at 11-13.

⁴⁷ 47 U.S.C. § 254(b)(1).

area served by a rural telephone company, such as whether consumers will be harmed. In so doing, we recognize that Congress expressed a specific intent to preserve and advance universal service in rural areas as competition emerges.⁴⁸ In particular, we believe that Congress was concerned that consumers in areas served by rural telephone companies continue to be adequately served should the incumbent telephone company exercise its option to relinquish its ETC designation under section 214(e)(4).⁴⁹

19. Western Wireless demonstrates a financial commitment and ability to provide service to rural consumers that minimizes the risk that it may be unable to satisfy its statutory ETC obligations after designation.⁵⁰ We note that Western Wireless currently provides service in 17 western states.⁵¹ Western Wireless also indicates that it can provide the supported services using its own facilities.⁵² By choosing to use its own facilities to provide service in Wyoming, Western Wireless can continue to offer service to any requesting customer even if the incumbent carrier subsequently withdraws from providing service.⁵³

20. Nor are we convinced that the incumbent rural telephone carriers will relinquish their ETC designation or withdraw service altogether in the event that Western Wireless is designated as an ETC in Wyoming.⁵⁴ None of the incumbent rural telephone companies at issue in this proceeding has indicated any intention to do so.⁵⁵ In the absence of any empirical information to support this assertion, we decline to conclude that this constitutes a serious risk to consumers. In addition, Western Wireless, as an ETC, has a statutory duty to offer service to

⁴⁸ 47 U.S.C. § 214(e)(6) (stating that before designating an additional ETC for an area served by a rural telephone company, the Commission shall find that the designation is in the public interest). *See also* 47 U.S.C. § 254(b)(3).

⁴⁹ *See* Letter from Earl W. Comstock, Counsel for Nucentrix, to Magalie Roman Salas, FCC, dated October 25, 2000.

⁵⁰ We note that Western Wireless has filed its 1999 Annual Report containing substantial financial information for the period between 1997-1999 in this proceeding. *See* Western Wireless Oct. 24 *ex parte* - Attachment 2 (Western Wireless 1999 Annual Report).

⁵¹ Western Wireless Petition at 2.

⁵² Western Wireless Petition at 10.

⁵³ We note, however, that an ETC is not required to provide service using its own facilities. Section 214(e)(1)(A) allows a carrier designated as an ETC to offer the supported services "either using its own facilities or a combination of its own facilities and resale of another carrier's services." *See* 47 U.S.C. § 214(e)(1)(A).

⁵⁴ US West Comments at 17.

⁵⁵ Even if the incumbent carrier determined that it no longer desired to be designated as an ETC, section 214(e)(4) requires the ETC seeking to relinquish its ETC designation to give advance notice to the Commission. Prior to permitting the ETC to cease providing universal service in an area served by more than one ETC, section 214(e)(4) requires that the Commission "ensure that all customers served by the relinquished carrier will continue to be served, and shall require sufficient notice to permit the purchase or construction of adequate facilities by any remaining eligible telecommunications carrier." The Commission may grant a period, not to exceed one year, within which such purchase or construction shall be completed. *See* 47 U.S.C. § 214(e)(4).

every customer within the designated service area. We reiterate that a carrier's ETC designation may be revoked if the carrier fails to comply with the statutory ETC and common carrier obligations.

21. Western Wireless also indicates that, in many instances, its local calling area is larger than the local calling area of the existing local exchange carrier.⁵⁶ We believe that rural consumers may benefit from expanded local calling areas by making intrastate toll calls more affordable to those consumers.⁵⁷ As discussed above, Western Wireless also indicates that it will offer varying amounts of local usage, including a package containing unlimited local usage to consumers.⁵⁸ In addition, Western Wireless has stated its intent to offer a new fixed wireless service to consumers in Wyoming.⁵⁹

22. We reject the general argument that rural areas are not capable of sustaining competition for universal service support.⁶⁰ We do not believe that it is self-evident that rural telephone companies cannot survive competition from wireless providers. Specifically, we find no merit to the contention that designation of an additional ETC in areas served by rural telephone companies will necessarily create incentives to reduce investment in infrastructure, raise rates, or reduce service quality to consumers in rural areas. To the contrary, we believe that competition may provide incentives to the incumbent to implement new operating efficiencies, lower prices, and offer better service to its customers.⁶¹ While we recognize that some rural areas may in fact be incapable of sustaining more than one ETC, no evidence to demonstrate this has been provided relating to the requested service areas. We believe such evidence would need to be before us before we could conclude that it is not in the public interest to designate Western Wireless as an ETC for those areas served by rural telephone companies.

