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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

MARC SPITZER, Chairman
WILLIAM A. MUNDELL
JEFF HATCH-MILLER
MIKE GLEASON
KRISTIN K. MAYES

AZ CORP COMMISSION
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IN THE MATTER OF THE APPLICATION)
OF ALLTEL COMMUNICATIONS, INC.,)
FOR DESIGNATION AS AN ELIGIBLE)
TELECOMMUNICATIONS CARRIER PUR-)
SUANT TO SECTION 214(e)(2) OF THE)
COMMUNICATIONS ACT OF 1934.)

DOCKET NO. T-03887A-03-0316

Arizona Corporation Commission
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**CLOSING POST-HEARING BRIEF OF THE ARIZONA LOCAL
EXCHANGE CARRIERS ASSOCIATION**

MARCH 16, 2004

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1 Company, Gila River Telecommunications, San Carlos Apache Telecom Utility and the Tohono
2 O'Odham Utility Authority are tribally-owned, and not subject to the jurisdiction of the
3 Commission, each supports ALECA's position in this case.

4 **I. INTRODUCTION.**

5 ALLTEL's Application for designation as an additional ETC in those areas served by
6 rural telephone companies should be denied. ALLTEL has not demonstrated the capability and
7 the commitment to provide the nine ETC-supported services throughout the requested rural
8 service area, and the Utilities Division Staff ("Staff") has not evaluated the Application with
9 sufficient rigor to enable the Arizona Corporation Commission ("Commission") to find that
10 ALLTEL's request is in the public interest.

11 Congress granted to state commissions the responsibility for designating eligible
12 telecommunications carriers. However, this Commission is not obligated to designate ALLTEL
13 as an additional ETC. Section 214(e)(2) of the Act states that "[u]pon request *and consistent*
14 *with the public interest, convenience, and necessity*, the State commission *may, in the case of an*
15 *area served by a rural telephone company, and shall, in the case of all other areas*, designate
16 more than one common carrier as an eligible telecommunications carrier for a service area
17 designated by the State commission, so long as each additional requesting carrier meets the
18 requirements of paragraph (1)." (Emphasis added). Section 214(e)(2) further states that
19 "[b]efore designating an additional eligible telecommunications carrier for an area served by a
20 rural telephone company, the State commission shall find that the designation is in the public
21 interest." With full awareness of the crucial role played by rural ILECs as carriers of last resort
22 in high-cost areas (of which Arizona has many), Congress included this heightened public
23 interest test for applicants seeking ETC status in areas served by rural telephone companies.

24 Congress did not establish specific criteria for state commissions to follow in evaluating
25 whether or not an application for ETC designation is in the public interest. Rather, in making
26 this evaluation, the state commissions were left to strike what each believed was a proper balance

1 between the dual goals of the Act: promoting competition among providers of
2 telecommunications services and preserving and maintaining the principles of universal service
3 as set forth in Section 254(b). While state commissions have broad latitude in evaluating
4 applications for ETC designations in rural areas, many have focused too narrowly upon the value
5 of increased competition without giving proper weight to the equally important principles of
6 universal service. In the petition of Virginia Cellular, LLC, ("Virginia Cellular") for designation
7 as an ETC, the Federal Communications Commission ("FCC") declared that "the value of
8 increased competition, by itself, is not sufficient to satisfy the public interest test in rural areas."
9 *In the Matter of Virginia Cellular, LLC, Petition for Designation as an Eligible*
10 *Telecommunications Carrier in the Commonwealth of Virginia*, Memorandum Opinion and
11 Order, CC Docket No. 96-45, FCC 03-338 (released January 22, 2004), p. 3, ¶ 4 (the "*Virginia*
12 *Cellular Order*"). A copy of the *Virginia Cellular Order* is attached as Attachment 1. In the
13 case before this Commission, ALLTEL and Staff have placed too much emphasis on the value of
14 increased competition, without adequate consideration of universal the service principles.

15 Moreover, the process for designating ETCs has not been sufficiently rigorous in many
16 states. The FCC acknowledged this deficiency in the *Virginia Cellular Order*, stating: "we need
17 a more stringent public interest analysis for ETC designations in rural telephone company
18 service areas." *Id.* To address this deficiency, the FCC in its *Virginia Cellular Order* provided a
19 framework of factors to be weighed in evaluating additional ETC designations in rural areas, but
20 noted that the FCC was awaiting the outcome of a review of the process for designating ETCs by
21 the Federal-State Joint Board on Universal Service.³

22 ALECA does not believe that ALLTEL has provided the information necessary for this
23 Commission to conduct a rigorous public interest review under the framework announced in the

24 ³ The Federal-State Joint Board on Universal Service released a Recommended Decision on February 27, 2004,
25 which, among other things, proposes "permissive federal guidelines for states to use when determining whether
26 applicants are qualified to be designated as ETCs under section 214." *In the Matter of the Federal-State Joint Board*
on Universal Service, Recommended Decision, CC Docket No. 96-45, FCC 04J-1 (rel. Feb. 27, 2004). The Joint
Board's Recommended Decision has not been addressed in this brief as the Administrative Law Judge ruled that it
would not be appropriate to consider recommendations of the Joint Board which have not been adopted by the FCC.

1 *Virginia Cellular Order*, nor has Staff conducted the type of fact-intensive investigation and
2 analysis contemplated by Section 214 and the *Virginia Cellular Order*. In fact, Staff has largely
3 accepted the assertions of ALLTEL without conducting a rigorous, independent inquiry.

4 Finally, ALLTEL has not made adequate commitments—and Staff has not required such
5 commitments—regarding ALLTEL's capability and commitment to provide the nine ETC-
6 supported services throughout its designated service area. In short, ALLTEL has not made the
7 requisite showing to be designated an ETC in rural Arizona.⁴

8 **II. REQUIREMENTS OF SECTION 214(E).**

9 An applicant for ETC status must make certain showings before it is deemed eligible for
10 ETC status under section 214(e) of the Act. First, the applicant must be a common carrier.
11 Second, the applicant must offer the nine services that are supported by the federal universal
12 service support mechanism.⁵ Third, the applicant must do so either using its own facilities or a
13 combination of its own facilities and resale of another carrier's facilities. Fourth, the applicant
14 must offer the supported services throughout the service area for which the designation is
15 received. Fifth, the applicant must advertise the supported services and charges throughout the
16 service area for which the designation is received using media of general distribution. Sixth, in
17 the case of an applicant seeking ETC status in areas served by rural telephone companies, the
18 state commission must find that the designation is in the public interest.

19 At a minimum, ALLTEL's Application fails under numbers four and six above, and
20 should be denied by this Commission. However, in the event the Commission decides to grant
21 ETC status to ALLTEL, then the Staff recommendations outlined in the Staff Report should be
22 adopted, as they have been modified at the hearing and the subsequent late-filed exhibit, together
23 with the additional recommendations of ALECA set forth below.

24 ⁴ ALECA takes no position on ALLTEL's request for ETC status in areas not served by rural telephone companies.

25 ⁵ The nine services supported under Section 254(e) are voice grade access to the public switched network (including
26 Lifeline and Link Up services), local usage, dual tone multi-frequency signaling or its functional equivalent, single-
party service or its functional equivalent, access to emergency services, access to operator services, access to
interexchange services, access to directory services, and toll limitation for qualifying low-income consumers. 47
C.F.R. § 54.101.

1 **III. ALLTEL HAS NOT DEMONSTRATED THE CAPABILITY AND**
2 **COMMITMENT TO PROVIDE THE SUPPORTED SERVICES THROUGHOUT**
3 **ITS REQUESTED RURAL SERVICE AREA.**

4 **A. Current Capability versus the Commitment to Serve.**

5 Section 214(e)(1) of the Act requires that an applicant for ETC status offer and advertise
6 the nine ETC-supported services "throughout the service area for which the designation is
7 received." While the FCC has not required that an applicant provide ubiquitous service *prior to*
8 designation as an ETC, the FCC has stated that a new entrant must make a reasonable
9 demonstration of its capability and commitment to provide universal service in the designated
10 areas. In the case of *In the Matter of Western Wireless Corporation Petition for Preemption of*
11 *an Order of the South Dakota Commission*, Declaratory Ruling, CC Docket No. 96-45, FCC 00-
12 248, 15 F.C.C.R. 15168 (released August 10, 2000) (the "*Western Wireless Order*"), the FCC
13 stated that there are several methods for making this demonstration of capability and
14 commitment, including:

15 (1) a description of the proposed service technology, as supported by appropriate
16 submissions; (2) a demonstration of the extent to which the carrier may otherwise
17 be providing telecommunications within the state; (3) a description of the extent
18 to which the carrier has entered into resale agreements; or (4) a sworn affidavit
19 signed by a representative of a carrier to ensure compliance with the obligation to
20 offer and advertise the supported services. ***We caution that a demonstration of***
21 ***the capability and commitment to provide service must encompass something***
22 ***more than a vague assertion of intent on the part of a carrier to provide service.***
23 ***The carrier must reasonably demonstrate to the state commission its ability and***
24 ***willingness to provide service upon designation.***

25 *Id.* at p. 15178, ¶ 24 (Emphasis added). A copy of the *Western Wireless Order* is attached as
26 Attachment 2.

Similarly, the Minnesota Public Utilities Commission discussed the importance of
commitments made by Midwest Wireless Communications in its petition for designation as an
ETC:

Here the Company is able to offer its service through approximately 200 cell sites
in and around the state, and has pledged to build an additional 15 cell sites upon

1 designation as an ETC. The Company has pledged to meet customer orders for
2 new service through a variety of measures including additional cell sites, cell
3 extenders, rooftop antennae, high-powered phones, and the resale of existing
4 service. In addition, the Company has stated that it is willing to address a
5 customer's request for service by developing a schedule for extending service.

6 *In the Matter of the Petition of Midwest Wireless Communications, L.L.C., for Designation as an*
7 *Eligible Telecommunications Carrier Under 47 U.S.C. § 214(e)(2), Order Granting Conditional*
8 *Approval and Requiring Further Filings, Docket No. PT-6153/AM-02-686 (Issued March 19,*
9 *2003) (the "Midwest Wireless Order"). A copy of the Midwest Wireless Order is attached as*
10 Attachment 3.

11 In granting the request for ETC status by Alaska DigiTel ("ADT"), a wireless carrier with
12 limited facilities within the requested designated area, the Regulatory Commission of Alaska
13 focused on the detailed plan presented by ADT for constructing such facilities:

14 ADT describes a 7-step plan for serving customers:

15 (a) if ADT can serve within its existing network, ADT will immediately serve the
16 customer;

17 (b) if the customer is not in an area where ADT currently provides service, ADT
18 will:

19 Step 1: determine whether the customer's equipment can be modified or replaced
20 to provide acceptable service;

21 Step 2: determine whether a roof-mounted antenna or other network equipment
22 can be deployed at the premises to provide service;

23 Step 3: determine whether adjustments at the nearest cell site can be made to
24 provide service;

25 Step 4: determine whether a cell-extender or repeater can be employed to provide
26 service;

Step 5: determine whether there are any other adjustments to network or customer
facilities that can be made to provide service;

Step 6: explore the possibility of offering the resold services of carriers with

1 facilities available to that location;

2 Step 7: determine whether an additional cell site can be constructed to provide
3 services, and evaluate the costs and benefits of using scarce high-cost support to
4 serve the number of customers requesting service.

5 ADT states that if there is no possibility of providing service short of constructing
6 a new cell site, it will report to the commission, providing the proposed cost of
7 construction and the company's position on whether the request for service is
8 reasonable and whether high-cost funds should be expended on the request.

9 We find ADT's plan is a reasonable means for ADT to provide service throughout
10 the MTA service area upon reasonable customer request. We will address any
11 ADT requests to deny service on a case-by-case basis.

12 *In the Matter of the Request by Alaska DigiTel, LLC for Designation as a Carrier*
13 *Eligible to Receive Federal Universal Service Support Under the Telecommunications Act of*
14 *1996, Order Granting Eligible Telecommunications Carrier Status and Requiring Filings, Docket*
15 *No. U-02-39, Order No. 10, pp. 8-9 (Aug. 28, 2003) (the "Alaska DigiTel Order"). A copy of*
16 *the Alaska DigiTel Order is attached as Attachment 4. The Alaska Regulatory Commission also*
17 *noted favorably ADT's "commitment to begin construction of six new cell sites in the first 24*
18 *months after it obtains USF." Id. at 8.*

19 In the *Virginia Cellular Order*, the FCC considered as relevant "the competitive ETC's
20 ability to provide the supported services throughout the designated service area within a
21 reasonable time frame." *Virginia Cellular Order* at p. 3, ¶ 4 (emphasis added).

22 In properly rejecting the request of Nextel Partners for designation as an ETC, the
23 Minnesota Public Utilities Commission concluded as follows:

24 In this case, Nextel has not adequately supported the assertion in its verified
25 petition that it will meet all service obligations of an ETC. Nextel has
26 acknowledged that there were large areas of its service area that it cannot serve at
present. The Company presented no plan for expanding its service capabilities
and simply stated that receipt of the universal service funding would change (in
unspecified ways) the economic model that might (no guarantee or analysis to
show reasonable likelihood) make expansion (of unspecified extent) into some
(unspecified) areas possible. The extent to which the economic model would

1 change was not specified. No guarantee of expansion or analysis was provided to
2 demonstrate the likelihood of expansion. No areas were identified for expansion.

3 In these circumstances and based on this record, therefore, the Commission finds
4 that Nextel has failed to demonstrate that it is willing and able to serve
5 "throughout the service area for which the designation is received" as required of
6 an ETC by 47 U.S.C. § 214(e)(1).

7 *In the Matter of the Petition of NPCR, Inc. d/b/a Nextel Partners for Designation as an Eligible*
8 *Telecommunications Carrier Under 47 U.S.C. § 214(e)(2), Order Denying Without Prejudice*
9 *Nextel's Application for ETC Designation, Docket No. PT-6200/M-03-647, p. 4 (Issued*
10 *December 1, 2003) (the "Minnesota Nextel Order"). A copy of the Minnesota Nextel Order is*
11 *attached as Attachment 5.*

12 Likewise, the Nebraska Public Service Commission also denied the application of Nextel
13 Partners for designation as an ETC based, in part, on its finding that "the Applicant has not
14 presented a clear plan and timetable for providing the supported services throughout the
15 designated service area." *In the Matter of the Application of NPCR, Inc., d/b/a Nextel Partners,*
16 *Eden Prairie, Minnesota Seeking Designation as an Eligible Telecommunications Carrier that*
17 *May Receive Universal Service Support, Order, Application No. C-2932, p. 6 (Entered February*
18 *10, 2004) (the "Nebraska Nextel Order"). A copy of the Nebraska Nextel Order is attached as*
19 *Attachment 6.*

20 There are many important reasons why an ETC must have the capability and commitment
21 to provide the supported services throughout the ETC area, but perhaps the most important is to
22 ensure that the applicant can provide service in the service area if the incumbent LEC
23 relinquishes its designation as contemplated in section 214(e)(4) of the Act.

24 **B. ALLTEL's Commitment to Serve Throughout the Service Area is Almost**
25 **Non-Existent.**

26 As the cases cited above all demonstrate, the FCC and the state commissions expect a
serious commitment on the part of an applicant to provide service throughout its designated
service area. There are any number of ways that an applicant can evidence this commitment, but

1 "vague assertions of intent" certainly do not qualify. The substance of ALLTEL's commitment
2 can be summarized in the following exchange at the hearing between ALECA's attorney and
3 ALLTEL witness Larry Krajci:

4 **Q. So essentially Alltel wants to be designated so that it can access federal**
5 **funds. And once it accesses federal funds, then it will determine**
6 **where it's going to spend those funds and how it's going to spend**
7 **them?**

8 **A. Yes.**

9 *Hearing Transcript*, Vol. 1, p. 47, lines 17-21. ALLTEL's commitment is reminiscent of
10 the line "*show me the money*," spoken by fictional character Rod Tidwell in the movie *Jerry*
11 *McGuire*. ALLTEL's commitment is deficient under any of the standards applied in the *Virginia*
12 *Cellular Order*, the *Western Wireless Order*, the *Midwest Wireless Order*, the *Alaska DigiTel*
13 *Order*, the *Minnesota Nextel Order*, or the *Nebraska Nextel Order*. The record in this case
14 shows that:

- 15 • ALLTEL failed to identify a single construction project that the company would
16 undertake in underserved rural areas within the designated service area.
- 17 • ALLTEL failed to provide a single construction plan for new infrastructure to
18 serve underserved rural areas.
- 19 • ALLTEL failed to provide a single schedule or timetable for constructing
20 infrastructure to serve underserved rural areas.
- 21 • ALLTEL has no plans to provide service in remote areas of its designated service
22 area using special equipment such as three watt handsets or yagi antennae.
- 23 • ALLTEL has not identified any plan for addressing customer requests to extend
24 service where no wireless coverage exists today, such as the seven-step plan addressed in the
25 *Alaska DigiTel Order*.
- 26 • ALLTEL has not identified a process with any detail regarding how the company
will provision customer requests for service in areas where the company does not now have

1 wireless coverage.

2 • ALLTEL has no plans to serve customers through resale agreements.
3 • ALLTEL has not presented a timetable for providing the ETC-supported services
4 throughout the designated service area, a factor considered significant in the *Virginia Cellular*
5 *Order* and the *Nebraska Nextel Order*.

6 • ALLTEL has stated that it will not accept carrier of last resort obligations.

7 ALECA witness Steve Metts summarized ALLTEL's deficient effort in this way:

8 First, ALLTEL is very vague in its application, testimony, and responses to data
9 requests in this proceeding. Although ALLTEL asserts that it needs funding to
10 expand its service into rural areas, it provides no detail regarding any specific
11 construction plans, construction timelines, or projected customers in rural areas.
12 When asked to identify construction projects planned for 2004, 2005, and 2006,
13 ALLTEL's response was that the company has not finalized construction plans
14 for any of the years requested (ALLTEL Response 1-12 to ALECA's First Set of
15 Data Requests). When asked to provide a projection of new local customers that
16 ALLTEL expects to add in the rural portion of its requested ETC area for the
17 years 2004 through 2008, ALLTEL responded that it has not projected the
18 number of new customers in rural areas for these years (ALLTEL Response 1-14
19 to ALECA's First Set of Data Requests). It is clear from these responses that
20 ALLTEL has not developed, or is not willing to provide, *even a basic business*
21 *plan for serving rural areas*, and yet is requesting the Commission to make a
22 determination that granting ETC status and ultimately universal service funding
23 in the rural areas is in the public interest. *Direct Testimony of Steven Metts* at p.
24 4, lines 2-18 (emphasis added).

18 ALLTEL has failed to make any tangible commitment that can be recognized by this
19 Commission which shows that the company is serious about expanding its network in the rural
20 areas of Arizona. Absent such a tangible commitment, ALLTEL has failed to meet one of the
21 primary criteria for designation as an ETC under section 214(e)(2) of the Act. Accordingly, this
22 Commission should deny ALLTEL's Application.

23 **IV. APPLYING THE PUBLIC INTEREST TEST.**

24 **A. General.**

25 Congress did not establish specific criteria for state commissions to follow in evaluating
26

1 whether or not designation of an ETC is in the public interest. However, the FCC has provided
2 some useful guidance in prior cases, including the recent *Virginia Cellular* case, as have other
3 state public service commissions such as those reference herein. In formulating the public
4 interest test to be applied in the case of ALLTEL, the Commission should consider (i) the factors
5 identified by the FCC in *Virginia Cellular* and (ii) the factors previously considered by this
6 Commission in the Smith-Bagley ETC designations.

