



President
ROGER L. HERMSEN
President Elect
DOUGLAS J. WELZLAFF
Executive Director
WILLIAM OSBECK

Public Service Commission of Wisconsin
RECEIVED: 07/28/06, 11:47:41 AM

Filed Via Electronic Regulatory Filing (ERF) System

July 28, 2006

Ms. Sandra Paske, Secretary to the Commission
Public Service Commission of Wisconsin
610 N. Whitney Way
P.O. Box 7854
Madison, WI 53707-7854

RE: Biennial Review of Universal Service Fund Rules, Docket 1-AC-198

Dear Ms. Paske:

On behalf of the Wireless Division of the Wisconsin State Telecommunications Association, I file the attached Comments in the above referenced docket. These Comments are filed pursuant to the Notice Of Hearing dated June 2, 2006.

If you have any problems with this filing, please contact the Wisconsin State Telecommunications Association at (608) 256-8866.

Sincerely,

/s/ Dan Fabry
Dan Fabry
Nsight Telservices
Chairman, WSTA Wireless Council

**BEFORE THE
PUBLIC SERVICE COMMISSION OF WISCONSIN**

Biennial Review of Universal Service)
Fund Rules)
)

1-AC-198

**COMMENTS OF THE WIRELESS DIVISION OF THE WISCONSIN
STATE TELECOMMUNICATIONS ASSOCIATION**

INTRODUCTION

The Wireless Division of the Wisconsin State Telecommunications Association (“WSTA Wireless Division”) submits these Comments pursuant to the Public Service Commission of Wisconsin’s (the “Commission’s”) June 2, 2006 Notice of Hearing in this docket. *Biennial Review of Universal Service Fund Rules*, Public Service Commission of Wisconsin Docket 1-AC-198, Notice of Hearing (June 2, 2006) (hereinafter, the “*Notice of Hearing*”). The WSTA Wireless Division is an interested party in this docket because it includes ten wireless carriers doing business in this state, all of which could be directly affected by this issues raised in this docket.

The WSTA Wireless Division is generally in agreement with the Comments filed by the WSTA in this docket. However, with respect to one specific issue – the assessment of commercial mobile radio service (“CMRS”) providers for the state Universal Service Fund (“USF”) – the WSTA Wireless Division respectfully requests

that the Commission maintain the current moratorium on the assessment of CMRS providers.

BACKGROUND

The context surrounding this issue dates back to 2000, when the Commission first employed its powers under Wis. Stat. § 196.218(3)(b) to exempt CMRS providers from the requirements of Wis. Stat. §196.218(3)(a)1., a statute that generally requires that all telecommunications providers contribute to the state USF. *Administration of the Universal Service Fund*, Public Service Commission of Wisconsin Docket No. 05-GF-104, Order at 1 (November 8, 2000) (the “*November 2000 Order*”). The reasoning behind the exemption of CMRS providers was that “CMRS is an emerging telecommunications market” and was viewed as “adjunct to wireline service.” *Id.* Additionally, the exemption was based on the fact that CMRS providers would not be able to recover the USF charges through a surcharge on their bill. *Id.* (citing Wis. Stat. § 196.218(3)(e)). Under the *November 2000 Order*, the exemption was to be in place until January of 2002. *Id.* at 2.

In December of 2001, just before the exemption was set to expire, the Commission revisited this issue and extended the exemption until the Commission “considers the issue of CMRS providers in its biennial review of the USF Rules.” *Administration of the Universal Service Fund*, Order, Public Service Commission of Wisconsin Docket No. 05-GF-104 at 1 (December 20, 2001) (the “*December 2001 Order*”).

Between the two Commission Orders, the Legislature made modifications to Wis. Stat. § 196.202(2), a statute addressing the regulation of CMRS providers in the state. 2001 Wisconsin Act 16, effective August 31, 2001 (“2001 Act 16”). The statutory changes were:

Scope of regulation. A commercial mobile radio service provider is not subject to ch. 201 or this chapter, except as provided in sub. (5), and except that a commercial mobile radio service provider is subject to s. 196.218 (3) if the commission promulgates rules that designate commercial mobile radio service providers as eligible to receive universal service funding under both the federal and state universal service fund programs. If the commission promulgates such rules, a commercial mobile radio service provider shall respond, subject to the protection of the commercial mobile radio service provider's competitive information, to all reasonable requests for information about its operations in this state from the commission necessary to administer the universal service fund.