23. Designated Service Areas. We designate Western Wireless as an ETC for the specific service areas in Wyoming discussed herein.⁶² For those areas served by the non-rural

⁵⁶ Western Wireless Oct. 24 *ex parte* – Attachment 1 (Information Sheet) at 1.

⁵⁷ See *Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas*, Further Notice of Proposed Rulemaking, CC Docket No. 96-45, 14 FCC Rcd 21177, 21227 at paras. 122-123 (1999).

⁵⁸ Western Wireless Petition at 8.

⁵⁹ Western Wireless Petition at 8.

⁶⁰ Wyoming Telecommunications Association Comments at 7-8.

⁶¹ As noted in the *Universal Service Order*, we believe that arguments like those of the Wyoming Telecommunications Association “present a false choice between competition and universal service.” *Universal Service Order*, 12 FCC Rcd at 8803, para. 50.

⁶² The term “service area” means a geographic area established by a state commission (or the Commission under section 214(e)(6)) for the purpose of determining universal service obligations and support mechanisms. 47 U.S.C. § 214(e)(5). In the *Universal Service Order*, the Commission recommended that the states designate non-rural service areas that are smaller than the incumbent carrier's study area. *Universal Service Order*, 12 FCC Rcd at 8879, para. 185.

carrier Qwest (formerly US West), we designate the specific exchanges requested by Western Wireless to the extent that such exchanges are located within the state of Wyoming.⁶³ We note that Western Wireless has requested designation in two of Qwest's exchanges, Laramie and Cheyenne, that extend beyond the boundaries of Wyoming. We limit the designation in these two exchanges to the area that they cover within the state of Wyoming. Section 214(e)(6) directs the Commission to designate a carrier as an ETC only in those instances when the relevant state commission lacks jurisdiction.⁶⁴ Because the Wyoming Commission has indicated by order that it lacks jurisdiction to perform the designation in Wyoming,⁶⁵ we conclude that the Commission's authority, in this instance, does not extend beyond the boundaries of Wyoming.

24. For the requested service areas served by rural telephone companies,⁶⁶ we designate as Western Wireless' service area the study areas that are located within the state of Wyoming.⁶⁷ The study area of Chugwater Telephone is located entirely within Wyoming, and we designate this study area as Western Wireless' service area without modification. Western Wireless also requests designation for the study areas in Wyoming of Golden West Telephone (Golden West), Range Telephone Coop. (Range), RT Communications, Inc.,⁶⁸ and United Telephone Company of the West (United Telephone).⁶⁹ The study areas of these telephone companies include exchanges that extend beyond the boundaries of Wyoming.⁷⁰ As discussed

⁶³ Western Wireless seeks designation for the following exchanges of Qwest in Wyoming: Buffalo, Cheyenne, Casper, Douglas, Glendo, Glenrock, Gillette, Laramie, Lusk, Rawlins, Riverton, Sheridan, Wheatland, and Wright. See Western Wireless Petition, App. D. See also Western Wireless Dec. 20 *ex parte* – Proposed Designated ETC Service Areas.

⁶⁴ 47 U.S.C. § 214(e)(6).

⁶⁵ *Wyoming Order* at 2-4.

⁶⁶ Western Wireless seeks designation for the following areas served by rural telephone companies in Wyoming: Chugwater Telephone Co. (Chugwater); Golden West Telephone Coop. Inc. (Edgemont); Range Telephone Coop. Inc. (Alzada, Arvada, Clearmont, Decker, Southeast, Sundance); RT Communications, Inc. (Albin, Burns, Carpenter, Gas Hills, Hulet, Kaycee, Midwest, Moorcroft, Newcastle, Osage, Pine Bluff, Upton, Jeffrey City, Thermopolis, Shoshoni, Worland) and United Telephone Company of the West (Lyman, Guernsey, Lingle, Lagrange, Torrington). Western Wireless Petition, App. D. See also Western Wireless Dec. 20 *ex parte* – Proposed Designated ETC Service Areas.

⁶⁷ For areas served by a rural telephone company, section 214(e)(5) of the Act provides that the company's service area will be its study area unless and until the Commission and states establish a different definition of service area for such company. 47 U.S.C. § 214(e)(5). See also *Universal Service Order*, 12 FCC Rcd at 8880, para. 186.