7 **B. The Virginia Cellular Order**

8 The *Virginia Cellular Order* makes three important points.⁶ First, the FCC
9 acknowledged "the need for a more stringent public interest analysis for ETC designations in
10 rural telephone company service areas." *Virginia Cellular* at p. 3, ¶ 4. Second, the FCC
11 concluded that "the value of increased competition, by itself, is not sufficient to satisfy the public
12 interest test in rural areas." Third, the FCC announced specific factors to be weighed in
13 determining whether designation of a competitive ETC in a rural telephone company's service
14 area is in the public interest. These factors include:

- 15 • benefits of increased competitive choice
- 16 • the impact of multiple designations on the universal service fund
- 17 • the unique advantages and disadvantages of the competitor's service offering
- 18 • any commitments made regarding quality of telephone service provided by
19 competing providers
- 20 • the competitive ETC's ability to provide the supported services throughout the
21 designated service area within a reasonable time frame.

22 Clearly, statements regarding the generalized benefits of competition when evaluating
23 ETC applications are no longer sufficient after the *Virginia Cellular Order*. Rather, a rigorous,
24 fact-intensive inquiry is the appropriate manner of analyzing the public interest.

25 The New Mexico Public Regulation Commission deemed the *Virginia Cellular Order* so

26 ⁶ The FCC noted that "the outcome of [the State-Board] proceeding could potentially impact, among other things, the support that Virginia Cellular and other competitive ETCs may receive in the future and the criteria used for continued eligibility to receive universal service support."

1 significant that the hearing examiner vacated the post-hearing briefing schedule regarding
2 ALLTEL's petition for designation as an ETC in New Mexico (Case No. 03-00283-UT) and
3 scheduled a status conference for March 16, 2004. A copy of the New Mexico order is attached
4 as Attachment 7.

5 **C. The Smith-Bagley ETC Designation.**

6 The Arizona Corporation Commission has previously considered ETC applications from
7 Smith-Bagley, a wireless carrier serving in Indian country. In designating Smith-Bagley as an
8 ETC, the Commission focused almost exclusively on the scarcity of local telephone service on
9 the Native American lands served by Smith-Bagley, and the commitment made by Smith-Bagley
10 to bring local exchange service to those lands. *See* Arizona Corporation Commission Decision
11 No. 63269. Among the relevant factors cited by the Commission were:

- 12 • Smith-Bagley's licensed service area includes approximately 100,000 potential
13 Native American subscribers, most of whom live in remote areas where it is *cost*
prohibitive to provide wireline telecommunications services. Id. at ¶ 49.
- 14 • In many parts of its licensed service area, Smith-Bagley is the *only*
15 *telecommunications provider offering any service* and it is doubtful that any
16 wireline carrier will ever extend lines to those areas. *Id.*
- 17 • Smith-Bagley was willing to expend the resources necessary to offer Basic Local
18 Exchange Telephone Service to *every potential subscriber* in its licensed service
19 area. *Id.* (Emphasis added).
- 20 • Smith Bagley was developing innovative programs targeted at the large number
21 of Native Americans without telephone service. *Id.* at ¶ 50.
- 22 • Smith-Bagley diligently constructed its network to reach unserved areas which
23 may never be reached by wireline service. *Id.* at ¶ 51.

24 **D. Evaluating ALLTEL's Application.**

25 An analysis of the factors that this Commission considered in the Smith-Bagley case, and
26 the factors announced by the FCC in the *Virginia Cellular Order*, leads inevitably to the
conclusion that ALLTEL has not met its burden of proof in demonstrating that its designation as

1 an ETC in the rural parts of its requested designated area serves the public interest. The various
2 assertions of ALLTEL regarding the public interest are addressed below:

3 • **"Benefits of Competition to an Underserved Marketplace."** ALLTEL claims that
4 its designation as an ETC will "further the public interest by bringing the benefits of competition
5 to an underserved marketplace." *Application* at pp. 10-11. First, increased competition, by
6 itself, is insufficient to satisfy the public interest test. *Virginia Cellular Order* at p. 3, ¶ 4.
7 Second, the "underserved marketplace" identified by ALLTEL is underserved *by ALLTEL*, not
8 the rural telephone companies in the requested designated area, as evidenced by the following
9 question and answer at the hearing between ALECA's attorney and ALLTEL witness Krajci:

10 **Q. But do you know of any current customers within a rural ILEC**
11 **service area that want telephone service that can't get it?**

12 **A. No. Specifically, I don't.**

13 *Hearing Transcript*, Vol. 1, p. 91, lines 23-25, and p. 92, lines 1-2.

14 Unlike Smith-Bagley, ALLTEL provides no analysis regarding the rural markets within
15 its requested designated area, nor does it provide any market data to substantiate its claim that
16 the areas are "underserved." Obviously, ALLTEL already provides wireless service in its
17 licensed service area, and the company did not need federal universal service support to establish
18 that service. And, while ALLTEL has said that it will use federal support to construct new
19 infrastructure, it has not identified a single project or provided a single capital budget or
20 construction plan pertaining to such new infrastructure. Instead, ALLTEL witness Krajci
21 testified: "When we receive that designation, we will undertake the process where we will be
22 able to identify the areas that need the expansion on a priority basis." *Hearing Transcript*, Vol.
23 1, p. 46, lines 18-20. Thus, ALLTEL cannot point to any concrete benefit that will accrue to
24 rural Arizona if ALLTEL is designated an ETC.

25 • **"Prior Designation of Smith-Bagley as an ETC."** ALLTEL cites the previous
26 designation of Smith-Bagley in support of its own *Application* at p. 10. However,

1 the Smith-Bagley request is clearly distinguishable from ALLTEL's request:

2 Smith-Bagley's petition for ETC designation focused on providing
3 telecommunications services to unserved or under-served areas, primarily on
4 Native American lands. Smith Bagley contended that ETC designation would
enable it to provide a wireless option to customers in areas where wireline
household penetration is low.

5 ALLTEL, on the other hand, has stated from the outset that if it is granted ETC
6 status it intends to report all of its current wireless customers, as well as future
7 customers, in its designated ETC area and claim federal USF support for those
customers.

8 *Direct Testimony of Steven Metts, p. 3, lines 3-11.*

9 ALLTEL's application fails to address the benefits that ALLTEL will provide to Native
10 Americans lands, and ALLTEL has not made any efforts to date to show how it will better serve
11 Native American lands, as evidenced by this exchange at the hearing between ALECA's attorney
12 and ALLTEL witness Krajci:

13 **Q. And has Alltel made any plans that you're aware of to construct**
14 **infrastructure on Native American lands?**

15 **A. Specifically associated with this application, not to this date we have**
16 **not.**

17 *Hearing Transcript, Vol. 1, p. 90, lines 5-9.*

18 • **"More Choices, Higher Quality Service and Lower Rates."** ALLTEL asserts that
19 its designation as an ETC "will bring to consumers the benefits of competition, including
20 increased choices, higher quality service, and lower rates." *Application* at p. 10. However,
21 ALLTEL's assertions are without any credible substantiation. For example, ALLTEL already
22 provides wireless service to customers within its licensed service area, and the company has not
23 described what additional facilities will be constructed to serve new customers. Likewise,
24 ALLTEL provided no data to substantiate its claim that it will provide a higher quality of service
25 than is currently available within the requested designated area. To the contrary, this
26 Commission's records would indicate that the rural ILECs provide a high level of service quality.

1 Finally, the least expensive package offered by ALLTEL is \$29.95 per month, which is higher
2 than the least expensive packages of the ALECA members. *Hearing Transcript*, Vol. 1, p. 67,
3 lines 1-2. ALLTEL has not substantiated the claims asserted in its Application.

4 • **"Without Competition, there will be no Innovation or Advanced Service**
5 **Offerings.** ALLTEL asserts that "[w]ithout competition, the incumbent provider has little or no
6 incentive to introduce new, innovative, or advanced service offerings." *Application* at p. 11.
7 Contrary to this assertion, Arizona's rural ILECs have many incentives to introduce new and
8 innovative products and services. These companies are already subject to competition from
9 wireless providers (including ALLTEL) and Internet service providers, which requires that they
10 continuously work to provide a high level of service while maintaining competitive prices. In
11 addition, rural customers have come to expect and demand access to the same contemporary
12 telecommunications services as those available in urban areas, thanks in large part to the federal
13 universal service fund. With the exception of a few areas, Arizona's rural ILECs provide digital
14 switching, DSL-capable facilities, CLASS features and other contemporary telecommunications
15 features. Moreover, these ILECs are providing a superior level of service to their customers, as
16 evidenced by their exemplary complaint history in Arizona.

17 • **"Advanced Telecommunications Options.**" ALLTEL asserts that its designation
18 as an ETC "would give those in rural areas in the State of Arizona advanced telecommunications
19 options." *Application* at p. 11. Yet, ALLTEL has not identified which advanced options it will
20 provide, nor has the company shown that advanced telecommunications are lacking in these rural
21 areas. ALECA also noted that "advanced services" are not supported services under Section
22 214(e) of the Act. *See Hearing Transcript*, Vol. 1, p. 88, lines 5-7.

23 • **"Investment in Construction and Upgrading of Facilities.**" ALLTEL claims that
24 it will "use available federal high cost support for its intended purposes—the construction,
25 maintenance and upgrading of facilities serving the rural areas for which support is intended."
26 *Application* at p. 11. However, ALLTEL has provided no tangible evidence to support this

1 commitment. The universal service provisions of the 1996 Act require Federal support be used
2 for infrastructure investment in areas where it would not otherwise be economically feasible to
3 provide services at rates that are affordable and reasonably comparable to urban areas of the
4 country. Without an enforceable commitment, there is no way to ensure that ALLTEL would
5 actually use monies from the universal service fund to serve rural Arizona, or Arizona at all.
6 ALLTEL should describe what facilities it will construct, where they will be constructed, how
7 they will be financed, and the timetable for completing construction.

8 ALLTEL has failed to meet its burden of demonstrating that its designation as an ETC
9 serves the public interest. Accordingly, the Commission should deny ALLTEL's request.

10 **E. Effect of ALLTEL's Designation on the Universal Service Fund.**

11 As the governmental body charged with designating eligible telecommunications carriers
12 in Arizona, the Arizona Corporation Commission effectively controls access to the federal
13 universal service funds. In this case, Staff has largely ignored the impact to the federal universal
14 service fund of designating ALLTEL as an additional ETC, one of the factors to be considered
15 under the *Virginia Cellular Order*. ALECA witness Steve Metts presented evidence in his direct
16 pre-filed testimony regarding the alarming growth of the federal universal service fund:

17 Upon review of data available on the USAC's website,
18 **www.universalservice.org/overview/filings**, I found the following: In the Fourth
19 Quarter of 2001, competitive ETCs drew approximately \$2.7 million per quarter
20 from the federal USF. By the Fourth Quarter of 2002 that amount had grown to
21 over \$41 million per quarter and as of the Fourth Quarter of 2003 the amount
22 drawn by competitive ETCs had grown to in excess of \$62 million per quarter.
23 As recently as the First quarter of 1999, the contribution percentage assessed to
24 carriers which then pass the charge on to their customers, was approximately
25 3.2%. By the end of 2001, that percentage had increased to 6.9%, by the end of
26 2002 it was up to 7.3%, and it currently is approximately 8.7%.

As more competitive ETCs are designated by state commissions, the demand on
the federal USF and the corresponding assessment to carriers and their customers
will continue to escalate.

Direct Testimony of Steven Metts at p. 16, lines 12-25.

1 No party refuted Mr. Metts' numbers regarding the growth of the fund. While Congress
2 delegated to individual states the right to make ETC designations, collectively these decisions
3 have national implications. They affect not only the dynamics of competition in the areas subject
4 to the proceedings, but also the national strategies of new entrants. Clearly, they affect the
5 overall size of the federal fund.

6 Unchecked growth in the federal universal service fund threatens the support which
7 sustains Arizona's rural ILECs, the carriers of last resort in rural Arizona. ALECA witness Metts
8 testified as follows:

9 As noted by numerous parties in the FCC's pending Federal-State Joint Board on
10 Universal Service proceeding (CC Docket No. 96-45, FCC 031-1), the
11 indiscriminate granting of ETC status to wireless carriers is causing an alarming
12 growth in the size of the federal USF. This is a view held not just by incumbent
13 RLECs, but has also been recognized and expressed by consumer groups. In the
14 Joint Board proceeding, the National Association of State Utility Consumer
15 Advocates filed Comments stating:

16 Under the current ETC designation rules, in the near future there
17 will likely be a sharp upward curve in the growth of the high-cost
18 fund related to the issues being examined here. A substantial
19 portion of this growth is a result of additional funds needed to
20 support multiple lines per customer and to support lines provided
21 by new competitive eligible telecommunications carriers
22 ("CETCs"), **mostly wireless ETCs.**

23 * * * * *

24 Thus, under the current rules that provide support for all lines in
25 high-cost areas, **a substantial portion of the growth of the high-**
26 **cost fund will be attributable to the support of additional lines**
provided by wireless carriers.

* * * * *

The current and anticipated rate of growth in fund requirements
needed to support additional lines suggests that the current support
mechanisms will be strained unless the Commission makes
substantial changes to the ETC designation rules. (Emphasis
added).

1 There can be no doubt that growth in the federal fund necessitated by multiple
2 wireless ETC designations ultimately will jeopardize the sustainability of the fund
3 for all providers, including the incumbent providers of last resort.

4 *Direct Testimony of Steven Metts at pp. 15-16.*

5 State commissions have a solemn duty—as reflected in the *Virginia Cellular Order*—to
6 protect the viability of the federal universal service fund by rigorously evaluating requests for
7 ETC designation in rural areas. ALLTEL has not demonstrated that the public interest will be
8 served by its designation as an ETC in the rural portions of its licensed service areas, and its
9 Application should therefore be denied.

10 **V. STAFF'S REVIEW OF ALLTEL'S APPLICATION IN THIS CASE HAS NOT**
BEEN SUFFICIENTLY RIGOROUS.

11 No one would disagree that state commissions should conduct rigorous proceedings in
12 designating ETCs. However, the evaluation of ALLTEL's Application by Staff in this case has
13 not been sufficiently rigorous for the Commission to make a proper determination regarding the
14 public interest, especially in light of the recent *Virginia Cellular Order*. Staff has largely
15 accepted at face value—without adequate investigation—the assertions of ALLTEL. Staff
16 appears to hold the view that so long as ALLTEL asserts that it can provide the nine ETC-
17 supported services, then the Commission must grant the designation, in spite of: (i) ALLTEL's
18 failure to provide tangible evidence of its commitment to expand service in rural areas; (ii) the
19 impact of ALLTEL's designation on the federal universal service fund; and (iii) evidence that
20 ALLTEL has not satisfied the public interest test. The following are a few examples of the
21 shortcomings of Staff's investigation:

22 • Staff did not require ALLTEL to identify any specific projects to be constructed
23 in rural areas with federal universal service support, as evidenced by the following exchange at
24 the hearing between ALECA's attorney and Staff witness Richard Boyles:

25 **Q. Would it be part of Staff's public interest analysis to determine**
26 **whether or not the company had plans to construct additional**

1 **infrastructure and capital budgets for using federal USF money?**

2 **A. In terms of specific, initially identified projects, I don't believe so.**

3 * * * *

4 **Q. So would it be your position, then, that it is sufficient for the company**
5 **simply to indicate that it will take federal USF monies and use them in**
6 **compliance with federal requirements?**

7 **A. That's my understanding, yes.**

8 *Hearing Transcript*, Vol. 2, p. 224, lines 14-15; p. 225, lines 1-5. Staff's response is not
9 consistent with the pronouncements of other state commissions in the *Midwest Wireless Order*
10 (company pledged to build 15 cell sites upon designation as an ETC), the *Alaska DigiTel Order*
11 (company commits to begin construction of six new cell sites in the first 24 months after it
12 obtains USF), the *Minnesota Nextel Order* (company failed to identify plans for expansion or
13 areas for expansion), the *Nebraska Nextel Order* (company failed to present a clear plan and
14 timetable for providing the supported services throughout the designated territory), and the FCC
15 in the *Western Wireless Order* (demonstration of capability and commitment to provide service
16 must encompass something more than a vague assertion of intent on the part of the carrier).

17 • Staff did not obtain any specific commitments from ALLTEL regarding the
18 construction of infrastructure to serve rural Arizona, as evidenced by the following exchange at
19 the hearing between ALECA's attorney and Staff witness Boyles:

20 **Q. Alltel made no kinds of commitments to Staff regarding the number**
21 **of cell sites that it would build in rural Arizona? No specific**
22 **commitments regarding specific facilities?**

23 **A. Not that I recall at this moment, no.**

24 *Hearing Transcript*, Vol. 2, p. 286, lines 22-25, and p. 287, line 1. In contrast, the FCC noted
25 approvingly in the *Virginia Cellular Order* as follows:

26 Virginia Cellular has further committed to use universal service support to further
 improve its universal service offering by constructing several new cellular sites in

1 sparsely populated areas within its licensed service areas but outside its existing
2 network coverage. Virginia Cellular estimates that it will construct 11 cell sites
3 over the first year and a half following ETC designation.

4 *Virginia Cellular Order* at p. 9, ¶ 16.

5 By failing to obtain specific commitments from ALLTEL regarding the use of federal
6 universal service support in rural areas of the States, Staff has missed an opportunity to ensure
7 benefits for rural Arizona.

8 • Staff conducted no field visits in evaluating ALLTEL's application. *See Hearing
9 Transcript*, Vol. 2, p. 231, lines 10-12.

10 • Staff did not obtain information regarding ALLTEL's plans, if any, to augment its
11 network to improve service levels in rural areas, as evidenced by the following exchange at the
12 hearing between ALECA's attorney and Staff witness Boyles:

13 **Q. And in the question Staff asks [Staff Data Request MK 1-19,
14 introduced as ALECA-14], it asks the company to describe with
15 specificity how the company would augment its network to improve
16 service levels and offerings in rural areas. Does the company respond
17 to that question in its answer here?**

18 **A. No. It does not.**

19 *Hearing Transcript*, Vol. 2, p. 233, lines 9-15.

20 • Staff did not attempt to determine the extent to which unserved customers might
21 exist in the requested designated area, as evidenced by the following exchange at the hearing
22 between ALECA's attorney and Staff witness Boyles:

23 **Q. Did Staff do any analysis to determine whether there are unserved
24 customers currently in any of the ILEC service areas that are covered
25 under this filing?**

26 **A. No. It did not.**

Q. Did Staff look at held orders in any of the ILEC serving areas?

A. No.

1 *Hearing Transcript*, Vol. 2, p. 234, lines 8-12, and p. 235, lines 6-8.

2 • Staff did not make a comparison of the rates of ALLTEL and those of the rural
3 ILECs, as evidenced by the following exchange at the hearing between ALECA's attorney and
4 Staff witness Boyles:

5 **Q. Did Staff perform a comparison of Alltel's proposed rates to those of**
6 **the incumbent LECs serving the same areas?**

7 **A. A direct comparison of rates was not done, no.**

8 *Hearing Transcript*, Vol. 2, p. 235, lines 9-11 and 20-21.

9 • Staff did not seek any commitments from ALLTEL regarding the quality of
10 service provided by ALLTEL, as evidenced by the following exchange at the hearing between
11 ALECA's attorney and Staff witness Boyles:

12 **Q. Is Staff proposing any specific quality of service benchmarks that**
13 **Alltel would need to meet in order to be designated as an ETC?**

14 **A. No. It is not.**

15 *Hearing Transcript*, Vol. 2, p. 240, lines 21-24. Commitments regarding service quality was
16 specifically identified by the FCC in the *Virginia Cellular Order* as one of the factors to be
17 weighed in the public interest analysis. *Virginia Cellular Order* at p. 3, ¶ 4.

18 • Staff did not adequately consider the impact of multiple ETC designations on the
19 universal service fund, as evidenced by the following exchange at the hearing between ALECA's
20 attorney and Staff witness Boyles:

21 **Q. Mr. Boyles, did Staff consider specifically what effect the designation**
22 **of Alltel might have on the federal universal service fund?**

23 **A. In specific terms, no.**

24 *Hearing Transcript*, Vol. 2, p. 243, lines 5-9. The impact of multiple designations on the
25 universal service fund was specifically identified by the FCC in the *Virginia Cellular Order* as
26 another one of the factors to be weighed in the public interest analysis. *Virginia Cellular Order*

1 at p. 3, ¶ 4.