Wis. Stat. § 196.202(2).

Finally, this Commission has also acted to designate several CMRS providers as ETCs for the purposes of the federal USF. *See e.g., Application of United States Cellular Corporation for Designation as an Eligible Telecommunications Carrier in Wisconsin*, Public Service Commission of Wisconsin Docket No. 8225-TI-102, Final Decision at 5 (December 20, 2002) (hereinafter “*ETC Designation Order*”). In these ETC designation cases, the CMRS providers specifically sought ETC status to receive federal universal service support and not state universal service support. *See, id.* at 4. The Commission acknowledged that receiving state USF support would require additional action.

“However, since US Cellular will not be subject to the state requirements and state obligations, the Commission requires that US Cellular not apply for state USF money. If US Cellular ever does apply

for state USF money, then all of the state requirements for and obligations of ETC status shall again be applicable to US Cellular.”

ETC Designation Order at 5.

COMMENTS

I. THE STATUTORY CHANGES AND COMMISSION ACTION SUGGEST THAT CARRIERS BE REQUIRED TO SEEK STATE USF SUPPORT BEFORE THE ASSESSMENT WILL APPLY

When read together, the Commission’s *ETC Designation Order* and 2001 Wisconsin Act 16 evidence a policy that carriers would be required to abide by the state requirements, including the assessment requirements, if and when a CMRS provider sought status as an ETC for purposes of the state fund.

The statutory changes became effective in August of 2001. *See* 2001 Wisconsin Act 16. The Commission’s *ETC Designation Order* was released subsequent to the legislative action, in December of 2002. As such, the Commission would have been aware of the statutory requirements at the time of the *ETC Designation Order*. Yet, in the *ETC Designation Order*, the Commission concedes that U.S. Cellular *could have applied for state USF funding* had they agreed to abide by all of the state requirements in Wis. Admin. Code Ch. PSC 160.¹ This indicates that the Commission believes that its rules *currently* allow for the Commission to “designate

¹ The Commission acknowledged that U.S. Cellular may not be able to meet all of the state requirements. *ETC Designation Order* at 7 (“Other objections to US Cellular’s designation focus on an alleged inability to meet certain additional state requirements in Wis. Admin. Code § PSC 160.13. These are moot, however, since the Commission has adopted different requirements for US Cellular.”).

[CMRS] providers as eligible to receive universal service funding under both the federal and state universal service fund programs.”² *See* Wis. Stat. § 196.202(2).

Given this history and practice, the Commission appears to have interpreted the intervening changes to Wis. Stat. § 196.202 to mean that carriers would have to specifically seek status as ETCs for the state USF before they would be subject to the assessment requirements found in Wis. Stat. § 196.218(3). To date, no CMRS providers have sought state funding, and to the WSTA Wireless Division’s knowledge, no CMRS providers plan to do so in the near future.

This interpretation of the Commission’s prior actions represents good policy. The state USF (including the designation procedures) is clearly based upon a wireline model. The “essential telecommunications services” listed in Wis. Admin. Code § PSC 160.03 highlights the reliance on a wireline model, without acknowledgement or incorporation of the significant benefits of mobile technology, namely mobility. Requirements like equal access, toll blocking, local calling areas, and directory listings clearly favor wireline technology. Wis. Admin. Code § PSC 160.03(2)5.-6.; 13.; 15. Mandating that wireless subscribers and providers subsidize a wireline program is inequitable and imposes a competitive disparity. Such action should be until the rules are significantly adjusted to include wireless applications for expenditures from the fund and CMRS providers begin seeking status as ETCs for purposes of the state fund.

² This is true, even though no changes have been made to the rules since April of 2000. *See* Wis. Admin. Code ch. PSC 160, History.

The Commission's action to date suggests that this is the both the best policy for Wisconsin, and the best interpretation of the legislative intent of 2001 Wisconsin Act 16. The WSTA Wireless Division believes that, to carry out the intent of intervening legislation, the exemption on assessing CMRS providers should remain in effect unless and until CMRS providers seek funding from the state USF.

II. THE CONCERNS IDENTIFIED IN THE PREVIOUS COMMISSION ORDERS REMAIN TRUE TODAY AND THEREFORE THE EXEMPTION SHOULD CONTINUE

In November of 2000, this Commission stated that “[s]ince providers may not recover their universal service fund assessment through a surcharge, in order to recover that amount they must either increase basic rates or absorb the expense of the assessment.” *November 2000 Order* at 1 (citing Wis. Stat. § 196.218(3)(e); Wis. Admin. Code § PSC 160.15). Nothing has changed to remove this concern, and intervening federal action only highlights the concerns that could come into play if the Commission removes the current moratorium.

