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February 24, 2006

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

**RE: Objection to Universal Service Fund Assessment by Cheqtel
Communications, Inc. and Request for Refund, Docket 1065-UO-100**

Dear Ms. Zehner:

Enclosed, please find the Brief of the Wisconsin State Telecommunications Association for filing in the above-referenced docket.

Electronic copies of this filing are also being sent to service list in this docket.

If you have any questions or problems with this filing, please contact me at (608) 256-8866 ext. 23 or by email at brybarik@wsta.info.

Sincerely,

/s/ Brian J. Rybarik
Brian J. Rybarik (SBN 1047401)
Legal Counsel and
Manager of Regulatory Affairs

Attachment

cc: Service List

**BEFORE THE
PUBLIC SERVICE COMMISSION OF WISCONSIN**

Objection to Universal Service Fund Assessment
by Cheqtel Communications, Inc. and Request for Refund

1065-UO-100

**BRIEF OF THE WISCONSIN STATE TELECOMMUNICATIONS
ASSOCIATION**

Pursuant to the schedule set by the Administrative Law Judge (“ALJ”) at the February 16th, 2006 hearing in this docket, the Wisconsin State Telecommunications Association (“WSTA”)¹ files this brief relating to the policy issues underlying any Commission decision on Cheqtel Communications, Inc.’s (“Cheqtel”) objection and request for a refund in this docket.

INTRODUCTION

Mistakes happen. The issue in this docket is whether the Public Service Commission of Wisconsin (“Commission”) will allow Cheqtel to correct an error in their annual report. Along with correcting Cheqtel’s annual report, the Commission will also decide whether Cheqtel will receive a reduction in their Universal Service Fund (“USF”) assessment and a refund of excessive payments. These excessive payments and assessment levels were a direct result of the error in Cheqtel’s annual report. The WSTA believes that Cheqtel should be allowed to correct their error and recognize a

¹ WSTA was granted intervention into this docket during the February 16th hearing. *Transcript of February 16, 2006 Hearing* at 4:9-10. Hereinafter, the hearing transcript will be cited as “*Tr.*” and references to page and line numbers will be done in the following format: Page:Line.)

corresponding decrease in their USF payments along with a refund of excessive payments already made.

While this case involves only the Cheqtel situation, it has broader implications for the telecommunications industry. The Commission's decision in this docket could set a precedent for future situations when mistakes are discovered that have an impact on a company's payment into the USF. Approving Cheqtel's application will confirm that every telecommunications provider in the state has a process to correct mistakes and ensure that any one company's payment into the USF corresponds with their share of the fund.

BACKGROUND

Each year, public utilities in the state are required to file an annual report with the Commission. Wis. Stat. § 196.07. Telecommunications utilities in the state are required to file reports that include, among other things, their "Assessable Revenues for Universal Service Fund Assessment Purposes." See e.g., *2004 Annual Report of Chequamegon Communications Cooperative, Inc.*, Utility No. 1070, at 43 (April 29, 2005). The figures provided in the annual reports (the "Assessable Revenues") are used to set the rates for USF assessments. Wis. Stat. § 196.218(3)(a)3m; Wis. Admin. Code § PSC 160.18(3) ("Telecommunications providers shall be assessed on the basis of their gross intrastate operating revenues from telecommunications services."); *Tr.* at 26:20 – 27:3.

In this case, Cheqtel discovered an error in their annual report after receiving notification (from the Commission) of the USF assessment rates for the coming year. *Tr.* at 9:12-19. Cheqtel filed the application in this docket seeking an adjustment of USF payments to account for a corrected assessable revenue amount. *Universal Service Fund*

Payment Request, Cheqtel Communications, Inc., Utility No. 1065, Docket 1065-UO-100 (December 22, 2005).

The Commission opened this docket to consider Cheqtel's application and set a hearing date. *Notice of Proceeding and Hearing*, Docket 1065-UO-100 (February 8, 2006). Testimony was filed by Cheqtel, WSTA and the Commission Staff. *Direct Testimony of Janet Christenson*, Docket 1065-UO-100 (February 15, 2006); *Direct Testimony of William C. Esbeck*, Docket 1065-UO-100 (February 15, 2006); *Direct Testimony of Gary A. Evenson*, Docket 1065-UO-100 (February 14, 2006). At the hearing, additional testimony was elicited from Janet Christenson and Gary Evenson. *Tr.* 5-16 (Janet Christenson) and 23-38 (Gary Evenson).