2 In light of the record in this case, Staff's investigation regarding ALLTEL's Application
3 for designation as an ETC is not sufficiently rigorous in order for the Commission to evaluate
4 whether the designation of ALLTEL as an additional ETC serves the public interest.

5 **VI. PERMITTED USES OF FEDERAL UNIVERSAL SERVICE SUPPORT.**⁷

6 **A. Provision, Maintenance and Upgrading of Facilities and Services for Which**
7 **Support is Intended.**

8 Section 254(e) of the Act specifies the intended use of federal universal service support:

9 A carrier that receives such support shall use that support only for the provision,
10 maintenance, and upgrading of facilities and services for which the support is
11 intended.

12 In its *Fourteenth Report and Order*, the FCC provided additional guidance regarding the intent
13 behind federal universal service support:

14 [T]he federal high-cost support that is provided to rural carriers is intended to
15 enable the reasonable comparability of intrastate rates, and states have jurisdiction
16 over intrastate rates.

17 *See Fourteenth Report and Order*, CC Docket Nos. 96-45 and 00-256, FCC 01-157 (rel.
18 May 23, 2001), ¶ 187. A copy of the *Fourteenth Report and Order* is attached as
19 Attachment 8.

20 In other words, the federal support for rural areas is intended to make possible comparable rates
21 for supported services between high-cost rural areas and urban areas. Thus, federal support
22 provided to rural ILECs, or to competitive ETCs serving customers in the service areas of rural
23 ILECs, must be used to build, maintain and upgrade telecommunications infrastructure, and to
24 facilitate rates for supported services that are comparable to rates in urban areas.

25 **B. State Certifications.**

26 States must file an annual certification with the FCC certifying that the use of federal
universal service support by all ETCs within the state—*rural and non-rural*—is consistent with

⁷ The ALJ asked the parties to address the question of how the FCC requires that Federal Universal Service Support be used.

1 Section 254(e). See 47 CFR §§ 54.313 and 54.314. The FCC has determined that since states
2 have primary jurisdiction over intrastate rates, "it is most appropriate for states to determine
3 whether support is used consistent with section 254(e)." See *Fourteenth Report and Order* at ¶¶
4 185 and 187. Thus, the Arizona Corporation Commission has responsibility for determining
5 whether or not federal universal service support funds received by a carrier were used in
6 accordance with Section 254(e). If the Commission determines that they were not, then the
7 Commission can withhold certification for that carrier. Absent state certification, no federal
8 universal service support can be provided to the carrier.

9 The authority of a state commission to revoke ETC status is discussed in the FCC's
10 *Western Wireless Order*, where the FCC stated "[w]e also note that the state commission may
11 revoke a carrier's ETC designation if the carrier fails to comply with the ETC eligibility criteria."
12 *Western Wireless Order* at ¶ 13. Thus, the Arizona Corporation Commission may revoke
13 ALLTEL's ETC status, once granted, if ALLTEL fails to comply with any of the eligibility
14 criteria.

15 **VII. ENFORCING ALLTEL'S COMMITMENT TO FOLLOW FCC REQUIREMENTS**
16 **REGARDING THE USE OF FEDERAL UNIVERSAL SERVICE SUPPORT.**⁸

17 There is no question that the Arizona Corporation Commission has broad authority to
18 impose conditions upon ALLTEL's use of federal universal service funds, including conditions
19 to enforce ALLTEL's commitment to use federal universal service support in compliance with
20 section 252(e) of the Act. Section 253(b) of the Act states as follows:

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

26 Similarly, section 254(f) of the Act states that "[a] State may adopt regulations not
inconsistent with the [FCC]'s rules to preserve and advance universal service." Specifically, in

⁸ The ALJ asked the parties to address the question of how the Commission can enforce ALLTEL's commitment to follow the FCC requirements regarding the use of federal universal service support.

1 the *Virginia Cellular Order*, the FCC stated that "in this Order, we impose as ongoing conditions
2 the commitments Virginia Cellular has made on the record in this proceeding." *Virginia Cellular*
3 *Order* at ¶ 4.

4 In *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 418 (5th Cir. 1999)
5 ("*TOPUC v. FCC*"), the U. S. Court of Appeals for the Fifth Circuit invalidated a portion of the
6 FCC's Universal Service Order which prohibited states from imposing additional eligibility
7 requirements on carriers otherwise eligible to receive federal support, ruling as follows:

8 The plain language of [section 214(e)] speaks to the question of *how many*
9 carriers a state commission may designate, but nothing in the subsection prohibits
10 the states from imposing their own eligibility requirements. This reading makes
11 sense in light of the states' historical role in ensuring service quality standards for
12 local service. Therefore, we reverse that portion of the [Universal Service] Order
13 prohibiting the states from imposing any additional requirement when designating
14 carriers as eligible for federal universal service. *Id.* at 418 (emphasis in original).

15 A copy of the *TOPUC v. FCC* decision is attached as Attachment 9. Thus, this
16 Commission has the right, if not the duty, to impose additional conditions on ALLTEL's
17 eligibility which preserve and advance universal service in Arizona, and which make binding any
18 commitments made by ALLTEL in this case.⁹ The Commission should be prepared to revoke
19 ALLTEL's ETC status if ALLTEL does not continue to meet all eligibility criteria.

20 **VIII. THE COMMISSION CAN LIMIT WHERE AND HOW FEDERAL UNIVERSAL**
21 **SERVICE SUPPORT IS USED BY ALLTEL.**¹⁰

22 As discussed above, the Arizona Corporation Commission clearly has the authority to
23 impose additional eligibility requirements in granting ALLTEL's ETC designation. Such
24 conditions may include appropriate limitations on how and where ALLTEL will use federal
25 universal service support, consistent with section 254(e) of the Act. In addition, the Commission
26

⁹ The Fifth Circuit noted in *TOPUC v. FCC* that "[t]o be sure, if a state commission imposed such onerous eligibility requirements that no otherwise eligible carrier could receive designation, that state commission would probably run afoul of § 214(e)(2)'s mandate to 'designate' a carrier or 'designate more than one carrier.'" *TOPUC v. FCC* at 418. However, neither Staff in its recommendations nor ALECA in its proposals approach this line.

¹⁰ The ALJ asked the parties to address the question of whether the Commission can limit where and how federal universal service support is spent.

1 is charged with certifying, on an annual basis, that ALLTEL continues to use federal support
2 consistent with universal service principles. And, if ALLTEL fails to meet the eligibility criteria,
3 the Commission has the authority to revoke its ETC status.

4 One major concern of the ALECA members is that if designated, ALLTEL will use
5 federal universal service support received for customers in rural areas to construct or maintain
6 infrastructure in urban areas. Because ALLTEL serves both urban and rural areas—unlike the
7 ALECA member companies which serve only rural areas—the possibility exists that ALLTEL
8 can circumvent the intent of section 254(e). For example, ALLTEL might apply the estimated
9 \$9,000,000 that it will receive in federal support to the "maintenance" of its existing network in
10 rural areas—maintenance which ALLTEL is funding today *without* federal support. That would
11 then allow ALLTEL to redeploy money that it is spending today to maintain its rural network to
12 build telecommunications infrastructure in its urban markets. This would not be in keeping with
13 ALLTEL's responsibility to use federal support in the way it was intended. The
14 telecommunications infrastructure constructed by ALLTEL in rural Arizona was constructed
15 without the incentive of federal high-cost money. Using federal support simply to maintain
16 existing, pre-ETC, infrastructure is not enough. If the Commission grants ALLTEL's request for
17 ETC status, the Commission must ensure that federal support received by ALLTEL for rural
18 customers is used for significant new infrastructure in rural areas. The Commission can
19 accomplish this objective by adding such a condition to the grant of ALLTEL's application, and
20 by carefully evaluating ALLTEL's performance on an annual basis when the Commission
21 certifies to the FCC under 47 CFR § 54.314.

22 **IX. STAFF RECOMMENDATIONS AND ALECA PROPOSALS.**

23 As discussed above, the Arizona Corporation Commission has the authority to establish
24 additional eligibility requirements in granting ETC status. Thus, if the Commission designates
25 ALLTEL as an ETC, the Commission should include appropriate conditions, since ALLTEL has
26 failed to provide adequate commitments that it will serve "throughout the designated service

1 area." In the event that the Commission decides to grant ALLTEL's Application, the Staff
2 recommendations contained in the Staff Report should be adopted, as they have been modified,
3 together with the additional proposals of ALECA set forth below.

4 **A. Staff Recommendations.**

5 ALECA agrees that if ALLTEL is designated as an ETC, the recommendations of Staff
6 as set forth in the Staff Report, and as modified in the Errata to Staff Report dated January 23,
7 2004, should be adopted. ALECA also agrees with Staff's late-filed Exhibit S-4 which revises
8 Staff Recommendation 9.

9 **B. Additional Proposals of ALECA.**

10 ALECA believes that the following additional conditions on the grant of ETC
11 status to ALLTEL.

12 1. Action by the FCC on the Recommended Decision of the Federal-State
13 Joint Board.

14 On February 27, 2004, the Federal-State Joint Board on Universal Service released its
15 Recommended Decision which, among other things, proposes "permissive federal guidelines for
16 states to use when determining whether applicants are qualified to be designated as ETCs under
17 section 214." The FCC now has one year to consider and act upon the Federal-State Joint
18 Board's recommendations. In the *Virginia Cellular Order*, the FCC noted for the benefit of
19 Virginia Cellular that "[t]he outcome of [the Federal-State Joint Board] proceeding could
20 potentially impact, among other things, the support that Virginia Cellular and other competitive
21 ETCs may receive in the future and the criteria used for continued eligibility to receive universal
22 service support." *Virginia Cellular Order* at ¶ 3. Similarly, this Commission should make
23 explicit in its order that eligibility criteria applicable to ALLTEL may change in the future, that
24 ALLTEL's designation is subject to revocation in the event that ALLTEL does not meet any new
25 criteria, and that the Commission's order does not prohibit the Commission from making changes
26 to ALLTEL's status as an ETC in the future.

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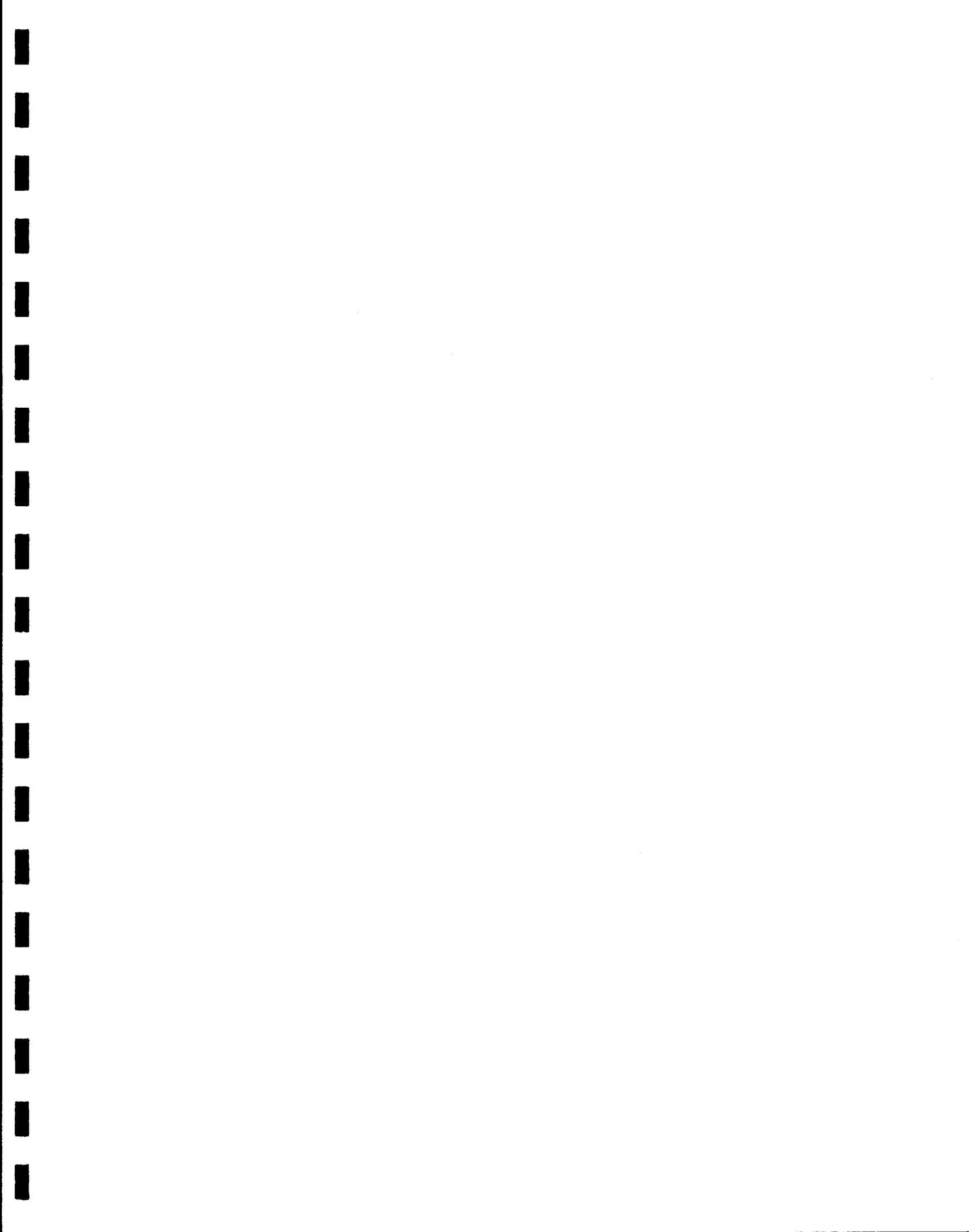
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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Federal-State Joint Board on
Universal Service
Virginia Cellular, LLC
Petition for Designation as an
Eligible Telecommunications Carrier
In the Commonwealth of Virginia
CC Docket No. 96-45

MEMORANDUM OPINION AND ORDER

Adopted: December 31, 2003

Released: January 22, 2004

By the Commission: Chairman Powell, Commissioners Abernathy, Copps, and Adelstein issuing
separate statements; Commissioner Martin dissenting and issuing a separate statement.

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APPENDIX A -- VIRGINIA NON-RURAL WIRE CENTERS FOR INCLUSION IN VIRGINIA
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APPENDIX B -- VIRGINIA RURAL TELEPHONE COMPANY STUDY AREAS FOR
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APPENDIX C -- VIRGINIA RURAL TELEPHONE COMPANY WIRE CENTERS FOR
INCLUSION IN VIRGINIA CELLULAR'S ETC SERVICE AREA

I. INTRODUCTION

1. In this Order, we grant in part and deny in part, subject to enumerated conditions, the petition of Virginia Cellular, LLC (Virginia Cellular) to be designated as an eligible telecommunications carrier (ETC) throughout its licensed service area in the Commonwealth of Virginia pursuant to section 214(e)(6) of the Communications Act of 1934, as amended (the Act).¹ In so doing, we conclude that Virginia Cellular, a commercial mobile radio service (CMRS) carrier, has satisfied the statutory eligibility requirements of section 214(e)(1).² Specifically, we conclude that Virginia Cellular has demonstrated that it will offer and advertise the services supported by the federal universal service support mechanisms throughout the designated service area. We find that the designation of Virginia Cellular as an ETC in two non-rural study areas serves the public interest.³ We also find that the designation of Virginia Cellular as an ETC in areas served by five of the six rural telephone companies serves the public interest and furthers the goals of universal service. As explained below, with regard to the study area of NTELOS, we do not find that ETC designation would be in the public interest.

2. Because Virginia Cellular is licensed to serve only part of the study area of three of six incumbent rural telephone companies affected by this designation, Virginia Cellular has requested that the Commission redefine the service area of each of these rural telephone companies for ETC designation purposes, in accordance with section 214(e)(5) of the Act.⁴ We agree to the service area redefinition proposed by Virginia Cellular for the service areas of Shenandoah and MGW, subject to the agreement of the Virginia State Corporation Commission (Virginia Commission) in accordance with applicable Virginia Commission requirements.⁵ We find that the Virginia Commission's first-hand knowledge of the rural areas in question uniquely qualifies it to examine the redefinition proposal and determine whether it should be approved.⁶

¹ Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier in the State of Virginia, filed April 26, 2002 (Virginia Cellular Petition).

² 47 U.S.C. § 214(e)(1).

³ Virginia Cellular requests ETC designation in the study areas of the following non-rural telephone companies: Bell Atlantic and GTE South, Inc. (GTE). Virginia Cellular requests ETC designation in the study areas of the following rural telephone companies: Shenandoah Telephone Company (Shenandoah), NTELOS Telephone Inc. (NTELOS, formerly Clifton Forge-Waynesboro Telephone Company), MGW Telephone Company (MGW, formerly Mountain Grove-Williamsville Telephone Company), New Hope Telephone Company (New Hope), North River Telephone Cooperative (North River), and Highland Telephone Cooperative (Highland). We note that although the Virginia Cellular Petition requested ETC designation for the study area served by Central Telephone Company of Virginia, Virginia Cellular subsequently withdrew its request for ETC designation in Central Telephone's study area. See Supplement to Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier in the State of Virginia, filed April 17, 2003 at 1 (Virginia Cellular April 17, 2003 Supplement).

⁴ Virginia Cellular asked the Commission to redefine the service areas of Shenandoah, NTELOS, and MGW. See Virginia Cellular Petition at 11-12 and Virginia Cellular Reply Comments at 7. See also Virginia Cellular Amendment to Petition for Designation as an Eligible Telecommunications Carrier, filed October 21, 2002, at 2 (Virginia Cellular Amendment).

⁵ As discussed below, at this time, we do not designate Virginia Cellular as an ETC in the study area of NTELOS. See *infra* paras. 35, 39. Accordingly, we do not find it necessary to redefine the service area of NTELOS.

⁶ If the Virginia Commission does not agree to our redefinition of the affected rural service areas, we will reexamine our decision with regard to redefining these rural service areas.

Because we do not designate Virginia Cellular as an ETC in NTELOS' study area, we do not redefine this service area.

3. In response to a request from the Commission, the Federal-State Joint Board on Universal Service (Joint Board) is currently reviewing: (1) the Commission's rules relating to the calculation of high-cost universal service support in areas where a competitive ETC is providing service; (2) the Commission's rules regarding support for non-primary lines; and (3) the process for designating ETCs.⁷ Some commenters in that proceeding have raised concerns about the rapid growth of high-cost universal service support and the impact of such growth on consumers in rural areas.⁸ The outcome of that proceeding could potentially impact, among other things, the support that Virginia Cellular and other competitive ETCs may receive in the future and the criteria used for continued eligibility to receive universal service support.

4. While we await a recommended decision from the Joint Board, we acknowledge the need for a more stringent public interest analysis for ETC designations in rural telephone company service areas. The framework enunciated in this Order shall apply to all ETC designations for rural areas pending further action by the Commission. We conclude that the value of increased competition, by itself, is not sufficient to satisfy the public interest test in rural areas. Instead, in determining whether designation of a competitive ETC in a rural telephone company's service area is in the public interest, we weigh numerous factors, including the benefits of increased competitive choice, the impact of multiple designations on the universal service fund, the unique advantages and disadvantages of the competitor's service offering, any commitments made regarding quality of telephone service provided by competing providers, and the competitive ETC's ability to provide the supported services throughout the designated service area within a reasonable time frame. Further, in this Order, we impose as ongoing conditions the commitments Virginia Cellular has made on the record in this proceeding.⁹ These conditions will ensure that Virginia Cellular satisfies its obligations under section 214 of the Act. We conclude that these steps are appropriate in light of the increased frequency of petitions for competitive ETC designations and the potential impact of such designations on consumers in rural areas.