1. Wisconsin Law Is Inconsistent With Federal Law

With very limited exception, Wisconsin law prohibits the establishment of surcharge to collect the entire USF assessment amount. Specifically, Wis. Stat. § 196.218(3)(e) states: “a telecommunications provider or other person may not establish a surcharge on customers’ bills to collect from customers contributions required under this subsection.”

In March of 2005, the FCC determined that any state regulations requiring or prohibiting the use of line-items constitutes rate regulation, which is impermissible

under federal law. *In the Matter of Truth-In-Billing and Billing Format*, CC Docket 98-170, *National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-In-Billing*, GC Docket 04-208, Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking at ¶ 30 (March 18, 2005) (the “*FCC Truth-In-Billing Order*”)(citing 47 U.S.C. § 332(c)(3)(A)). Given this conclusion, the Wisconsin statute cited above appears to be in conflict with federal law since it prohibits the use of a line-item surcharge on the bills of wireless customers.³

Imposing the assessment requirements now would still require companies to “increase basic rates or absorb the expense of the assessment” since Wisconsin law still prohibits companies from imposing a surcharge on their customer bills. To the extent this Commission would enforce the prohibitions in Wis. Stat. § 196.218(3)(e), removing the current exemption on wireless carriers could lead to costly legal proceedings to establish the requirements that CMRS providers would have to abide by. To avoid this situation, the current moratorium should be kept in place until the statutes are changed to be consistent with federal law.

2. Recent Changes To Wisconsin Statutes Do Not Change The Analysis

It may be argued that the concerns identified above have been alleviated because Wis. Stat. § 196.218(3) was recently amended to require companies to

³ Interestingly, the *FCC Truth-In-Billing Order* appears to reflect the same concerns addressed in the Commission’s *November 2000 Order*, namely that the prohibitions on surcharges would have a negative effect on wireless rates. *November 2000 Order* at 1 (given the statutory requirements, carriers would have to “either increase rates or absorb the expense of the assessment”).

identify portions of the USF assessment amounts. Wis. Stat. § 196.218(3)(f) (see also 2005 Wisconsin Act 25, effective on July 26, 2005). This provision now states:

“A telecommunications utility that adjusts local exchange service rates for the purpose of recovering all or any amount of that portion shall identify on customer bills a single amount that is the total amount of the adjustment. The public service commission shall provide telecommunications utilities the information necessary to identify such amounts on customer bills.”

Prior to the statutory changes, providers were explicitly prohibited from establishing any type of surcharge with respect to the recovery of USF assessments. The new provisions require a portion of the USF assessment to be “identified” on customer bills, but the remainder (and relatively larger portion) of the USF assessment amount is still subject to the prohibitions in Wis. Stat. § 196.218(3)(e).⁴

Relying on these changes to show that wireless carriers are allowed to “pass through” any assessment amounts to their customers would be improper. First, the changes have no effect on CMRS providers because they only apply to carriers that provide “local exchange service.” Wis. Stat. § 196.218(3)(f). This would not apply to CMRS providers since they, by statute, do not provide “basic local exchange service.” Wis. Stat. § 196.01(1g) (“Basic local exchange service’ does not include cable television service or services provided by a commercial mobile radio service provider.”)

⁴ The total amount collected is approximately \$30 million annually, while the Commission administered programs are capped at \$6 million annually. See e.g., *Administration of Universal Service Fund, Determination and Delegation of Assessment Rates for the Universal Service Fund*, Public Service Commission of Wisconsin Docket 05-GF-104, Staff Memorandum at 4-5 (Nov. 15th, 2005) (identifying the appropriation levels for the various USF programs).

Second, the changes (even if they did apply to CMRS providers) still do not comply with the *FCC Truth-In-Billing Order* since (1) the changes *require* companies to identify a portion of the USF assessment amount; and (2) because the changes only apply to a portion of the total USF assessment amount, the remainder of which is still subject to the *prohibition* found in Wis. Stat. § 196.218(3)(e). Applying the current statutes to CMRS providers would violate the FCC’s decision in two ways, since it would both require and prohibit the establishment of a surcharge. *FCC Truth-In-Billing Order* at ¶ 30.