⁶⁸ RT Communications, Inc. is a wholly-owned subsidiary of Range.

⁶⁹ See Western Wireless Dec. 20 *ex parte*.

⁷⁰ Golden West's Edgemont exchange serves lines in both South Dakota and Wyoming. Range's Alzada and Decker exchanges serve lines in both Montana and Wyoming. United Telephone's Wyoming study area extends into Nebraska (LaGrange) and its Nebraska study area extends into Wyoming (Lyman). RT Communications' (continued....)

above, we conclude that we have authority under section 214(e)(6) to designate such study areas only to the extent that they are contained within the boundaries of the state of Wyoming.⁷¹ Accordingly, we designate as Western Wireless' service area the study areas of Golden West, Range, RT Communications, and United Telephone to the extent that such study areas are contained within Wyoming. We exclude from Western Wireless' service area those portions of the requested study areas that are outside the state of Wyoming.⁷²

IV. ANTI-DRUG ABUSE ACT CERTIFICATION

25. Pursuant to section 5301 of the Anti-Drug Abuse Act of 1988, no applicant is eligible for any new, modified, or renewed instrument of authorization from the Commission, including authorizations issued pursuant to section 214 of the Act, unless the applicant certifies that neither it, nor any party to its application, is subject to a denial of federal benefits, including Commission benefits.⁷³ This certification must also include the names of individuals specified by section 1.2002(b) of the Commission's rules.⁷⁴ Western Wireless has provided a certification consistent with the requirements of the Anti-Drug Abuse Act of 1988.⁷⁵ We find that Western Wireless has satisfied the requirements of the Anti-Drug Abuse Act of 1988, as codified in sections 1.2001-1.2003 of the Commission's rules.

V. ORDERING CLAUSES

26. Accordingly, IT IS ORDERED that, pursuant to the authority contained in section 214(e)(6) of the Communications Act, 47 U.S.C. § 214(e)(6), and the authority delegated in sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, Western Wireless

(Continued from previous page) _____

Wyoming study area extends beyond Wyoming into Montana and South Dakota. See Western Wireless Dec. 20 *ex parte*. See also Letter from David L. Sieradzki, Counsel for Western Wireless Corp., to Magalie Roman Salas, FCC dated Dec. 19, 2000 – Attached Maps.

⁷¹ We note that in the *Universal Service Order*, the Commission set forth procedures for modifying a rural telephone company's study area through joint action by the Commission and the relevant state. See *Universal Service Order*, 12 FCC Rcd at 8880-83, paras. 186-190. The instant case deals with study areas that cross state boundaries, however, unlike the situation addressed in the *Universal Service Order*. Accordingly, we find inapplicable the procedures for modification of a study area contained within a state's boundaries.

⁷² In so doing, we follow the approach of state commissions that have designated carriers in similar circumstances. See, e.g., *Application of WWC Texas RSA Limited Partnership for Designation as an Eligible Telecommunications Carrier*, PUC Docket Nos. 22289 and 22295, SOAH Docket Nos. 473-00-1167 and 473-00-1168, Order at 6-7 (Texas Pub. Util. Comm'n, rel. Oct., 2000).

⁷³ 47 C.F.R. § 1.2002(a); 21 U.S.C. § 862.

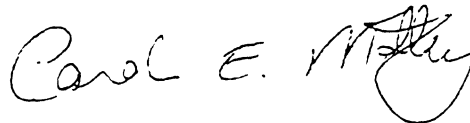
⁷⁴ Section 1.2002(b) provides that a certification pursuant to that section shall include: "(1) If the applicant is an individual, that individual; (2) If the applicant is a corporation or unincorporated association, all officers, directors, or persons holding 5% or more of the outstanding stock or shares (voting/and or non-voting) of the petitioner; and (3) If the applicant is a partnership, all non-limited partners and any limited partners holding a 5% or more interest in the partnership." 47 C.F.R. § 1.2002(b).

⁷⁵ See Western Wireless Petition at 13, App.E.

Corporation IS DESIGNATED AN ELIGIBLE TELECOMMUNICATIONS CARRIER for designated service areas in Wyoming, as discussed herein.

27. IT IS FURTHER ORDERED that a copy of this Memorandum Opinion and Order SHALL BE transmitted by the Common Carrier Bureau to the Universal Service Administrative Company.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in black ink, appearing to read "Carol E. Matthey". The signature is fluid and cursive, with the first name "Carol" being the most prominent part.

Carol E. Matthey
Deputy Chief, Common Carrier Bureau