II. BACKGROUND

A. The Act

5. Section 254(e) of the Act provides that "only an eligible telecommunications carrier designated under section 214(e) shall be eligible to receive specific Federal universal service support."¹⁰ Pursuant to section 214(e)(1), a common carrier designated as an ETC must offer

⁷ See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order, FCC 02-307 (rel. Nov. 8, 2002) (*Referral Order*); *Federal-State Joint Board on Universal Service Seeks Comment on Certain of the Commission's Rules Relating to High Cost Universal Service Support and the ETC Process*, CC Docket 96-45, 18 FCC Rcd 1941, Public Notice (rel. Feb. 7, 2003) (*Portability Public Notice*).

⁸ See generally, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, United States Telecom Association's Comments, filed May 5, 2003; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Verizon's Comments, filed May 5, 2003.

⁹ See *infra* para. 46.

¹⁰ 47 U.S.C. § 254(e).

and advertise the services supported by the federal universal service mechanisms throughout the designated service area.¹¹

6. Section 214(e)(2) of the Act gives state commissions the primary responsibility for performing ETC designations.¹² 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.”¹³ Under section 214(e)(6), the Commission may, with respect to an area served by a rural telephone company, and shall, in all other areas, designate more than one common carrier as an ETC for a designated service area, consistent with the public interest, convenience, and necessity, so long as the requesting carrier meets the requirements of section 214(e)(1).¹⁴ Before designating an additional ETC for an area served by a rural telephone company, the Commission must determine that the designation is in the public interest.¹⁵

B. Commission Requirements for ETC Designation and Redefining the Service Area

7. Filing Requirements for ETC Designation. An ETC petition must contain the following: (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 or intends to offer all services designated for support by the Commission pursuant to section 254(c); (3) a certification that the petitioner offers or intends to offer 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;” and (5) if the petitioner is not a rural telephone company, a detailed description of the geographic service area for which it requests an ETC designation from the Commission.¹⁶

¹¹ 47 U.S.C. § 214(e)(1).

¹² 47 U.S.C. § 214(e)(2). See also *Federal-State Joint Board on Universal Service, Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas*, CC Docket No. 96-45, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 15 FCC Rcd 12208, 12255, para. 93 (2000) (*Twelfth Report and Order*).

¹³ 47 U.S.C. § 214(e)(6). See, e.g., *Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier for the Pine Ridge Reservation in South Dakota*, CC Docket No. 96-45, Memorandum Opinion and Order, 16 FCC Rcd 18133 (2001) (*Western Wireless Pine Ridge Order*); *Pine Belt Cellular, Inc. and Pine Belt PCS, Inc., Petition for Designation as an Eligible Telecommunications Carrier*, CC Docket No. 96-45, Memorandum Opinion and Order, 17 FCC Rcd 9589 (Wireline Comp. Bur. 2002); *Corr Wireless Communications, LLC Petition for Designation as an Eligible Telecommunications Carrier*, CC Docket 96-45, Memorandum Opinion and Order, 17 FCC Rcd 21435 (Wireline Comp. Bur. 2002). We note that the Wireline Competition Bureau has delegated authority to perform ETC designations. See *Procedures for FCC Designation of Eligible Telecommunications Carriers Pursuant to Section 214(e)(6) of the Communications Act*, Public Notice, 12 FCC Rcd 22947, 22948 (1997) (*Section 214(e)(6) Public Notice*). The Wireline Competition Bureau was previously named the Common Carrier Bureau.

¹⁴ 47 U.S.C. § 214(e)(6).

¹⁵ *Id.*

¹⁶ *Section 214(e)(6) Public Notice*, 12 FCC Rcd at 22948-49. See also *Federal-State Joint Board on Universal Service, Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities*

8. *Twelfth Report and Order*. On June 30, 2002, the Commission released the *Twelfth Report and Order* which, among other things, sets forth how a carrier seeking ETC designation from the Commission must demonstrate that the state commission lacks jurisdiction to perform the ETC designation.¹⁷ Carriers seeking designation as an ETC for service provided on non-tribal lands must provide the Commission with an “affirmative statement” from the state commission or a court of competent jurisdiction that the carrier is not subject to the state commission’s jurisdiction.¹⁸ 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.”¹⁹ The requirement to provide an “affirmative statement” ensures that the state commission has had “a specific opportunity to address and resolve issues involving a state commission’s authority under state law to regulate certain carriers or classes of carriers.”²⁰

9. *Redefining a Service Area*. Under section 214(e)(5) of the Act, “[i]n 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), establish a different definition of service area for such company.”²¹ Section 54.207(d) of the Commission’s rules permits the Commission to initiate a proceeding to consider a definition of a service area that is different from a rural telephone company’s study area as long as it seeks agreement on the new definition with the applicable state commission.²² Under section 54.207(d)(1), the Commission must petition a state commission with the proposed definition according to that state commission’s procedures.²³ In that petition, the Commission must provide its proposal for redefining the service area and its decision presenting reasons for adopting the new definition, including an analysis that takes into account the recommendations of the Federal-State Joint Board on Universal Service (Joint Board).²⁴ When the Joint Board recommended that the Commission retain the current study areas of rural telephone companies as the service areas for the rural telephone companies, the Joint Board made the following observations: (1) the potential for “cream skimming” is minimized by retaining study areas because competitors, as a condition of eligibility, must provide services throughout the rural telephone company’s study area; (2) the Telecommunications Act of 1996 (1996 Act), in many respects, places rural telephone

Commission, Declaratory Ruling, CC Docket No. 96-45, 15 FCC Rcd 15168 (2000) (Declaratory Ruling), recon. pending.

¹⁷ See *Twelfth Report and Order*, 15 FCC Rcd at 12255-65, paras. 93-114.

¹⁸ *Id.* at 12255, para. 93.

¹⁹ *Id.* at 12264, para. 113.

²⁰ *Id.*

²¹ 47 U.S.C. § 214(e)(5).

²² See 47 C.F.R. § 54.207(d). Any proposed definition will not take effect until both the Commission and the state commission agree upon the new definition. See 47 C.F.R. § 54.207(d)(2).

²³ See 47 C.F.R. § 54.207(d)(1).

²⁴ See *id.* We note that the Wireline Competition Bureau has delegated authority to redefine service areas. 47 C.F.R. § 54.207(e).

companies on a different competitive footing from other local telephone companies; and (3) there would be an administrative burden imposed on rural telephone companies by requiring them to calculate costs at something other than a study area level.²⁵

C. Virginia Cellular's Petition

10. On April 26, 2002, Virginia Cellular filed with this Commission a petition, pursuant to section 214(e)(6), seeking designation as an ETC throughout its licensed service area in the Commonwealth of Virginia.²⁶ In its petition, Virginia Cellular contends that the Virginia Commission issued an "affirmative statement" that the Virginia Commission does not have jurisdiction to designate a CMRS carrier as an ETC. Accordingly, Virginia Cellular asks the Commission to exercise jurisdiction and designate Virginia Cellular as an ETC pursuant to section 214(e)(6).²⁷ Virginia Cellular also maintains that it satisfies the statutory and regulatory prerequisites for ETC designation, and that designating Virginia Cellular as an ETC serves the public interest.²⁸

11. Virginia Cellular also requests the Commission to redefine the service areas of three rural telephone companies, Shenandoah, NTELOS, and MGW, because it is not permitted under its current license to provide facilities-based service to the entire study area of each of these companies.²⁹ Virginia Cellular states that as a wireless carrier, it is restricted to providing facilities-based service only in those areas where it is licensed by the Commission.³⁰ It adds that it is not picking and choosing the "lowest cost exchanges" of the affected rural telephone companies, but instead is basing its requested ETC area solely on its licensed service area and proposes to serve the entirety of that area.³¹ Virginia Cellular contends that the proposed redefinition of the rural telephone companies' service areas is consistent with the recommendations regarding rural telephone company study areas set forth by the Joint Board in its *Recommended Decision*.³²

²⁵ See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Recommended Decision, 12 FCC Rcd 87, 179-80, paras. 172-74 (1996) (*1996 Recommended Decision*).

²⁶ See generally, Virginia Cellular Petition. On May 15, 2002, the Wireline Competition Bureau released a Public Notice seeking comment on the Virginia Cellular Petition. See *Wireline Competition Bureau Seeks Comment on Virginia Cellular LLC Petition for Designation as an Eligible Telecommunications Carrier in the State of Virginia*, CC Docket No 96-45, Public Notice, 17 FCC Rcd 8778 (Wireline Comp. Bur. 2002); *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket 96-45, Comments of Virginia Rural Telephone Companies, filed June 11, 2002 (Virginia Rural Telephone Companies Comments); *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket 96-45, Reply Comments of the National Telecommunications Cooperative Association, filed June 17, 2002 (NTCA Comments).

²⁷ Virginia Cellular Petition at 3-4.

²⁸ *Id.* at 1-2, 4-9, 14-17.

²⁹ *Id.* at 10-14. See Supplement to Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia, filed October 11, 2002 at 1-2 (Virginia Cellular October 11 Supplement) and Virginia Cellular Amendment at 2.

³⁰ Virginia Cellular Petition at 13.

³¹ *Id.*

³² *Id.* at 12-14. See also 47 U.S.C. § 214(e)(5).

15 F.C.C.R. 15168
2000 WL 1801992 (F.C.C.), 15 FCC Rcd. 15,168, 21 Communications Reg. (P&F) 1011
(Cite as: 15 F.C.C.R. 15168)

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demonstration of the capability and commitment to provide service must encompass something more than a vague assertion of intent on the part of a carrier to provide service. The carrier must reasonably demonstrate to the state commission its ability and willingness to provide service upon designation.

C. Federal Preemption Authority

1. Background

25. State regulatory provisions may be preempted when enforcement of a state legal requirement conflicts with federal law or "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." [FN50] Preemption may result not only from action taken by Congress, but also from a federal agency acting within the scope of its congressionally delegated authority. [FN51]

26. In section 254, Congress codified the Commission's historical policy of promoting universal service to ensure that consumers in all regions of the nation have access to *15179 telecommunications services. [FN52] Congress, recognizing that existing universal service support mechanisms were adopted in a monopoly environment, directed the Commission, in consultation with a federal-state Joint Board, to establish support mechanisms for the preservation and advancement of universal service in the competitive telecommunications environment that Congress envisioned. [FN53] Section 254(b) sets forth the underlying principles on which Congress directed the Commission to base policies for the preservation and advancement of universal service. These principles include the promotion of access to telecommunications services in rural and high-cost areas of the nation. [FN54] As noted above, consistent with the recommendation of the Joint Board, the Commission adopted the additional guiding principle of competitive neutrality. [FN55] In doing so, the Commission concluded that competitive neutrality will foster the development of competition and benefit certain providers, including wireless carriers, that may have been excluded from participation in the existing universal service mechanism. [FN56] Section 254(f) also provides that, "[a] State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service." [FN57]

2. Discussion

27. We find an interpretation of section 214(e)(1) that requires a new entrant to provide service throughout the service area prior to designation as an ETC to be fundamentally inconsistent with the universal service provisions in the 1996 Act. Specifically, we find such a requirement to be inconsistent with the meaning of section 214(e)(1), Congress' universal service objectives as outlined in section 254, and the Commission's policies and rules in implementing section 254. As discussed above, this approach essentially requires a new entrant to provide service throughout high-cost areas prior to its designation as an ETC. We find that such a requirement stands as an obstacle to the Commission's execution and

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III. DISCUSSION

12. After careful review of the record before us, we find that Virginia Cellular has met all the requirements set forth in section 214(e)(1) and (e)(6) to be designated as an ETC by this Commission for portions of its licensed service area. First, we find that Virginia Cellular has demonstrated that the Virginia Commission lacks the jurisdiction to perform the designation and that the Commission therefore may consider Virginia Cellular's petition under section 214(e)(6). Second, we conclude that Virginia Cellular has demonstrated that it will offer and advertise the services supported by the federal universal service support mechanisms throughout the designated service area upon designation as an ETC in accordance with section 214(e)(1). In addition, we find that the designation of Virginia Cellular as an ETC in certain areas served by rural telephone companies serves the public interest and furthers the goals of universal service by providing greater mobility and a choice of service providers to consumers in high-cost and rural areas of Virginia. Pursuant to our authority under section 214(e)(6), we therefore designate Virginia Cellular as an ETC for parts of its licensed service area in the Commonwealth of Virginia, as set forth below. As explained below, however, we do not designate Virginia Cellular as an ETC in the study area of NTELOS.³³ In areas where Virginia Cellular's proposed service areas do not cover the entire study area of a rural telephone company, Virginia Cellular's ETC designation shall be subject to the Virginia Commission's agreement with our new definition for the rural telephone company service areas. In all other areas, as described herein, Virginia Cellular's ETC designation is effective immediately. Finally, we note that the outcome of the Commission's pending proceeding before the Joint Board examining the rules relating to high-cost universal service support in competitive areas could potentially impact the support that Virginia Cellular and other ETCs may receive in the future.³⁴ This Order is not intended to prejudice the outcome of that proceeding. We also note that Virginia Cellular always has the option of relinquishing its ETC designation and its corresponding benefits and obligations to the extent that it is concerned about its long-term ability to provide supported services in the affected rural study areas.³⁵

A. Commission Authority to Perform the ETC Designation

13. We find that Virginia Cellular has demonstrated that the Virginia Commission lacks the jurisdiction to perform the requested ETC designation and that the Commission has authority to consider Virginia Cellular's petition under section 214(e)(6) of the Act. Specifically, Virginia Cellular states that it submitted an application for designation as an ETC with the Virginia Commission, and on April 9, 2002, the Virginia Commission issued an order stating that it had not asserted jurisdiction over CMRS carriers.³⁶ In its order, the Virginia Commission directed Virginia Cellular to file for ETC designation with the FCC.³⁷ Based on this statement by the Virginia Commission, we find that the Virginia Commission lacks jurisdiction to designate Virginia Cellular as an ETC and that this Commission has authority to perform the requested

³³ See *infra* paras. 35, 39.

³⁴ See *Portability Public Notice*, 18 FCC Rcd at 1941.

³⁵ See *Declaratory Ruling*, 15 FCC Rcd at 15173; see also 47 U.S.C. § 214(e)(4).

³⁶ See *Virginia Cellular Petition* at 3-4 and Exhibit A.

³⁷ *Id.*

ETC designation in the Commonwealth of Virginia pursuant to section 214(e)(6).³⁸

B. Offering and Advertising the Supported Services

14. Offering the Services Designated for Support. We find that Virginia Cellular has demonstrated through the required certifications and related filings, that it now offers, or will offer upon designation as an ETC, the services supported by the federal universal service support mechanism. As noted in its petition, Virginia Cellular is an "A-Band" cellular carrier for the Virginia 6 Rural Service Area, serving the counties of Rockingham, Augusta, Nelson, and Highland, as well as the cities of Harrisonburg, Staunton, and Waynesboro.³⁹ Virginia Cellular states that it currently provides all of the services and functionalities enumerated in section 54.101(a) of the Commission's rules throughout its cellular service area in Virginia.⁴⁰ Virginia Cellular certifies that it has the capability to offer voice-grade access to the public switched network, and the functional equivalents to DTMF signaling, single-party service, access to operator services, access to interexchange services, access to directory assistance, and toll limitation for qualifying low-income consumers.⁴¹ Virginia Cellular also complies with applicable law and Commission directives on providing access to emergency services.⁴² In addition, although the Commission has not set a minimum local usage requirement, Virginia Cellular certifies it will comply with "any and all minimum local usage requirements adopted by the FCC" and it intends to offer a number of local calling plans as part of its universal service offering.⁴³ As discussed below, Virginia Cellular has committed to report annually its progress in achieving its build-out plans at the same time it submits its annual certification required under sections 54.313 and 54.314 of the Commission's rules.⁴⁴

15. Virginia Cellular has also made specific commitments to provide service to requesting customers in the service areas that it is designated as an ETC. Virginia Cellular states that if a request is made by a potential customer within its existing network, Virginia Cellular will provide service immediately using its standard customer equipment.⁴⁵ In instances where a request comes from a potential customer within Virginia Cellular's licensed service area but outside its existing network coverage, it will take a number of steps to provide service that include determining whether: (1) the requesting customer's equipment can be modified or replaced to provide service; (2) a roof-mounted antenna or other equipment can be deployed to provide service; (3) adjustments can be made to the nearest cell tower to provide service; (4) there are any other adjustments that can be made to network or customer facilities to provide service; (5) it can offer resold services from another carrier's facilities to provide service; and (6) an additional cell site, cell extender, or repeater can be employed or can be constructed to

³⁸ 47 U.S.C. § 214(e)(6).

³⁹ Virginia Cellular Petition at 1.

⁴⁰ *Id.* at 2.

⁴¹ *Id.* at 4-8 and Exhibit B.

⁴² See 47 C.F.R. § 54.101(a)(5); Virginia Cellular Petition at 7.

⁴³ *Id.* at 5-6 and Exhibit B.

⁴⁴ See *infra* para 46; Virginia Cellular November 12 Supplement at 4.

⁴⁵ *Id.* at 3.

provide service.⁴⁶ In addition, if after following these steps, Virginia Cellular still cannot provide service, it will notify the requesting party and include that information in an annual report filed with the Commission detailing how many requests for service were unfulfilled for the past year.⁴⁷

16. Virginia Cellular has further committed to use universal service support to further improve its universal service offering by constructing several new cellular sites in sparsely populated areas within its licensed service area but outside its existing network coverage.⁴⁸ Virginia Cellular estimates that it will construct 11 cell sites over the first year and a half following ETC designation.⁴⁹ These 11 cell sites will serve a population of 157,060.⁵⁰ Virginia Cellular notes that the parameters of its build-out plans may evolve over time as it responds to consumer demand.⁵¹

17. The Virginia Rural Telephone Companies raise several concerns about Virginia Cellular's service offerings. We address each of these concerns below, and in so doing, we conclude that Virginia Cellular has demonstrated that it will offer the services supported by the federal universal service support mechanism upon designation as an ETC. Initially, we note that the Commission has held that to require a carrier to actually provide the supported services before it is designated an ETC has the effect of prohibiting the ability of prospective entrants from providing telecommunications service.⁵² Instead, "a new entrant can make a reasonable demonstration . . . of its capability and commitment to provide universal service without the actual provision of the proposed service."⁵³

18. We also reject the argument of the Virginia Rural Telephone Companies that Virginia Cellular does not offer all of the services supported by the federal universal service support mechanisms as required by section 214(e)(1)(A).⁵⁴ Specifically, the Virginia Rural Telephone Companies claim that Virginia Cellular: (1) has not yet upgraded from analog to digital and until

⁴⁶ *Id.* at 3-4.

⁴⁷ *Id.* at 4.

⁴⁸ *Id.* at 4-5.

⁴⁹ *Id.* at 4-5 and Attachment. For purposes of this analysis, we exclude Virginia Cellular's proposed cell site in Crimora, Augusta County, Virginia, which would be located in the study area of NTELOS. As discussed above, we deny Virginia Cellular's request for ETC designation in the NTELOS study area.

⁵⁰ *Id.* Virginia Cellular estimates the populations covered by these cell sites as follows: Hinton (population of 65,027), North Harrisonburg (population of 52,750), Churchville (population of 5,865), Spottswood (population of 7,114), Central Nelson (population of 9,354), Middlebrook (population of 4,749), Bergton (population of 2,987), Afton (population of 7,064), McDowell (population of 731), Mustoe (population of 1,094), and West Augusta (population of 325). *Id.* at 5 and Attachment.

⁵¹ *Id.* at 5.

⁵² See *Declaratory Ruling*, 15 FCC Rcd at 15173-74, paras. 12-14. In the *Declaratory Ruling*, the Commission stated that "a new entrant cannot reasonably be expected to be able to make the substantial financial investment required to provide the supported services in high-cost areas without some assurance that it will be eligible for federal universal service support." *Id.* at 15173, para. 13.