Commission staff concedes that Cheqtel's original annual report contained a mistake and misstated their Assessable Revenues. *See Tr.* at 28:2 and 34:3-8. Given the error, staff believes that it is necessary to correct Cheqtel's annual report. *Tr.* at 29:1-3. However, with respect to the practical effects of Cheqtel's errors – their USF payments – the *Staff Testimony*² sets forth three options:

Option 1: Recognize the mistake made in Cheqtel's annual report and allow Cheqtel to correct their annual report and provide for a corresponding correction to Cheqtel's USF assessment. *Tr.* 29:7-18.

Option 2: Require Cheqtel to amend their annual report, but deny their application to adjust their USF assessment and deny their request for a refund of excessive USF payments already made. *Tr.* at 29:19-30:5.

Option 3: Require Cheqtel to amend their annual report and adjust Cheqtel's USF assessment going forward, but deny their request for a refund of excessive USF payments already made. *Tr.* 30:6-14.

² The portion of the transcript that corresponds with the Commission staff's pre-filed testimony is referenced as "*Staff Testimony*".

DISCUSSION

Approving either Option 2 or Option 3 would require Cheqtel to pay an incorrect and excessive amount into the state USF. Such an outcome would set a concerning precedent that is at odds with the Wisconsin Statutes and the Commission's own Administrative Rules. Seemingly recognizing the importance of having an error-correcting procedure in place, the Wisconsin Statutes and Administrative Rules set forth a method for companies to use when a mistake is discovered. As shown below, Options 2 and 3 go against the procedures set out in the law.

As a basis for Options 2 and 3, staff testified that because the USF assessment amounts have already been set for the coming year (a process that used Cheqtel's inaccurate annual report data), any refund request could be denied because it could require a recalculation of the USF assessment amounts. *Tr.* at 29:20-23. WSTA does not believe that this rationale should be followed and that the Commission should approve Option 1.

I. Cheqtel's Application Is In Compliance With The Objection Allowances In The Commission Rules and Denying the Application Would Nullify The Objection Rules.

Cheqtel's objection to their USF assessment is timely and in compliance with the process determined by the Commission and outlined in the Commission's administrative rules. Wis. Admin. Code § PSC 160.18(9)(b); *Tr.* at 33:10-15 (noting that it is staff's understanding that there is no dispute about the timeliness of the objection). This rule provides that a company can object to a USF assessment within 30 days of the bill's mailing. *Id.*

Denying a refund in this case would render the objection allowances in Wis. Admin. Code § PSC 160.18(9)(b) to be effectively meaningless, an outcome that even the *Staff Testimony* recognizes. *Tr.* at 30:2. Courts have consistently refused to apply interpretations of statutes that give little or no meaning to statutory provisions and the Commission should decline to do the same here with its Administrative Rules. *Osborn v. Board of Regents*, 2002 WI 83, ¶ 22, 254 Wis. 2d 266, 647 N.W.2d 158 (“When interpreting a statute, [a court] attempt[s] to give effect to every word, so as not to render any portion of the statute superfluous.”); *Unified School Dist. No. 1 of Racine Cty. v. WERC*, 81 Wis. 2d 89, 98, 259 N.W.2d 724 (1977) (“The law favors a construction which gives meaning to every portion of a statute.”)

Additionally, from a practical perspective, a company may first realize mistakes in their reported Assessable Revenues only after the assessment rates have been set for USF purposes. That is, the assessment level will be the trigger that encourages a company to review their annual report if something is amiss.³ Wisconsin Administrative Code § PSC 160.18(9) appears to be the safety valve when these situations occur, allowing the company and the Commission to correct errors. Providing little to no relief here would remove this safety valve and make Wis. Admin. Code § 160.18(9)(b) meaningless here and potentially in the future.

³ The WSTA recognizes that the time between the filing of the annual report (generally April) and the setting of the USF assessment rates (November) is significant. However, the objection allowances are based on the USF assessment time, and not the annual report. Since the USF assessment calculation is dependent on the annual report numbers, the rule appears to provide an opportunity to correct errors at the later date.