The recent changes to Wisconsin law do not change the equation as it relates to the ability of CMRS providers to identify the USF assessment amount on their customer bills. As such, the Commission’s exemption should remain in place unless and until Wisconsin law complies with the requirements of Federal law.

III. THE COMMISSION SHOULD ABSTAIN FROM INCREASING THE PROVIDERS ASSESSED UNTIL IT CAN ENSURE TECHNOLOGY NEUTRALITY

Much of the discussion on this issue at the USF Council has encouraged the Commission to “level the playing” field of the types of carriers that are assessed. *See e.g.*, Public Service Commission of Wisconsin, Universal Service Fund Council, *Summary of February 28th, 2006 Meeting* at 2 (noting that there is a “lack of parity” among providers who are assessed for the fund). Simply including wireless providers will not eliminate this lack of parity, and the Commission should wait for additional legislation or guidance on how to ensure complete neutrality before moving forward.

The current marketplace for “telecommunications service” has started a wide-ranging debate as to what is and what is not a “telecommunications service.” This is particularly true with respect to Voice over Internet Protocol (“VoIP”) service, which is becoming an increasingly popular choice for consumers. As a regulatory issue, however, the Federal Communications Commission has made clear that the “[FCC], not the state commissions, has the responsibility and obligation to decide whether certain regulations apply to DigitalVoice and other IP-enabled services...” See, *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Federal Communications Commission, WC Docket No. 03-211, Memorandum Opinion and Order at ¶ 1 (November 12, 2004) (the “*Vonage Order*”). The ability for a state Commission to impose USF assessment requirements on a VoIP provider remains very questionable. See *id.*⁵ Until this jurisdiction is clarified, the Commission should refrain from imposing assessments on additional providers.⁶

As a practical and policy matter, it would odd if the Commission moved forward with the assessment of wireless providers before pursuing the assessment of VoIP providers since VoIP is generally advertised as a one-for-one substitute for

⁵ The *Vonage Order* specifically preempted an order of the Minnesota Public Utilities Commission that applied Minnesota’s traditional “telephone company” regulations to Vonage’s DigitalVoice service. *Vonage Order* at 22407-08, paras. 8-9.

⁶ Recent action by the FCC signifies that interconnected VoIP providers will pay into the federal USF. *In the Matter of Universal Service Contribution Methodology*, Federal Communications Commission WC Docket No. 06-122, Report and Order and Notice of Proposed Rulemaking at ¶ 34 (June 27, 2006). This Order does not address whether states could require these providers to pay into the various state funds.

traditional home phone service. To ensure parity among assessed providers, the Commission should continue the exemption of wireless providers until the regulatory treatment of other services (such as VoIP) has been clarified.⁷

CONCLUSION

For the reasons stated above, the Commission should keep in place the exemptions of its *November 2000 Order* and *December 2001 Order* in place.⁸

Dated this 28th day of July, 2006.

WISCONSIN STATE TELECOMMUNICATIONS ASSOCIATION WIRELESS DIVISION

By: /s/ Dan Fabry
Dan Fabry
Nsight Telservices
Chairman, WSTA Wireless Council

⁷ The Commission's previous Order also stated concern about the adjunct nature of wireless service and the fact that wireless was an emerging market. *November 2000 Order* at 1. The WSTA Wireless Division believes, and this Commission has found, that wireless service has grown considerably and now *can be* a substitute for traditional wireline service. *Petition of SBC Wisconsin for Suspension of Wisconsin Statute sec. 196.196(1) with Regard to Basic Local Exchange Service*, Final Decision, Public Service Commission of Wisconsin Docket No. 6720-TI-196 at 25 (November 25, 2005) ("*SBC Wisconsin Suspension Order*"). However, for the most part, wireless service remains an adjunct or supplementary service, with customers generally taking both wireline and wireless services. *See e.g.*, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, Federal Communications Commission, WT Docket No. 05-71, Tenth Report at ¶ 196 and n.492 (Sept. 30, 2005) (noting that wireless substitution is growing, but remains at about six percent of households). While the emerging nature of wireless service has certainly changed, it has not yet achieved a high level of substitution for wireline service. The Commission may want to continue the current suspension until the trend of "cutting the cord" is more prevalent.

⁸ To the extent the Commission decides to reverse the decisions of these orders, the WSTA Wireless Division is in agreement with the limitation and conditions identified in the Comments of the WSTA ILEC Division, Sections II and III that were filed in this docket.