⁵³ *Id.* at 15178, para. 24.

⁵⁴ See Virginia Rural Telephone Companies Comments at 4-6.

this happens, Virginia Cellular cannot effectively implement E-911 or the Communications Assistance for Law Enforcement Act (CALEA); (2) offers no local usage; (3) has stated that its customers will not have equal access to interexchange carriers; (4) states only that it will participate "as required" with respect to Lifeline service; and (5) has wireless signals that are sporadic or unavailable in some of the mountainous regions that Virginia Cellular proposes to serve.⁵⁵

19. We find that Virginia Cellular's commitment to provide access to emergency services is sufficient. Virginia Cellular states that it is in compliance with state and federal 911 and E-911 mandates and is upgrading from analog to digital technology.⁵⁶ Virginia Cellular states that it is implementing Phase I E-911 services in those areas where local governments have developed E-911 functionality and that upon designation as an ETC, it will be able to effectively implement E-911.⁵⁷

20. We find sufficient Virginia Cellular's showing that it will offer minimum local usage as part of its universal service offering. Therefore, we reject the Virginia Rural Telephone Companies' claim that Virginia Cellular should be denied ETC designation because it does not currently offer any local usage.⁵⁸ Although the Commission did not set a minimum local usage requirement, in the *Universal Service Order*, it determined that ETCs should provide some minimum amount of local usage as part of their "basic service" package of supported services.⁵⁹ Virginia Cellular states that it will comply with any and all minimum local usage requirements adopted by the FCC.⁶⁰ It adds that it will meet the local usage requirements by including a variety of local usage plans as part of a universal service offering.⁶¹ In addition, Virginia Cellular states that its current rate plans include access to the local exchange network, and that many plans include a large volume of minutes.⁶² Accordingly, we find that Virginia Cellular's commitment to provide local usage is sufficient.

21. We reject the Virginia Rural Telephone Companies' claim that ETC designation should be denied because Virginia Cellular's customers will not have equal access to

⁵⁵ *Id.* at 5-6.

⁵⁶ See Supplement to Virginia Cellular, LLC Petition for Designation as an ETC in the Commonwealth of Virginia, filed October 3, 2002 at 3-4 (Virginia Cellular October 3 Supplement); Virginia Cellular October 11 Supplement at 3.

⁵⁷ See Virginia Cellular Reply Comments at 3.

⁵⁸ Virginia Rural Telephone Companies Comments at 5.

⁵⁹ See *Federal-State Joint Board on Universal Service*, Report and Order, CC Docket No. 96-45, 12 FCC Rcd 8776, 8813, para. 67 (1997) (*Universal Service Order*) (subseq. history omitted). Although the Commission's rules define "local usage" as "an amount of minutes of use of wire center service, prescribed by the Commission, provided free of charge to end users," the Commission has not specified a number of minutes of use. See 47 C.F.R. § 54.101(a)(2). See also *Federal-State Joint Board on Universal Service*, Recommended Decision, CC Docket No. 96-45, FCC 02J-1 (rel. Jul. 10, 2002) (*Supported Services Recommended Decision*).

⁶⁰ Virginia Cellular Petition at 5-6.

⁶¹ *Id.* at 6.

⁶² Virginia Cellular Reply Comments at 4.

interexchange carriers.⁶³ Section 54.101(a)(7) of the rules states that one of the supported services is access to interexchange services, not equal access to those services.⁶⁴ Virginia Cellular states that it provides access to interexchange services.⁶⁵ Accordingly, we find sufficient Virginia Cellular's showing that it will offer access to interexchange services.

22. We find that Virginia Cellular's commitment to participate in the Lifeline and Linkup programs is sufficient. In its petition, Virginia Cellular states that it currently has no Lifeline customers, and upon designation as an ETC, it will participate in Lifeline as required.⁶⁶ Virginia Cellular also states that it will advertise the availability of Lifeline service to its customers.⁶⁷ Although Virginia Cellular does not currently advertise Lifeline to its customers, we note that the advertising rules for Lifeline and Linkup services apply only to already-designated ETCs.⁶⁸ Thus, we find sufficient Virginia Cellular's commitment to participate in Lifeline and Linkup.

23. Although the Virginia Rural Telephone Companies claim that Virginia Cellular's wireless signals are sporadic in certain areas, we find that the existence of so-called "dead spots" in Virginia Cellular's network does not preclude us from designating Virginia Cellular as an ETC. The Commission has already determined that a telecommunications carrier's inability to demonstrate that it can provide ubiquitous service at the time of its request for designation as an ETC should not preclude its designation as an ETC.⁶⁹ Moreover, as stated above, Virginia Cellular has committed to improve its network.⁷⁰ In addition, the Commission's rules acknowledge the existence of dead spots.⁷¹ "Dead spots" are defined as "[s]mall areas within a service area where the field strength is lower than the minimum level for reliable service."⁷² Section 22.99 of the Commission's rules states that "[s]ervice within dead spots is presumed."⁷³ Additionally, the Commission's rules provide that "cellular service is considered to be provided in all areas, including dead spots . . ."⁷⁴ Because "dead spots" are acknowledged by the Commission's rules, we are not persuaded by the Virginia Rural LECs that the possibility of

⁶³ Virginia Rural Telephone Companies Comments at 5.

⁶⁴ 47 C.F.R. §54.101(a)(7). We note that in July 2002, four members of the Joint Board recommended adding equal access as a supported service. *See Supported Services Recommended Decision*, at paras. 75-86. In July 2003, the Commission decided to defer consideration of this issue pending resolution of the Commission's proceeding examining the rules relating to high-cost universal service support in competitive areas. *See Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order and Order on Reconsideration, 18 FCC Rcd 15,090, 15,104, para. 33 (2003).

⁶⁵ Virginia Cellular Reply Comments at 4-5.

⁶⁶ Virginia Cellular Petition at 8.

⁶⁷ Virginia Cellular Reply Comments at 5.

⁶⁸ *See Twelfth Report and Order*, 15 FCC Rcd at 12249-50, para. 76-80.

⁶⁹ *See Declaratory Ruling*, 15 FCC Rcd at 15175, para. 17.

⁷⁰ *See supra* para. 16; Virginia Cellular Petition at 2, 17 and Virginia Cellular October 3 Supplement at 2, Virginia Cellular November 12 Supplement at 4-5 and Attachment.

⁷¹ *See* 47 C.F.R. § 22.99.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *See* 47 C.F.R. § 22.911(b).

dead spots demonstrates that Virginia Cellular is not willing or capable of providing acceptable levels of service throughout its service area.

24. Offering the Supported Services Using a Carrier's Own Facilities. Virginia Cellular has demonstrated that it satisfies 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.⁷⁵ Virginia Cellular states that it intends to provide the supported services using its cellular network infrastructure, which includes "the same antenna, cell-site, tower, trunking, mobile switching, and interconnection facilities used by the company to serve its existing conventional mobile cellular service customers."⁷⁶ We find that this certification is sufficient to satisfy the facilities requirement of section 214(e)(1)(A).

25. Advertising the Supported Services. We conclude that Virginia Cellular 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.⁷⁷ Virginia Cellular certifies that it "will use media of general distribution that it currently employs to advertise its universal service offerings throughout the service areas designated by the Commission."⁷⁸ In addition, Virginia Cellular details alternative methods that it will employ to advertise the availability of its services. For example, Virginia Cellular will provide notices at local unemployment, social security, and welfare offices so that unserved consumers can learn about Virginia Cellular's service offerings and learn about Lifeline and Linkup discounts.⁷⁹ Virginia Cellular also commits to publicize locally the construction of all new facilities in unserved or underserved areas so customers are made aware of improved service.⁸⁰ We find that Virginia Cellular's certification and its additional commitments to advertising its service offerings satisfy section 214(e)(1)(B). In addition, as the Commission has stated in prior decisions, because an ETC receives universal service support only to the extent that it serves customers, we believe that strong economic incentives exist, in addition to the statutory obligation, for an ETC to advertise its universal service offering in its designated service area.⁸¹

C. Public Interest Analysis

26. We conclude that it is "consistent with the public interest, convenience, and necessity" to designate Virginia Cellular as an ETC for the portion of its requested service area that is served by the non-rural telephone companies Bell Atlantic and GTE South, Inc. We also conclude that it is in the public interest to designate Virginia Cellular as an ETC in Virginia in the study areas served by five of the six affected rural telephone companies. In determining whether the public interest is served, the Commission places the burden of proof upon the ETC applicant. We conclude that Virginia Cellular has satisfied the burden of proof in establishing

⁷⁵ 47 U.S.C. § 214(e)(1)(A).

⁷⁶ Virginia Cellular Petition at 9.

⁷⁷ 47 U.S.C. § 214(e)(1)(B).

⁷⁸ Virginia Cellular Petition at 9.

⁷⁹ Virginia Cellular November 12 Supplement at 5.

⁸⁰ *Id.*

⁸¹ See *Pine Ridge Order*, 16 FCC Rcd at 18137, para. 10.

that its universal service offering in these areas will provide benefits to rural consumers. We do not designate Virginia Cellular as an ETC, however, for the study area of NTELOS because we find that Virginia Cellular has not satisfied its burden of proof in this instance.⁸²

27. Non-Rural Study Areas. We conclude that it is "consistent with the public interest, convenience, and necessity" to designate Virginia Cellular as an ETC for the portion of its requested service area that is served by the non-rural telephone companies of Bell Atlantic and GTE South.⁸³ We note that the Bureau previously has found designation of additional ETCs in areas served by non-rural telephone companies to be *per se* in the public interest based upon a demonstration that the requesting carrier complies with the statutory eligibility obligations of section 214(e)(1) of the Act.⁸⁴ We do not believe that designation of an additional ETC in a non-rural telephone company's study area based merely upon a showing that the requesting carrier complies with section 214(e)(1) of the Act will necessarily be consistent with the public interest in every instance. We nevertheless conclude that Virginia Cellular's public interest showing here is sufficient based on the detailed commitments Virginia Cellular made to ensure that it provides high quality service throughout the proposed rural and non-rural service areas; indeed, given our finding that Virginia Cellular has satisfied the more rigorous public interest analysis for the rural study areas, it follows that its commitments satisfy the public interest requirements for non-rural areas.⁸⁵ We also note that no parties oppose Virginia Cellular's request for ETC designation in the study areas of these non-rural telephone companies. We therefore conclude that Virginia Cellular has demonstrated that its designation as an ETC in the study areas of these non-rural telephone companies, is consistent with the public interest, as required by section 214(e)(6).⁸⁶ We further note that the Joint Board is reviewing whether to modify the public interest analysis used to designate ETCs in both rural and non-rural carrier study areas under section 214(e) of the Act.⁸⁷ The outcome of that proceeding could impact the Commission's public interest analysis for future ETC designations in non-rural telephone company service areas.

28. Rural Study Areas. Based on the record before us, we conclude that grant of this ETC designation for the requested rural study areas, in part, is consistent with the public interest. In considering whether designation of Virginia Cellular as an ETC will serve the public interest, we have considered whether the benefits of an additional ETC in the wire centers for which Virginia Cellular seeks designation outweigh any potential harms. We note that this balancing of benefits and costs is a fact-specific exercise. In determining whether designation of a competitive ETC in a rural telephone company's service area is in the public interest, we weigh the benefits of increased competitive choice, the impact of the designation on the universal service fund, the unique advantages and disadvantages of the competitor's service offering, any

⁸² See *infra* para. 35.

⁸³ See 47 U.S.C. § 214(e)(6). See also Appendix A.

⁸⁴ See, e.g., *Cellco Partnership d/b/a Bell Atlantic Mobile Petition for Designation as an Eligible Telecommunications Carrier*, CC Docket No. 96-45, Memorandum Opinion and Order, 16 FCC Rcd 39 (Com. Car. Bur. 2000).

⁸⁵ See Virginia Cellular November 12 Supplement at 4-5, Attachment; *infra* para. 28.

⁸⁶ See 47 U.S.C. § 214(e)(6).

⁸⁷ See *Portability Public Notice*, 18 FCC Rcd at 1954-55, para. 33.

commitments made regarding quality of telephone service, and the competitive ETC's ability to satisfy its obligation to serve the designated service areas within a reasonable time frame. We recognize that as part of its review of the ETC designation process in the pending proceeding examining the rules relating to high-cost support in competitive areas, the Commission may adopt a different framework for the public interest analysis of ETC applications. This Order does not prejudge the Joint Board's deliberations in that proceeding and any other public interest framework that the Commission might ultimately adopt.

29. Virginia Cellular's universal service offering will provide benefits to customers in situations where they do not have access to a wireline telephone. For instance, Virginia Cellular has committed to serve residences to the extent that they do not have access to the public switched network through the incumbent telephone company.⁸⁸ Also, the mobility of Virginia Cellular's wireless service will provide other benefits to consumers. For example, the mobility of telecommunications assists consumers in rural areas who often must drive significant distances to places of employment, stores, schools, and other critical community locations. In addition, the availability of a wireless universal service offering provides access to emergency services that can mitigate the unique risks of geographic isolation associated with living in rural communities.⁸⁹ Virginia Cellular also submits that, because its local calling area is larger than those of the incumbent local exchange carriers it competes against, Virginia Cellular's customers will be subject to fewer toll charges.⁹⁰

30. We acknowledge arguments made in the record that wireless telecommunications offerings may be subject to dropped calls and poor coverage.⁹¹ Parties also have noted that wireless carriers often are not subject to mandatory service quality standards.⁹² Virginia Cellular has committed to mitigate these concerns. Virginia Cellular assures the Commission that it will alleviate dropped calls by using universal service support to build new towers and facilities to offer better coverage.⁹³ As evidence of its commitment to high service quality, Virginia Cellular has also committed to comply with the Cellular Telecommunications Industry Association Consumer Code for Wireless Service, which sets out certain principles, disclosures, and practices for the provision of wireless service.⁹⁴ In addition, Virginia Cellular has committed to provide

⁸⁸ Virginia Cellular November 12 Supplement at 3-4. According to Virginia Cellular, 11 out of 12 of its proposed cell sites contain some area that is unserved by Virginia Cellular's facilities and/or wireline networks. *See id. at 3*; *but see* Virginia Rural Telephone Companies Comments at 3 (stating that there is an incumbent ETC in all the areas where Virginia Cellular seeks ETC designation).

⁸⁹ Virginia Cellular Petition at 16 (*citing Smith Bagley, Inc.*, Order, Decision No. 63269, Docket No. T-02556A-99-0207 (Ariz. Corp. Comm'n Dec. 15, 2001) (finding that competitive entry provides a potential solution to "health and safety risks associated with geographic isolation"). *See also Twelfth Report and Order*, 15 FCC Rcd at 12212, para. 3.

⁹⁰ *See* Virginia Cellular Petition at 17; Virginia Cellular April 3 Supplement at 1-2.

⁹¹ *See e.g.*, Virginia Rural Telephone Companies Comments at 6; 12 Va. Admin. Code § 5-400-80.

⁹² *See* Virginia Rural Telephone Companies Comments at 6; 12 Va. Admin. Code § 5-400-80.

⁹³ *See* Virginia Cellular November 12 Supplement at 1.

⁹⁴ *Id.*; CTIA, *Consumer Code for Wireless Service*, available at http://www.wow-com.com/pdf/The_Code.pdf. Under the CTIA Consumer Code, wireless carriers agree to: (1) disclose rates and terms of service to customers; (2) make available maps showing where service is generally available; (3) provide contract terms to customers and confirm changes in service; (4) allow a trial period for new service; (5) provide specific disclosures in advertising;

the Commission with the number of consumer complaints per 1,000 handsets on an annual basis.⁹⁵ Therefore, we find that Virginia Cellular's commitment to provide better coverage to unserved areas and its other commitments discussed herein adequately address any concerns about the quality of its wireless service.

31. Although we find that grant of this ETC designation will not dramatically burden the universal service fund, we are increasingly concerned about the impact on the universal service fund due to the rapid growth in high-cost support distributed to competitive ETCs.⁹⁶ Specifically, although competitive ETCs only receive a small percentage of all high-cost universal service support, the amount of high-cost support distributed to competitive ETCs is growing at a dramatic pace. For example, in the first quarter of 2001, three competitive ETCs received approximately \$2 million or 0.4 percent of high-cost support.⁹⁷ In the fourth quarter of 2003, 112 competitive ETCs are projected to receive approximately \$32 million or 3.7 percent of high-cost support.⁹⁸ This concern has been raised by parties in this proceeding, especially as it relates to the long-term sustainability of universal service high-cost support. Specifically, commenters argue that designation of competitive ETCs will place significant burdens on the federal universal service fund without any corresponding benefits.⁹⁹ We recognize these commenters raise important issues regarding universal service support. As discussed above, the Commission has asked the Joint Board to examine, among other things, the Commission's rules relating to high-cost universal service support in service areas in which a competitive ETC is providing service, as well as the Commission's rules regarding support for second lines.¹⁰⁰ We note that the outcome of the Commission's pending proceeding examining the rules relating to

(6) separately identify carrier charges from taxes on billing statements; (7) provide customers the right to terminate service for changes to contract terms; (8) provide ready access to customer service; (9) promptly respond to consumer inquiries and complaints received from government agencies; and (10) abide by policies for protection of consumer privacy. *See id.*

⁹⁵ *See infra* para. 46 (requesting that Virginia Cellular provide consumer complaint data on October 1 of each year).

⁹⁶ For example, assuming, that Virginia Cellular captures each and every customer located in the five affected rural study areas, the overall size of the high-cost support mechanisms would not significantly increase because the total amount of high-cost universal service support available to incumbent carriers in the rural study areas where we grant Virginia Cellular ETC designation is only approximately 0.105% percent of the total high-cost support available to all ETCs. *See Federal Universal Service Support Mechanisms Fund Size Projections for the Fourth Quarter of 2003, Appendix HC 1 (Universal Service Administrative Company, August 1, 2003)* (determining that the total amount of high-cost universal service support available to incumbent carriers in the affected rural study areas is projected to be \$899,706 out of a total of \$857,903,276 in the fourth quarter of 2003). We note, however, in light of the rapid growth in competitive ETCs, comparing the impact of one competitive ETC on the overall fund may be inconclusive. We hope that the Joint Board will speak to this issue in the proceeding addressing rules relating to high-cost support in competitive areas.

⁹⁷ *See Federal Universal Service Support Mechanisms Fund Size Projections for the First Quarter of 2001 (Universal Service Administrative Company, Jan. 31, 2002)*.

⁹⁸ *Federal Universal Service Support Mechanisms Fund Size Projections for the Fourth Quarter of 2003 (Universal Service Administrative Company, Aug. 1, 2003)*. At the same time, we recognize that high-cost support to incumbent ETCs has grown significantly in real and percentage terms over the same period. *See generally, Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Cellular Telecommunications Industry Association's Comments, filed May 5, 2003.*

⁹⁹ *See Virginia Rural Telephone Companies Comments at 2-4; NTCA Comments at 2-4, 8-9.*

¹⁰⁰ *See Portability Public Notice.*

high-cost support in competitive areas could potentially impact, among other things, the support that Virginia Cellular and other competitive ETCs may receive in the future. It is our hope that the Commission's pending rulemaking proceeding also will provide a framework for assessing the overall impact of competitive ETC designations on the universal service mechanisms.

32. Additionally, we conclude that, for most of the rural areas in which Virginia Cellular seeks ETC designation, such designation does not raise the rural creamskimming and related concerns alleged by commenters.¹⁰¹ Rural creamskimming occurs when competitors seek to serve only the low-cost, high revenue customers in a rural telephone company's study area.¹⁰² In this case, because the contour of its CMRS licensed area differs from the existing rural telephone companies' study areas, Virginia Cellular will be unable to provide facilities-based service to the entirety of the study areas of three of the six affected rural telephone companies - Shenandoah, MGW, and NTELOS. Generally, a request for ETC designation for an area less than the entire study area of a rural telephone company might raise concerns that the petitioner intends to creamskim in the rural study area.¹⁰³ In this case, however, Virginia Cellular commits to provide universal service throughout its licensed service area.¹⁰⁴ It therefore does not appear that Virginia Cellular is deliberately seeking to enter only certain portions of these companies' study areas in order to creamskim.