II. Options 2 and 3 appear to be inconsistent with Wisconsin Statutes and Administrative Code Provisions.

A. Wis. Stat. S. 196.85(4)

As noted above, Wis. Admin. Code § PSC 160.18(9) provides a mechanism for companies to challenge their USF assessment levels if they believe the billed amount is in error. If such an objection is lodged, the Commission is obligated to follow the process in Wis. Stat. § 196.85(4). Wis. Admin. Code § PSC 160.18(9)(b) (“...commission action regarding [an] objection shall follow the procedures described in s. 196.85(4) stats”). This statute, among other things, requires the Commission to hold a hearing when an objection is filed. Wis. Stat. § 196.85(4). If after the hearing the Commission “finds any part of the bill to be excessive, erroneous, unlawful, or invalid, it shall . . . transmit to the objector by registered mail an amended bill, in accordance with the [Commission’s] findings.” Wis. Stat. § 196.85(4).⁴

The WSTA is not in a position to comment on whether Cheqtel’s bill was in fact erroneous. However, the testimony in this case, including the *Staff Testimony*, concludes that Cheqtel’s figures were initially incorrect. *See, e.g., Tr.* at 28:2 (“Cheqtel initially overstated the amount in that schedule”); *see also Tr.* at 34:3-8. There has been no evidence to suggest that Cheqtel’s amended numbers are incorrect. Since this is the case, Options 2 and 3 do not appear to be consistent with the statutory requirements because they would not provide the relief outlined in the statute. *See State ex rel. Marberry v. Macht*, 2003 WI 79, ¶ 16, 262 Wis. 2d 720, 665 N.W.2d 155 (while there is no *per se* rule, use of the term “shall” in the statutes is presumed to require mandatory action).

⁴ As noted above, Commission staff believes that it is necessary for Cheqtel to correct its annual report. *Tr.* at 29-1-3. However, requiring Cheqtel to correct its annual report without a corresponding correction to their USF assessment provides little more than a red herring of relief and would not fulfill the requirements of the statute.

B. Wis. Admin. Code S. PSC 160.18

Additionally, the outcome of either Option 2 or Option 3 would also be inconsistent with the overall requirements of Wis. Admin. Code § 160.18. For the purpose of funding the state's universal service fund, Wis. Admin. Code § PSC 160.18(3) states that "telecommunications providers shall be assessed on the basis of their gross intrastate operating revenues from telecommunications services." Wis. Admin. Code § PSC 160.18(5) sets up a framework under which the assessment is levied and spread out over all assessed providers on a percentage basis. Specifically, it states:

"The percentage liability for a given telecommunications provider is the ratio of that provider's intrastate gross telecommunications revenues to the sum of the intrastate gross telecommunications revenues for all contributory providers."

Wis. Admin. Code § PSC 160.18(5). Effectively, the rule requires that providers pay into the fund based on their proportion of the total intrastate revenues of all providers.

If the numbers in Cheqtel's application are deemed correct, and the Commission still denies their request for a refund and reduced assessment, Cheqtel's liability will be greater than their respective portion of the total amount of assessable revenue among all providers. *See e.g. Tr.* at 38:16-21.

Again, aside from setting a bad policy, this outcome would be inconsistent with the requirements of the Commission rules.

CONCLUSION

The Wisconsin Statutes and Administrative Code set forth a procedure through which a company can correct an erroneous annual report that results in an excessive USF assessment. To the extent the Commission accepts that Cheqtel's annual report was incorrect, the procedures set forth in Statutes and the Commission rules should be

followed Cheqtel's objection to its assessment and request for a refund should be approved. Options 2 and 3 in the *Staff Testimony* would produce outcomes that are inconsistent with the procedures identified above and would set a bad policy for the future that would remove the ability to correct inadvertent errors in future annual reports.

The Commission should encourage an outcome, here and in the future, that ultimately seeks *correct* annual reports and *correct* USF payments, even if this means correcting rare and unintentional errors. For the foregoing reasons, WSTA respectfully requests that the Commission grant Cheqtel's request in this docket.

Dated this 24th day of February, 2006.

WISCONSIN STATE TELECOMMUNICATIONS ASSOCIATION

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