33. At the same time, we recognize that, for reasons beyond a competitive carrier's control, the lowest cost portion of a rural study area may be the only portion of the study area that a wireless carrier's license covers.¹⁰⁵ Under these circumstances, granting a carrier ETC designation for only its licensed portion of the rural study area may have the same effect on the ILEC as rural creamskimming.

34. We have analyzed the record before us in this matter and find that, for the study areas of Shenandoah and MGW, Virginia Cellular's designation as an ETC is unlikely to undercut the incumbents' ability to serve the entire study area. Our analysis of the population density of each of the affected wire centers reveals that, for the study areas of MGW and Shenandoah, Virginia Cellular will not be serving only low-cost areas to the exclusion of high-cost areas.¹⁰⁶ Although

¹⁰¹ See NTCA Comments at 5-6; see also Virginia Rural Telephone Companies Comments at 11.

¹⁰² See 1996 Recommended Decision, 12 FCC Rcd at 180, para. 172. "Creamskimming" refers to the practice of targeting only the customers that are the least expensive to serve, thereby undercutting the ILEC's ability to provide service throughout the area. See, e.g., Universal Service Order, 12 FCC Rcd at 8881-2, para. 189.

¹⁰³ See 1996 Recommended Decision, 12 FCC Rcd at 180, para. 172 (stating that potential creamskimming is minimized when competitors, as a condition of eligibility for universal service support, must provide services throughout a rural telephone company's study area).

¹⁰⁴ See Virginia Cellular Petition at 2, 13.

¹⁰⁵ See NTCA Comments at 5.

¹⁰⁶ The Virginia Rural Telephone Companies express concerns about use of the term "wire center" versus "exchange" as the relevant area designated for support. See Virginia Rural Telephone Companies November 8, 2002 *ex parte* (stating that, in Virginia, the defined area for regulatory purposes is "exchange"). Virginia Cellular responded that the rural ILEC exchanges in Virginia contain a single wire center and therefore use of the term "wire center" is synonymous with "exchange." See Virginia Cellular November 20 Supplement at 2. The Virginia Rural Telephone Companies also state "generally, in rural companies there is one wire center per exchange." See Virginia Rural Telephone Companies November 8 *ex parte*. We note that the Commission has historically viewed high cost

there are other factors that define high-cost areas, a low population density typically indicates a high-cost area.¹⁰⁷ Our analysis of population density reveals that Virginia Cellular is serving not only the lower cost, higher density wire centers in the study areas of MGW and Shenandoah.¹⁰⁸ The population density for the Shenandoah wire center for which Virginia Cellular seeks ETC designation is approximately 4.64 persons per square mile and the average population density for Shenandoah's remaining wire centers is approximately 53.62 persons per square mile.¹⁰⁹ The average population density for the MGW wire centers for which Virginia Cellular seeks ETC designation is approximately 2.30 persons per square mile and the average population density for MGW's remaining wire centers is approximately 2.18 persons per square mile.¹¹⁰

35. We conclude, however, for the following reasons, that it would not be in the public interest to designate Virginia Cellular as an ETC in the study area of NTELOS. Virginia Cellular's licensed CMRS area covers only the Waynesboro wire center in NTELOS' study area. Based on our examination of the population densities of the wire centers in NTELOS' study area, we find that Waynesboro is the lowest-cost, highest-density wire center in the study area of NTELOS, and that there is a great disparity in density between the Waynesboro wire center and the NTELOS wire centers outside Virginia Cellular's service area. The population density in the Waynesboro wire center is approximately 273 persons per square mile, while the average population density of the remaining wire centers in NTELOS' study area is approximately 33

support in terms of wire centers. *See, e.g.*, 47 U.S.C. § 54.309. Thus, consistent with our rules, hereinafter in this order, we will discuss support in terms of wire centers.

¹⁰⁷ *See Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Docket No. 00-256, Second Report and Order and Further Notice of Proposed Rulemaking, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Fifteenth Report and Order, *Access Charge Reform for Incumbent Local Exchange Carriers Subject to Rate-of-Return Regulation*, CC Docket No. 98-77, Report and Order, *Prescribing the Authorized Rate of Return From Interstate Services of Local Exchange Carriers*, CC Docket No. 98-166, Report and Order, 16 FCC Rcd 19613, para. 28 (2001) (*MAG Order*), *recon. pending* (discussing Rural Task Force White Paper 2 at <<http://www.wutc.wa.gov/rtf>>) (stating that “[r]ural carriers generally serve more sparsely populated areas and fewer large, high-volume subscribers than non-rural carriers” and that “[t]he isolation of rural carrier service areas creates numerous operational challenges, including high loop costs, high transportation costs for personnel, equipment, and supplies, and the need to invest more resources to protect network reliability”).

¹⁰⁸ *See Virginia Cellular October 29 Supplement*. We note that the Virginia Rural Telephone Companies object to accuracy of the population density data submitted by Virginia Cellular. Rather than submitting different population density data, however, the Virginia Rural Telephone Companies submitted line count data. *See Virginia Rural Telephone Companies November 8 ex parte*. Virginia Cellular's response is that it calculated population density using the software program Exchange Plus by MapInfo, which allows a user to “simultaneously query an ILEC's exchange and the Census Bureau population database.” *See Virginia Cellular November 20 Supplement*. Virginia Cellular asserts that this software is commonly used in the telecommunications industry and yields accurate data. *Id.* Our review of the line count data submitted by the Virginia Rural Telephone Companies reveals that Virginia Cellular will be serving many of the high-cost, low-density wire centers in the study areas of MGW and Shenandoah. Accordingly, this line count analysis is consistent with the population density analysis that was based on data submitted by Virginia Cellular.

¹⁰⁹ *See Virginia Cellular October 29 Supplement*.

¹¹⁰ *See id.* Although the average population density of the MGW wire centers which Virginia Cellular proposes to serve is slightly higher than the average population density of MGW's remaining wire centers, the amount of this difference is not significant enough to raise creamskimming concerns. We also note that there is very little disparity between the population densities of the wire centers in the MGW study area.

persons per square mile.¹¹¹ Universal service support is calculated on a study-area-wide basis. Although NTELOS did not take advantage of the Commission's disaggregation options to protect against possible uneconomic entry in its lower-cost area,¹¹² we find on the facts here that designating Virginia Cellular as an ETC only for the Waynesboro wire center could potentially significantly undermine NTELOS' ability to serve its entire study area. The widely disparate population densities in NTELOS' study area and the status of Waynesboro as NTELOS' sole low-cost, high-density wire center could result in such an ETC designation placing NTELOS at a sizeable unfair competitive disadvantage. In addition, we believe that, if NTELOS had disaggregated, the low costs of service in the Waynesboro wire center would have resulted in little or no universal service support targeted to those lines.¹¹³ Therefore, our decision not to designate Virginia Cellular as an ETC in the study area of NTELOS is unlikely to impact consumers in the Waynesboro wire center because Virginia Cellular will make a business decision on whether to provide service in that area without regard to the potential receipt of universal service support.

D. Designated Service Area

36. Virginia Cellular is designated an ETC in the areas served by the non-rural carriers Bell Atlantic and GTE South, as listed in Appendix A.¹¹⁴ We designate Virginia Cellular as an ETC throughout most of its CMRS licensed service area in the Virginia 6 Rural Service Area. Virginia Cellular is designated an ETC in the areas served by the three rural telephone companies whose study areas Virginia Cellular is able to serve completely, as listed in Appendix B.¹¹⁵ As discussed below, and subject to the Virginia Commission's agreement on redefining the

¹¹¹ See *id.*

¹¹² In the *RTF Order*, the Commission provided incumbent LECs with certain options for disaggregating their study areas, determining that universal service support should be disaggregated and targeted below the study area level to eliminate uneconomic incentives for competitive entry caused by the averaging of support across all lines served by a carrier within its study area. Under disaggregation and targeting, per-line support is more closely associated with the cost of providing service. There are fewer issues regarding inequitable universal service support and potential harm to concerns regarding the incumbent's ability to serve its entire study area when there is in place a disaggregation plan in which the per-line support available to a competitive ETC in the wire centers located in "low-cost" zones is less than the amount a competitive ETC could receive if it served in one of the wire centers located in the "high-cost" zones. See *Federal-State Joint Board on Universal Service, Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking in CC Docket No. 96-45, and Report and Order in CC Docket No. 00-256, 16 FCC Rcd 11244, 11302, para. 145 (2001) (*RTF Order*), as corrected by Errata, CC Docket Nos. 96-45, 00-256 (Acc. Pol. Div. rel. Jun. 1, 2001), *recon. pending*. Although the deadline (May 15, 2002) for carriers to file disaggregation plans has passed, the relevant state commission or appropriate regulatory authority may nonetheless require a carrier to disaggregate, either on its own motion or that of an interested party. See USAC's website, <http://www.universalservice.org/hc/disaggregation>; see also *RTF Order*, 16 FCC Rcd at 11303, para. 147.

¹¹³ Section 54.315(d)(2)(ii) of the Commission's rules requires self-certified disaggregation plans to "be reasonably related to the cost of providing service for each disaggregation zone within each disaggregated category of support." 47 C.F.R. § 54.315(d)(2)(ii).

¹¹⁴ See Virginia Cellular Petition at 10 and Exhibit D. We note that, when designating a service area served by a non-rural carrier, the Commission may designate a service area that is smaller than the contours of the incumbent carrier's study area. See *Universal Service Order*, 12 FCC Rcd at 8879-90, paras. 184-85.

¹¹⁵ See Virginia Cellular Petition at 10-11 and Exhibit E.

service areas of MGW and Shenandoah, we also designate Virginia Cellular as an ETC for the entire Bergton, McDowell, Williamsville, and Deerfield wire centers.

37. We designate Virginia Cellular as an ETC in the entire Deerfield, McDowell, and Williamsville wire centers in the study area of MGW.¹¹⁶ We note that, although the boundaries of its CMRS licensed service area in Virginia exclude a small part of MGW's Williamsville wire center, Virginia Cellular has committed nevertheless to offer service to customers in the entirety of the Williamsville wire center through a combination of its own facilities and resale of either wireless or wireline services.¹¹⁷

38. We also designate Virginia Cellular as an ETC for the Bergton wire center in Shenandoah's study area. We note that the study area of Shenandoah is composed of two non-contiguous areas. One such area is composed solely of the Bergton wire center, which falls within Virginia Cellular's licensed service area, and the other area is composed of eight remaining wire centers, which fall outside of Virginia Cellular's licensed service area.¹¹⁸ We find that, because the Bergton wire center is a low-density, high-cost wire center, concerns about undermining Shenandoah's ability to serve the entire study area are substantially minimized. We further note that the Commission has previously expressed concern about requiring competitive ETCs to serve non-contiguous areas. In the *Universal Service Order*, the Commission concluded that requiring a carrier to serve a non-contiguous service area as a prerequisite of eligibility might impose a serious barrier to entry, particularly to wireless carriers.¹¹⁹ The Commission further concluded that "imposing additional burdens on wireless entrants would be particularly harmful in rural areas...."¹²⁰ Accordingly, we find that denying Virginia Cellular ETC status for Shenandoah's Bergton wire center simply because Virginia Cellular is not licensed to serve the eight remaining wire centers would be inappropriate. Thus, we conclude that it is appropriate to designate Virginia Cellular as an ETC for the Bergton wire center within Shenandoah's study area.

39. Finally, for the reasons described above, we do not designate Virginia Cellular as an ETC in any portion of NTELOS' service area.¹²¹

E. Redefining Rural Telephone Company Service Areas

40. We redefine the service areas of MGW and Shenandoah pursuant to section 214(e)(5). Consistent with prior rural service area redefinitions, we redefine each wire center in

¹¹⁶ MGW's study area consists of the Deerfield, McDowell, Williamsville, Mountain Grove, and McClung wire centers. Virginia Cellular is licensed to completely serve the Deerfield and McDowell wire centers and to partially serve the Williamsville wire center. See Virginia Cellular Amendment at 2.

¹¹⁷ See Appendix C. Virginia Cellular's wireless license covers all but approximately 200 people in 13.5 square miles of the Williamsville wire center. See Virginia Cellular October 11 Supplement at 2; Virginia Cellular April 17 Supplement at 2.

¹¹⁸ The other wire centers within Shenandoah's study area are: Bayse, Edinburg, Fort Valley, Mount Jackson, New Market, Strasburg, Toms Brook, and Woodstock, all in Virginia.

¹¹⁹ *Universal Service Order*, 12 FCC Rcd at 8882, para. 190.

¹²⁰ *Id.* at 8883, para. 190.

¹²¹ See *supra* para. 35.

the MGW and Shenandoah study areas as a separate service area.¹²² Our decision to redefine the service areas of these telephone companies is subject to the review and final agreement of the Virginia Commission in accordance with applicable Virginia Commission requirements. Accordingly, we submit our redefinition proposal to the Virginia Commission and request that it examine such proposal based on its unique familiarity with the rural areas in question.

41. In order to designate Virginia Cellular as an ETC in a service area that is smaller than the affected rural telephone company study areas, we must redefine the service areas of the rural telephone companies in accordance with section 214(e)(5) of the Act.¹²³ We define the affected service areas only to determine the portions of rural service areas in which to designate Virginia Cellular and future competitive carriers seeking ETC designation in the same rural service areas. Any future competitive carrier seeking ETC designation in these redefined rural service areas will be required to demonstrate that such designation will be in the public interest.¹²⁴ In defining the rural telephone companies' service areas to be different than their study areas, we are required to act in concert with the relevant state commission, "taking into account the recommendations" of the Joint Board.¹²⁵ The Joint Board's concerns regarding rural telephone company service areas as discussed in the *1996 Recommended Decision* are as follows: (1) minimizing creamskimming; (2) recognizing that the 1996 Act places rural telephone companies on a different competitive footing from other LECs; and (3) recognizing the administrative burden of requiring rural telephone companies to calculate costs at something other than a study area level.¹²⁶ We find that the proposed redefinition properly addresses these concerns.

42. First, we conclude that redefining the affected rural telephone company service areas at the wire center level for MGW and Shenandoah should not result in opportunities for creamskimming. Because Virginia Cellular is limited to providing facilities-based service only where it is licensed by the Commission and because Virginia Cellular commits to providing universal service throughout its licensed territory in Virginia, concerns regarding creamskimming are minimized.¹²⁷ In addition, we have analyzed the population densities of the wire centers Virginia Cellular can and cannot serve to determine whether the effects of creamskimming would occur.¹²⁸ We note that we do not propose redefinition in areas where ETC designation would potentially undermine the incumbent's ability to serve its entire study

¹²² See *RCC Holdings ETC Designation Order*, 17 FCC Rcd at 23547, para. 37. We do not designate Virginia as an ETC in the study area of NTELOS. Thus, we do not redefine the service area of NTELOS. In its original petition, Virginia Cellular stated that the Commission might choose not to redefine the service area of MGW, because Virginia Cellular serves all but a small portion of MGW's study area. See Virginia Cellular Petition at 12. Subsequently, Virginia Cellular amended its petition, explaining that there are two additional wire centers (McClung and Mountain Grove) within MGW's service area that it does not propose to serve. See Virginia Cellular Amendment at 2. In its amended petition, Virginia Cellular asks the Commission to reclassify each of MGW's five wire centers as separate service areas. *Id.*

¹²³ See 47 U.S.C. § 214(e)(5).

¹²⁴ See 47 U.S.C. § 214(e)(2), (6).

¹²⁵ See 47 U.S.C. § 214(e)(5).

¹²⁶ See *1996 Recommended Decision*, 12 FCC Rcd at 179-80, paras. 172-74.

¹²⁷ See *supra* para. 32.

¹²⁸ See *supra* paras. 32-35.

area.¹²⁹ Therefore, we conclude, based on the particular facts of this case, that there is little likelihood of rural creamskimming effects in redefining the service areas of MGW and Shenandoah as proposed.

43. Second, our decision to redefine the service areas of the affected rural telephone companies includes special consideration for the affected rural carriers. Nothing in the record convinces us that the proposed redefinition will harm the incumbent rural carriers. The high-cost universal service mechanisms support all lines served by ETCs in rural areas.¹³⁰ Under the Commission's rules, receipt of high-cost support by Virginia Cellular will not affect the total amount of high-cost support that the incumbent rural telephone company receives.¹³¹ Therefore, to the extent that Virginia Cellular or any future competitive ETC captures incumbent rural telephone company lines, provides new lines to currently unserved customers, or provides second lines to existing wireline subscribers, it will have no impact on the amount of universal service support available to the incumbent rural telephone companies for those lines they continue to serve.¹³² Similarly, redefining the service areas of the affected rural telephone companies will not change the amount of universal service support that is available to these incumbents.

44. Third, we find that redefining the rural telephone company service areas as proposed will not require the rural telephone companies to determine their costs on a basis other than the study area level. Rather, the redefinition merely enables competitive ETCs to serve areas that are smaller than the entire ILEC study area. Our decision to redefine the service areas does not modify the existing rules applicable to rural telephone companies for calculating costs on a study area basis, nor, as a practical matter, the manner in which they will comply with these rules. Therefore, we find that the concern of the Joint Board that redefining rural service areas would impose additional administrative burdens on affected rural telephone companies is not at issue here.

45. In accordance with section 54.207(d) of the Commission's rules, we submit this order to the Virginia Commission.¹³³ We request that the Virginia Commission treat this Order as a petition to redefine a service area under section 54.207(d)(1) of the Commission's rules.¹³⁴ Virginia Cellular's ETC designation in the service areas of Shenandoah and MGW is subject to the Virginia Commission's review and agreement with the redefinition proposal herein.¹³⁵ We

¹²⁹ See *supra* para. 35.

¹³⁰ See *Western Wireless Pine Ridge Order*, 16 FCC Rcd at 18138-39, para. 15.

¹³¹ See *RTF Order*, 16 FCC Rcd at 11299-11309, paras. 136-164.

¹³² See *Western Wireless Pine Ridge Order*, 16 FCC Rcd at 18138-39, para. 15.

¹³³ 47 C.F.R. § 54.207(d).

¹³⁴ Virginia Cellular submits that the Commonwealth of Virginia has no process for redefining service areas. See Virginia Cellular October 11 Supplement at 2.

¹³⁵ In the *Universal Service Order*, the Commission decided to minimize any procedural delays caused by the need for the federal-state coordination on redefining rural service areas. See *Universal Service Order*, 12 FCC Rcd at 8880-81, para. 187. Therefore, the Commission adopted section 54.207 of the Commission's rules by which the state commissions may obtain agreement of the Commission when proposing to redefine a rural service area. *Id.* at 8881, para. 188. Similarly, the Commission adopted a procedure in section 54.207 to address the occasions when the Commission seeks to redefine a rural service area. *Id.* The Commission stated that "in keeping with our intent

find that the Virginia Commission is uniquely qualified to examine the redefinition proposal because of its familiarity with the rural service areas in question. Upon the effective date of the agreement of the Virginia Commission with our redefinition of the service areas of Shenandoah and MGW, our designation of Virginia Cellular as an ETC for these areas as set forth herein shall also take effect. In all other areas for which this Order grants ETC status to Virginia Cellular, as described herein, such designation is effective immediately. If, after its review, the Virginia Commission determines that it does not agree with the redefinition proposal herein, we will reexamine Virginia Cellular's petition with regard to redefining the affected rural service areas.

F. Regulatory Oversight

46. We note that Virginia Cellular is obligated under section 254(e) of the Act to use high-cost support "only for the provision, maintenance, and upgrading of facilities and services for which support is intended" and is required under sections 54.313 and 54.314 of the Commission's rules to certify annually that it is in compliance with this requirement.¹³⁶ Separate and in addition to its annual certification filing under sections 54.313 and 54.314 of our rules, Virginia Cellular has committed to submit records and documentation on an annual basis detailing its progress towards meeting its build-out plans in the service areas it is designated as an ETC.¹³⁷ Virginia Cellular also has committed to become a signatory to the Cellular Telecommunications Industry Association's Consumer Code for Wireless Service and provide the number of consumer complaints per 1,000 mobile handsets on an annual basis.¹³⁸ In addition, Virginia Cellular will annually submit information detailing how many requests for service from potential customers in the designated service areas were unfulfilled for the past year.¹³⁹ We require that Virginia Cellular submit these additional data to the Commission and USAC on October 1 of each year beginning October 1, 2004.¹⁴⁰ We find that reliance on Virginia Cellular's commitments is reasonable and consistent with the public interest and the Act and the Fifth Circuit decision in *Texas Office of Public Utility Counsel v. FCC*.¹⁴¹ We conclude that fulfillment of these additional reporting requirements will further the Commission's goal of ensuring Virginia Cellular satisfies its obligation under section 214(e) of the Act to provide

to use this procedure to minimize administrative delay, we intend to complete consideration of any proposed definition of a service area promptly." *Id.*

¹³⁶ 47 U.S.C. § 254(e); 47 C.F.R. §§ 54.313, 54.314.

¹³⁷ See Virginia Cellular November 12 Supplement at 4-5.

¹³⁸ See *supra* para. 30; Virginia Cellular November 12 Supplement at 1.

¹³⁹ See *supra* para. 15; Virginia Cellular November 12 Supplement at 2.

¹⁴⁰ Virginia Cellular's submissions concerning consumer complaints per 1,000 handsets and unfulfilled service requests will include data from July 1 of the previous calendar year through June 30 of the reporting calendar year. We anticipate that Virginia Cellular's annual submission will only encompass the service areas where it is designated as an ETC.

¹⁴¹ *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 417-18 (5th Cir. 1999) In *TOPUC v. FCC*, the Fifth Circuit held that that nothing in section 214(e)(2) of the Act prohibits states from imposing additional eligibility conditions on ETCs as part of their designation process. See *id.* Consistent with this holding, we find that nothing in section 214(e)(6) prohibits the Commission from imposing additional conditions on ETCs when such designations fall under our jurisdiction.

supported services throughout its designated service area. We adopt the commitments that Virginia Cellular has made as conditions on our approval of its ETC designation for the Commonwealth of Virginia. We note that the Commission may institute an inquiry on its own motion to examine any ETC's records and documentation to ensure that the high-cost support it receives is being used "only for the provision, maintenance, and upgrading of facilities and services" in the areas where it is designated as an ETC.¹⁴² Virginia Cellular will be required to provide such records and documentation to the Commission and USAC upon request. We further emphasize that if Virginia Cellular fails to fulfill the requirements of the statute, our rules, and the terms of this Order after it begins receiving universal service support, the Commission has authority to revoke its ETC designation.¹⁴³ The Commission also may assess forfeitures for violations of Commission rules and orders.¹⁴⁴

IV. ANTI-DRUG ABUSE ACT CERTIFICATION

47. 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.¹⁴⁵ Virginia Cellular has provided a certification consistent with the requirements of the Anti-Drug Abuse Act of 1988.¹⁴⁶ We find that Virginia Cellular 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

48. 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), Virginia Cellular, LLC IS DESIGNATED AN ELIGIBLE TELECOMMUNICATIONS CARRIER for specified portions of its licensed service area in the Commonwealth of Virginia subject to the conditions described herein.¹⁴⁷

49. IT IS FURTHER ORDERED that, pursuant to the authority contained in section 214(e)(5) of the Communications Act, 47 U.S.C. § 214(e)(5), and sections 54.207(d) and (e) of the Commission's rules, 47 C.F.R. §§ 54.207(d) and (e), the request of Virginia Cellular, LLC to redefine the service areas of Shenandoah Telephone Company and MGW Telephone Company in Virginia IS GRANTED, SUBJECT TO the agreement of the Virginia State Corporation Commission with the Commission's redefinition of the service areas for these rural telephone companies. Upon the effective date of the agreement of the Virginia State Corporation

¹⁴² 47 U.S.C. §§ 220, 403; 47 C.F.R. §§ 54.313, 54.314.

¹⁴³ See *Declaratory Ruling*, 15 FCC Rcd at 15174, para. 15. See also 47 U.S.C. § 254(e).

¹⁴⁴ See 47 U.S.C. § 503(b).

¹⁴⁵ 47 U.S.C. § 1.2002(a); 21 U.S.C. § 862.

¹⁴⁶ Virginia Cellular Petition at 18. See also Supplement to Virginia Cellular, LLC Petition for Designation as an ETC in the Commonwealth of Virginia, filed February 28, 2003.

¹⁴⁷ See *supra* para. 46.

Commission with the Commission's redefinition of the service areas for those rural telephone companies, this designation of Virginia Cellular, LLC as an ETC for such areas as set forth herein shall also take effect.

50. IT IS FURTHER ORDERED that, pursuant to the authority contained in section 214(e)(5) of the Communications Act, 47 U.S.C. § 214(e)(5), and sections 54.207(d) and (e) of the Commission's rules, 47 C.F.R. §§ 54.207(d) and (e), the request of Virginia Cellular, LLC to redefine the service area of NTELOS Telephone Inc. in Virginia IS DENIED.

51. IT IS FURTHER ORDERED that a copy of this Memorandum Opinion and Order SHALL BE transmitted by the Office of the Secretary to the Virginia State Corporation Commission and the Universal Service Administrative Company.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

VIRGINIA NON-RURAL WIRE CENTERS FOR INCLUSION IN VIRGINIA
CELLULAR'S ETC SERVICE AREA

Bell Atlantic (Verizon)	GTE South, Inc. (Verizon)
Staunton (STDRVASD)*	Broadway
Staunton (STTNVAST)	Edom
Staunton (STTNVAVE)	Hinton
Craigsville	Dayton
Lovingston (NLFRVANF)	Keezletown
Lovingston (LVTNVALN)	Harrisonburg
Lovingston (WNTRVAWG)	McGaheysville
Greenwood	Bridgewater
Pine River	Weyerscave
	Grottoes
	Elkton
	Amherst
	Gladstone

* Because the wire center locality names are the same in some instances, the Wire Center Codes are listed in parentheses.

APPENDIX B

**VIRGINIA RURAL TELEPHONE COMPANY STUDY AREAS FOR INCLUSION IN
VIRGINIA CELLULAR'S ETC SERVICE AREA**

New Hope Telephone Company

North River Telephone Company

Highland Telephone Cooperative

APPENDIX C

VIRGINIA RURAL TELEPHONE COMPANY WIRE CENTERS
FOR INCLUSION IN
VIRGINIA CELLULAR'S ETC SERVICE AREA

Shenandoah Telephone Company

Bergton

MGW Telephone Company

McDowell

Williamsville

Deerfield

**SEPARATE STATEMENT OF
CHAIRMAN MICHAEL K. POWELL**

Re: Federal-State Joint Board on Universal Service; Virginia Cellular, LLC, Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia.

Competition is for rural as well as urban consumers. In this item, we recognize the unique value that mobile services provide to rural consumers by giving added substance to the public interest standard by which we evaluate wireless eligible telecommunications carriers (ETC). At the same time, we reinforce the requirement that wireless networks be ready, willing and able to serve as carriers of last resort to support our universal service goals.

The areas Virginia Cellular proposes to serve are indeed rural – they are areas where retail rates do not cover the cost of providing service and where high-quality wireless service is intermittent or scarce. This decision remains true to the requirement that ETCs must be prepared to serve all customers upon reasonable request and requires them to offer high-quality telecommunications services at affordable rates throughout the designated service area. In this case, Virginia Cellular has documented its proposed use of federal universal service funding and made important commitments to provide high-quality service throughout its designated service area. To ensure that Virginia Cellular abides by its commitments, moreover, we have imposed reporting requirements and, of course, retain the right to conduct audits and other regulatory oversight activities, if necessary.

Despite the importance of making rural, facilities-based competition a reality, we must ensure that increasing demands on the fund should not be allowed to threaten its viability. Incumbent local exchange carriers, competitive local exchange carriers and wireless carriers should have a competitively neutral opportunity to receive universal service funding. Yet determining an effective, equitable and affordable means of balancing competition and universal service goals is no easy task. The Federal-State Joint Board on Universal Service (Joint Board) is now considering a comprehensive record on these issues and plans to provide a recommended decision to us. I urge them to conclude their inquiry as expeditiously as possible in light of the complexity of the issues involved. Once we receive recommendations from the Joint Board, I hope to move quickly to provide much-needed regulatory certainty in this area and to ensure the support necessary to maintain a sustainable, competitively neutral universal service fund.

**SEPARATE STATEMENT OF
COMMISSIONER KATHLEEN Q. ABERNATHY**

Re: Federal-State Joint Board on Universal Service; Virginia Cellular, LLC, Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia.

In this Order, the Commission has taken an important (albeit incremental) step toward establishing a more rigorous framework for evaluating ETC applications. When the Commission initially exercised its authority to grant ETC status in areas where state commissions lack jurisdiction, it appeared to regard entry by any new competitor as *per se* consistent with the public interest. While promoting competition is undoubtedly a core goal under the Telecommunications Act of 1996, the use of universal service funding to engender competition where market forces alone cannot support it presents a more complex question. Particularly in rural study areas, where the cost of providing service typically far exceeds retail rates, regulators must carefully consider whether subsidizing the operations of an additional ETC promotes the public interest.

The Joint Board is developing comprehensive recommendations on the ETC designation process and the appropriate scope of support, and this isolated case is not an appropriate proceeding in which to make any fundamental changes. Nevertheless, to qualify for support even under our existing rules, I believe that an ETC must be prepared to serve all customers upon reasonable request, and it must offer high-quality services at affordable rates throughout the designated service area. State commissions exercising their authority under section 214(e)(2), and this Commission acting pursuant to section 214(e)(6), therefore should make certain that an applicant for ETC status is ready, willing, and able to serve as a carrier of last resort and is otherwise prepared to fulfill the goals set forth in section 254 of the Act.

To this end, I am pleased that the Commission has required Virginia Cellular to submit build-out plans to document its proposed use of federal universal service funding for infrastructure investment. I also support the Commission's insistence on appropriate service-quality commitments. Moreover, the Commission is right to consider the increasing demands on the universal service fund: While at one point the cost of granting ETC status to new entrants may have appeared trifling, the dramatic rate of growth in the flow of funds to competitive ETCs compels us to consider the overall impact of new ETC designations on the stability and sustainability of universal service. Finally, I strongly support our efforts to beef up regulatory oversight by imposing reporting requirements on Virginia Cellular and by reserving the right to conduct audits and revoke this ETC designation in the event of a failure to fulfill the requirements of the statute and this Order. All of these requirements are consistent with the statutory framework. The Joint Board may soon recommend that this Commission and state commissions impose additional requirements, and I eagerly await the outcome of that proceeding.

**SEPARATE STATEMENT OF
COMMISSIONER MICHAEL J. COPPS**

Re: *Federal-State Joint Board on Universal Service; Virginia Cellular, LLC, Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia.*

Today we grant Virginia Cellular eligible telecommunication carrier (ETC) status in study areas served by rural and non-rural telephone companies. We make some headway in this decision toward articulating a more rigorous template for review of ETC applications. Although I support this grant, I believe that the ETC process needs further improvement. The long-term viability of universal service requires that the Commission get the ETC designation process right. We must give serious consideration to the consequences that flow from using the fund to support multiple competitors in truly rural areas. And when we do fund competition, we need to ensure that we provide the appropriate level of support. For these reasons, I look forward to reviewing the Joint Board's upcoming Recommendation on universal service portability and ETC designation. I am hopeful that this document will lay the foundation for an improved approach that both honors the public interest and reflects the realities of the market.

**SEPARATE STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN**

Re: Federal-State Joint Board on Universal Service; Virginia Cellular, LLC, Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia.

Late last year, I had the opportunity to further outline my thoughts on the Commission's eligible telecommunications carrier (ETC) designation process and the role of the public interest in that process.¹ For the reasons discussed at that time, I am pleased to support this Order responding to the petition of Virginia Cellular, LLC to be designated as an ETC in the Commonwealth of Virginia. I believe this Order establishes a better template for the ETC designation process that is a significant improvement from past Commission decisions and that more fully embraces the statutory public interest mandate. I expect that state commissions also will find the template that we adopt here to be useful in their deliberations of ETC requests.

I am confident that this Order remains true to the Communications Act, which, through Universal Service, requires the Commission to ensure that all Americans, whoever they are or wherever they live, have access to a rapid and efficient communications system at reasonable rates. Congress clearly intended that, when appropriate, competitive carriers should have access to high cost funds on a technologically neutral basis. I believe the Federal-State Joint Board on Universal Service (Joint Board) can play a critical role in determining the parameters of where such competition is appropriate. I am pleased, however, that this Commission has been willing to strengthen the public interest test, pending a Joint Board recommendation. The template established in this Order provides a much more stringent examination of the public interest in making our ETC determination. Among other factors, Virginia Cellular has made significant investment and service quality commitments throughout its proposed service areas. Finally, I believe that our Order conducts a thorough and proper analysis of rural telephone company service areas pursuant to Section 214(e)(5). Indeed, we ultimately decided not to designate Virginia Cellular as an ETC in certain portions of its licensed service area. In other areas, it was determined, based on a detailed review of the affected service areas, that cream skimming or other similar concerns do not arise, and these areas ultimately are proposed for redefinition.

I look forward to working with my colleagues both at the Commission and on the Joint Board to provide further guidance on the ETC designation process and other Universal Service support issues in the upcoming months. As I outlined in the attached remarks, I believe there are many constructive actions we can take to make sure our Universal Service mandate is upheld while still ensuring that the fund does not grow dramatically.

¹ Commissioner Jonathan S. Adelstein, *Accessing the Public Interest: Keeping America Well-Connected*, Address Before the 21st Annual Institute on Telecommunications Policy & Regulation (Dec. 4, 2003) (<http://www.fcc.gov/commissioners/adelstein/speeches2003.html>). A copy of the remarks is incorporated into this statement.

**Remarks of
Jonathan S. Adelstein
Commissioner, Federal Communications Commission**

**“Accessing the Public Interest:
Keeping America Well-Connected”
21st Annual Institute on Telecommunications Policy & Regulation
The International Trade Center - Washington, DC
December 4, 2003
[As prepared for delivery]**

I. Introduction

Thank you Henry for that kind introduction.

There is no greater opportunity for someone who has dedicated his whole life to public service than to serve as an FCC Commissioner. My singular goal is to serve the public interest. But sometimes the hardest part is figuring out what that means. It is especially frustrating in the context of communications policy, because we hear so many conflicting views from parties with big stakes in the outcome.

Winston Churchill once described Russia as “a riddle, wrapped in a mystery, inside of an enigma.” Similar terms are used to describe the public interest standard of the FCC. As an eternal optimist, I still believe the public interest does exist and can be a meaningful standard. It is our job to figure it out, since Congress referred to it over 100 times in the Communications Act. If we are not sure what it means any given case, it is job number one to figure it out.

Looking back over the past year and across the Commission’s broad jurisdiction, I am guided in my public interest determinations by one key principle – that the public interest means securing access to communications for everyone, including those the market may leave behind.

I have tried to address these needs this last year, by protecting people with disabilities, non-English speakers, rural and low-income consumers, and many others. I have looked for opportunities for new entrants and smaller players who are seeking to compete in spectrum-based services and in broadcasting.

Today, I would like to focus on securing access to communications opportunities in three key areas. First, we face an urgent need to establish a new framework to shore up universal service so it can continue to fulfill its function of connecting everyone in this country to the latest telecommunications systems, no matter where they live. Second, we need to expand access to the spectrum so that people can maintain those connections in the increasingly untethered, portable world made possible by advances in wireless technologies. Finally, we need to ensure that communities have access to the broadcast airwaves and local broadcasters remain connected to the communities they serve, even as these broadcasters make the transition to the digital era.

II. Universal Service

Just this week, the Commission held an important forum on a development that could revolutionize not only the telephone system as we know it today, but the entire regulatory structure that has grown around it over the last century: Voice over Internet Protocol, or VoIP. As voice traffic is increasingly conveyed in packets, it becomes difficult to distinguish a voice call from e-mail, photos, or video clips sailing over the Internet.

This is one of the most exciting developments in telephony in decades, and promises a new era of competition, new efficiencies, lower prices, and innovative services. But we have to make sure that all consumers can benefit from the promises that VoIP may hold.

At Monday's forum, we kept coming back to the question of what that means for the future of universal service. The Communications Act requires that, through Universal Service, the Commission ensure that all Americans, whoever they are or wherever they live, have access to a rapid and efficient, communications system at reasonable rates. VoIP presents a long-term challenge to the current structure of the Universal Service program.

Yet, the system is already under increasing pressures as it is financed by interstate revenues – a declining source of funding – while new demands are being placed on it by competitive providers, and by those carriers that are trying to invest in upgrading their networks. This is the imminent crisis we must address now.

One area of concern is the growth of new entrants that are receiving universal service funding. Although the amount of funding these carriers receive is not yet that large, it is growing rapidly. The Act provides that only eligible telecommunications carriers, or ETCs, can receive Universal Service support. State commissions have the primary responsibility for designating ETCs, and can designate additional carriers, known as competitive ETCs or CETCs. In some cases, the FCC evaluates requests for these additional carriers because the states do not have the authority or have chosen not to use it.

This ETC process has raised a lot of questions from those who are concerned that many States and the FCC began using universal service to “create” competition in areas that could barely support just one provider, let alone multiple providers. They question if this is what Congress intended.

Reading the Act, it is safe to assume that Congress did intend that multiple carriers would have access to universal service. Otherwise, it would not have given the authority to designate additional carriers for eligibility. But it is not clear that Congress fully contemplated the impact of this growing competition on the ability of the fund to keep up with demand, and eventually to support advanced services. It may come down to a choice Congress never envisioned between financing competition or financing network development that will give people in Rural America access to advanced services like broadband.

But Congress did give some very clear direction we cannot ignore. The law requires that the designation of an additional ETC in a service area, both rural and non-rural, must be consistent

with the public interest. And it established an even higher level of review for those areas served by rural carriers. In those rural areas, the law requires that the authorizing agency shall find that the designation is in the public interest.

a. **ETC Designation Template**

That is why I have been working with my colleagues to establish a better template that appropriately embraces this public interest mandate.

Under this approach, competition alone cannot satisfy the public interest analysis. We must weigh other factors in determining whether the benefits exceed the costs. For example, we must increase oversight to ensure that universal service funds are actually being invested in the network for which funding is received. We should weigh the overall impact on the Universal Service Fund. And we should also assess the value of the provider's service offering. We must consider whether the applicant has made a service quality commitment or will provide essential services in its community. This is particularly important, as providers that gain ETC status may some day serve as their customers' only connection, so they must work well.

I will recommend that the Commission use this analysis whenever it reviews an ETC request.

b. **The Gregg Benchmark Proposal**

In response to these concerns, Joint Board member Billy Jack Gregg has suggested that there are certain areas where financing a competitor is simply not a proper use of universal service funds. He proposed that in areas where the high cost carrier receives more than \$30 per line, we should limit funding to only one ETC. In areas where the funding per line is between \$20-\$30, then we should permit no more than two ETCs. And in areas with less than \$20 per line in funding there would be no limit on the number of ETCs. These benchmarks could be challenged and overridden on a case-by-case basis with specific evidence.

Although this proposal needs further discussion, it has a lot of merit. The High Cost Fund ensures that end users in high cost, mostly rural, areas will have access to quality services at reasonable rates. Universal service funding became necessary in these areas because the costs of service were prohibitively high and without it, many would not have had access to telecommunications service at all. Yet, we now fund more than one carrier in several of these same high cost areas.

Mr. Gregg's proposal may allow us to move back toward the initial concept of the High-Cost Fund. Maybe the public interest is better served by ensuring that we use that fund to build out and advance the network in the highest cost areas rather than funding competitive ventures there.

This proposal would help to limit and better control the growth of the fund.

c. **Primary Lines**

Some are suggesting that a way to control costs is to fund only the primary lines. I believe that this would deny consumers the full support Congress intended. Universal service is not about one connection per household – it encompasses that concept, but is not limited by it. The Low-Income fund ensures at least one connection per household. But the High-Cost Fund embraces the concept of network development and support so that all Americans have access to comparable services at comparable rates, eventually evolving to advanced services.

Basing support solely on primary lines is likely to reduce network investment. It also will have severe implications for consumers who use second lines for fax machines or dial-up access to the Internet. This could have disastrous results for small businesses that operate in rural areas. Their telecommunications costs could easily become too expensive to continue affording services. This could undercut rural economic development and severely damage the economy in Rural America.

So I will not support restricting funding to primary lines only. There are other, better options for addressing the growth of the fund, such as the steps I already have outlined.

d. **Basis of Support**

Another way to better control the size of the fund and be true to our Congressional mandate is to make sure to provide the right level of support. Currently, competitive ETCs receive the same per line amount of funding as the incumbent local exchange carrier or ILECs. If the ILEC is rural, then its universal service funding is based on its own costs. That means the funds received by the competitive carriers are based on the rural ILECs' costs, not their own.

A large number of CETCs are wireless carriers. Wireline and wireless carriers provide different types of services and operate under different rules and regulations. Their cost structures are not the same. To allow a wireless CETC to receive the same amount of funding as the wireline carrier, without any reference to their cost structures, is artificial, not to mention clearly inconsistent with Section 254(e).

Section 254(e) requires that all carriers receiving Universal Service funding use that support "only for the provision, maintenance, and upgrading of facilities and services for which that support is intended." I believe the law compels us to change the basis on which we provide support to competitors.

III. **Managing Spectrum in the Public Interest**

When thinking about the federal role in ensuring access to the latest technologies, the Commission is also charged with managing the nation's spectrum in the public interest. Spectrum is the lifeblood of innovations that provide so many new services that people are demanding.

As some of you may know, I have set out an approach for spectrum policy that I call a "Framework for Innovation." In dealing with the spectrum, I believe the Commission should establish ground rules for issues such as interference and availability. But, to the greatest extent possible, we should let innovation and the marketplace drive the development of spectrum-based services. My goal is to maximize the amount of communications and information that flow over the Nation's airwaves, on earth and through space.

Spectrum is a finite public resource. And in order to improve our country's use of it, we need to improve access to spectrum-based services. We cannot afford to let spectrum lie fallow. It is not a property right, but a contingent right to use a public resource – it should be put to use for the benefit of as many people as possible.

I remain concerned that we need to do more to get spectrum in the hands of people who are ready and willing to use it. That is why I am taking a fresh look at our service and construction rules to ensure that our policies do not undercut the ability of carriers to get access to unused spectrum – whether they are in underserved areas or have developed new technologies. For example, we need to adopt tough but fair construction requirements to ensure that spectrum is truly being put to use. This was the case in our decision earlier this year to shorten the construction period for the MVDDS service from ten years to five.

Improved access to spectrum is also the reason why I pushed for our relatively unique service rules for the 70/80/90 GHz bands, which can provide for fiber-like first and last mile connections. This makes it easier for all licensees to get access to spectrum for Gigabit-speed broadband.

While I continue to support the use of auctions, Section 309(j)(6) of the Act recognizes that the public interest is not always served by adopting a licensing scheme that creates mutual exclusivity. Because of the unique sharing characteristics of the 70/80/90 GHz bands, we had an opportunity here to break that mold, and I am glad we did.

I have repeatedly said the FCC needs to improve access to spectrum by those providers who want to serve rural areas, particularly community-based providers. That is why I pushed for the inclusion of both Economic Areas as well as RSA licenses in our recent Advanced Wireless Services Order. Large license areas can raise auction prices so high that many companies that want to serve smaller areas cannot even afford to make a first bid. I certainly recognize that there is value in offering larger service areas for economies of scale and to facilitate wider area deployments. But the public interest demands that we find a balance in developing a band plan, and I am very pleased we did so in that item.

But I am not sure we are doing enough in this area. We heard last month at our wireless ISP forum that operators across the country need access to more spectrum. More spectrum can drive broadband deployment deeper and farther into rural America. We have to be more creative with a term I will coin "spectrum facilitation." That means stripping away barriers, regulatory or economic, to get spectrum into the hands of operators serving consumers at the most local levels.

For example, I was very pleased to support new guidelines to facilitate a more robust secondary market. We removed significant obstacles and provided a framework for allowing licensees to lease spectrum more easily, while ensuring that the Commission does not lose ultimate control over the spectrum. In doing so, we move closer to achieving our goal of ensuring that all Americans have access to the latest wireless technologies, no matter where they live.

The mobile wireless industry is marked by dynamic competition – due in no small part to the regulatory framework that the Commission initially adopted. In the future, we should continue to apply only those rules that truly benefit the public interest so as to avoid undermining these healthy competitive conditions.

For example, I was very pleased that this summer we took significant steps toward improving access to digital mobile wireless phones by those Americans who use hearing aids. We stepped in where the market did not step up. I can think of no more an appropriate action for a government agency to take.

Similarly, there is no higher priority for us at the Commission than improving E911 service. Every day, we confront issues that can affect millions of dollars; but nothing we do is more important than emergency response services. Unlike a lot of issues that get so much attention, this literally is a matter of life or death.

During the last year, the Commission has really stepped up its work with all stakeholders to accelerate the deployment of wireless E911. Continued success requires the unprecedented cooperation of such a wide range of players – the FCC, wireless carriers, public safety answering points, equipment and technology vendors, local exchange carriers, state commissions, and local governments. We all need to work together to get this done quickly and effectively.

Local number portability, or LNP, is another one of the more difficult issues that we faced over the past several months. It truly seemed that everyone in the telecommunications industry hated some part of it. Yet, LNP is one of those issues where the consumer clearly is the winner.

Clearly, there are a number of lingering concerns with LNP and its implementation. Ultimately, though, I believe both the public interest and the law are on our side. And while the concerns raised by both wireline and wireless carriers are significant, and we need to address them, the benefits to consumers outweigh these concerns.

IV. Media Diversity

As we saw this past year, Americans are very concerned about their media. The airwaves belong to the American people. Nowhere is it more important for us to preserve access to the airwaves as widely as possible. We should encourage a broad range of voices and viewpoints.

In today's radio and television, we are hearing troubling accounts of pay-for-play that is not being fully disclosed to the listening and viewing public. To the extent these allegations are true, this poses a real threat to the public airwaves. Practices like payola may inhibit the local broadcaster from making independent judgments about the needs of listeners in their community.

This can deny local artists and musicians access to their local airwaves. We need to investigate these allegations and make sure our rules address any troubling practices we identify.

It seems that the transition to digital television is finally upon us. As we move into the new era, we should not abandon our public interest model that sustains localism, competition and diversity. Courts have consistently reaffirmed these priorities as central to the health of our democracy.

We should reaffirm the public interest accountability of our broadcast media. Broadcasters enter into a social compact to use the public airwaves. Broadcasters can now magnify their voice digitally from one channel to say five or six. If triopolies are allowed by the courts, digital can expand three channels to up to eighteen. It is time to examine the public interest obligations of broadcasters on those multiple programming streams. Broadcasting is still a public privilege. Broadcasters must serve the public interest and remain accountable to their local communities for all their programming.

The FCC already has undertaken a number of steps to accelerate the digital transition. As we turn to the few remaining pieces, we should establish comprehensive public interest obligations for the digital era. With respect to carriage, broadcasters make the case that multicast carriage will further localism. If so, there should be no reason why they cannot accept a localism requirement on all their digital program streams that gain the privilege of must-carry.

V. Conclusion

As we have seen from the recent media debate, Congress clearly considers the communications industries as far more than makers of widgets. All communications fields involve externalities that are not fully captured in the marketplace. Communications technologies are the way people become informed and participate in society. These technologies bring us up-to-date with our friends and relatives. They educate us with stories, images, and people's creativity. They expand our horizons – from our neighborhoods to our towns and cities, our country, and the world around us. They literally bring the world to our fingertips.

It is the Commission's duty to protect every segment of the public in their access to technologies that convey information necessary to stay well-connected in our society. I look forward to working with all of you, and welcome your ideas on furthering the public interest as we move forward to secure the blessings of modern telecommunications for all of our citizens.

Thank you.

**DISSENTING STATEMENT OF
COMMISSIONER KEVIN J. MARTIN**

Re: Federal-State Joint Board on Universal Service; Virginia Cellular, LLC, Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia.

Today's decision designates Virginia Cellular, LLC (Virginia Cellular) as an eligible telecommunications carrier (ETC) in areas served by five rural telephone companies and two non-rural telephone companies in the State of Virginia. The Commission finds the designation of Virginia Cellular as an ETC to be in the public interest and furthers the goals of universal service by "providing greater mobility" and "a choice" of providers in high-cost and rural areas of Virginia.¹ I object to this Order's finding that the goals of universal service are to "provide greater mobility" and "a choice" of providers in rural areas. Rather, I believe the main goals of the universal service program are to ensure that all consumers—including those in high cost areas have access at affordable rates.

During the past two years, I have continued to express my concerns with the Commission's policy of using universal service support as a means of creating "competition" in high cost areas.² As I have stated previously, I am hesitant to subsidize multiple competitors to serve areas in which costs are prohibitively expensive for even one carrier. The Commission's policy may make it difficult for any one carrier to achieve the economies of scale necessary to serve all of the customers in rural areas.

I am troubled by today's decision because the Commission fails to require ETCs to provide the same type and quality of services throughout the same geographic service area as a condition of receiving universal service support. In my view, competitive ETCs seeking universal service support should have the same "carrier of last resort" obligations as incumbent service providers in order to receive universal service support. Adopting the same "carrier of last resort" obligation for all ETCs is fully consistent with the Commission's existing policy of competitive and technological neutrality amongst service providers.

First, today's decision fails to require CETCs to provide equal access. Equal access provides a direct, tangible consumer benefit that allows individuals to decide which long distance plan, if any, is most appropriate for their needs. As I have stated previously, I believe an equal access requirement would allow ETCs to continue to offer bundled local and long distance service packages, while also empowering consumers with the ability to choose the best calling plan for their needs.³

¹ Order at para. 12.

² Separate Statement of Commissioner Kevin J. Martin, *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers, Second Report and Order and Further Notice of Proposed Rulemaking*, CC Docket (No. 00-256)(rel. October, 11, 2002).

³ Separate Statement of Commissioner Kevin J. Martin, *Federal-State Joint Board on Universal Service*, CC Docket No.96-45, (rel. July 10, 2002); Separate Statement of Commissioner Kevin J. Martin, *Federal-State Joint Board on Universal Service, FCC 03-170*, CC Docket No. 96-45, (rel. July 14, 2003).

Second, the Commission redefines several rural telephone company service areas where Virginia Cellular's proposed service areas do not cover the entire service area of the incumbent rural telephone company. Given the potential for creamskimming, I do not support this redefining of the service areas of incumbent rural telephone companies. The Commission's decision to permit service area redefinition relies solely on an analysis of population densities of the wire centers that Virginia cellular can and cannot serve to determine whether the effects of creamskimming would occur, but fails to justify the decision based upon any cost data to verify whether Virginia Cellular is serving low-cost, high revenue customers in the rural telephone company's area.

Finally, I am concerned that the Commission's decision on Virginia Cellular's application may prejudice the on-going work of the Federal-State Joint Board regarding the framework for high-cost universal service support. Today's decision provides a template for approving the numerous CETC applications currently pending at the Commission, and I believe may push the Joint Board to take more aggressive steps to slow the growth of the universal service fund such as primary line restrictions and caps on the amount of universal service support available for service providers in rural America.

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C

Federal Communications Commission (F.C.C.)

Declaratory Ruling

IN THE MATTER OF FEDERAL-STATE JOINT BOARD ON UNIVERSAL SERVICE

WESTERN WIRELESS CORPORATION PETITION FOR PREEMPTION OF AN ORDER OF THE SOUTH
DAKOTA PUBLIC UTILITIES COMMISSION
CC Docket No. 96-45

FCC 00-248
Adopted: July 11, 2000
Released: August 10, 2000

***15168** By the Commission: Commissioner Furchtgott-Roth dissenting and issuing a statement.

I. INTRODUCTION

1. In this Declaratory Ruling, we provide guidance to remove uncertainty and terminate controversy regarding whether section 214(e)(1) of the Communications Act of 1934, as amended, (the Act) requires a common carrier to provide supported services throughout a service area prior to being designated an eligible telecommunications carrier (ETC) that may receive federal universal service support. [FN1] We believe the guidance provided in this Declaratory Ruling is necessary to remove substantial uncertainty regarding the interpretation of section 214(e)(1) in pending state commission and judicial proceedings. [FN2] We believe the guidance provided in this Declaratory Ruling will assist state commissions in acting expeditiously to fulfill their obligations under section 214(e) to designate competitive carriers as eligible for federal universal service support.

***15169** 2. We believe that interpreting section 214(e)(1) to require the provision of service throughout the service area prior to ETC designation prohibits or has the effect of prohibiting the ability of competitive carriers to provide telecommunications service, in violation of section 253(a) of the Act. We find that such an interpretation of section 214(e)(1) is not competitively neutral, consistent with section 254, and necessary to preserve and advance universal service, and thus does not fall within the authority reserved to the states in section 253(b). In addition, we find that such a requirement conflicts with section 214(e) and stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress as set forth in section 254. Consequently, under both the authority of section 253(d) and traditional federal preemption authority, we find that to require the provision of service throughout the service area prior to designation effectively precludes designation of new entrants as ETCs in violation of the intent of Congress. We believe that the guidance provided in this Declaratory Ruling will further the goals of the Act by

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ensuring that new entrants have a fair opportunity to provide service to consumers living in high-cost areas.

3. We note that Western Wireless has raised similar issues in its petition for preemption of a decision of the South Dakota Public Utilities Commission (South Dakota PUC). [FN3] In its petition, Western Wireless asks the Commission to preempt, under section 253 and as inconsistent with the Act, the South Dakota PUC's requirement that, pursuant to section 214(e), a carrier may not receive designation as an ETC unless it is providing service throughout the service area. In light of the recent South Dakota Circuit Court decision overturning the South Dakota PUC's decision and granting Western Wireless ETC status in each exchange served by non-rural telephone companies in South Dakota, we believe that it is unnecessary to act on the Western Wireless petition at this time. [FN4] In doing so, we note that section 253(d) requires the Commission to preempt state action only "to the extent necessary to correct such violation or inconsistency." [FN5] We acknowledge, however, that the South Dakota Circuit Court Order has been automatically stayed with the filing of the South Dakota PUC's notice of appeal to the Supreme Court of South Dakota. [FN6] We therefore place Western Wireless' petition for preemption of the South Dakota PUC Order in abeyance pending final resolution of this appeal. [FN7] The Commission *15170 will make a determination at that time as to whether it is necessary to proceed consistent with the guidance provided in this Declaratory Ruling.

II. BACKGROUND

A. The Act

4. Section 254(e) provides that "only an eligible telecommunications carrier designated under section 214(e) shall be eligible to receive specific Federal universal service support." [FN8] Section 214(e)(2) provides that "[a] State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of [subsection 214(e)(1)] as an eligible telecommunications carrier for a service area designated by the State commission." [FN9]

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. [FN10]

6. Section 253 establishes the legal framework for Commission preemption of a state statute, regulation, or legal requirement that prohibits or has the effect

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of prohibiting the competitive provision of telecommunications service. The Commission has interpreted and applied this standard on a number of occasions. [FN11] First, the Commission must determine whether *15171 the challenged law, regulation, or requirement violates section 253(a). Specifically, the Commission examines whether the state provision "prohibit[s] or ha[s] the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." [FN12]

7. If the Commission finds that the state requirement violates section 253(a), then it will determine whether it is nevertheless permissible under section 253(b). 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. [FN13] The Commission has held that a state program must meet all three 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). [FN14] The Commission has preempted state regulations for failure to satisfy even one of the three criteria. [FN15] If a requirement otherwise impermissible under section 253(a) does not satisfy section 253(b), the Commission must preempt the enforcement of the requirement in accordance with section 253(d). [FN16]

B. Federal Preemption Authority

8. The Supremacy Clause of the Constitution empowers Congress to preempt state or local laws or regulations under certain specified conditions. [FN17] As explained by the United States Supreme Court:

Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to preempt state law, when there is outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislated comprehensively, thus occupying an entire field of regulation *15172 and leaving no room for the States to supplement federal law, or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. [FN18] It is well established that "[p]re-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may preempt state regulations." [FN19]

III. DISCUSSION

A. Section 253(a) Analysis

1. Background

9. In order to determine whether a section 253(a) violation has occurred, we

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must consider whether the cited statute, regulation, or legal requirement "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." [FN20] We therefore examine whether the requirement that a carrier must be providing service throughout the service area prior to designation as an ETC "may prohibit or have the effect of prohibiting" carriers that are not incumbent LECs from providing telecommunications service.

2. Discussion

10. We find that requiring a new entrant to provide service throughout a service area prior to designation as an ETC has the effect of prohibiting the ability of the new entrant to provide intrastate or interstate telecommunications service, in violation of section 253(a).

11. Legal Requirement. As an initial matter, we find that the requirement that a new entrant must provide service throughout its service area as a prerequisite to designation as an ETC under section 214(e) constitutes a state "legal requirement" under section 253(a). We have previously concluded that Congress intended the phrase, "[s]tate or local statute or regulation, or other State or local requirement" in section 253(a), to be interpreted broadly. [FN21] The resolution of *15173 a carrier's request for designation as an ETC by a state commission is legally binding on the carrier and may prohibit the carrier from receiving federal universal service support. We find therefore that any such requirement constitutes a "legal requirement" under section 253(a).

12. Prohibiting the Provision of Telecommunications Service. We find that an interpretation of section 214(e) requiring carriers to provide the supported services throughout the service area prior to designation as an ETC has the effect of prohibiting the ability of prospective entrants from providing telecommunications service. [FN22] A new entrant faces a substantial barrier to entry if the incumbent local exchange carrier (LEC) is receiving universal service support that is not available to the new entrant for serving customers in high-cost areas. We believe that requiring a prospective new entrant to provide service throughout a service area before receiving ETC status has the effect of prohibiting competitive entry in those areas where universal service support is essential to the provision of affordable telecommunications service and is available to the incumbent LEC. Such a requirement would deprive consumers in high-cost areas of the benefits of competition by insulating the incumbent LEC from competition.

13. No competitor would ever reasonably be expected to enter a high-cost market and compete against an incumbent carrier that is receiving support without first knowing whether it is also eligible to receive such support. [FN23] 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. Moreover, a new entrant cannot reasonably be expected to be able to make the substantial financial investment required to provide the supported services in high-cost areas without some assurance that it will be eligible for federal universal service support. [FN24] In fact, the

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carrier may be unable to secure financing or finalize business plans due to uncertainty surrounding its designation as an ETC.

14. In addition, we find such an interpretation of section 214(e)(1) to be contrary to the meaning of that provision. Section 214(e)(1) provides that a common carrier designated as an eligible telecommunications carrier shall "offer" and advertise its services. [FN25] The language of *15174 the statute does not require the actual provision of service prior to designation. [FN26] We believe that this interpretation is consistent with the underlying congressional goal of promoting competition and access to telecommunications services in high-cost areas. In addition, this interpretation is consistent with the Commission's conclusion that a carrier must meet the section 214(e) criteria as a condition of its being designated an eligible carrier "and then must provide the designated services to customers pursuant to the terms of section 214(e) in order to receive support." [FN27]

15. In addition, we note that ETC designation only allows the carrier to become eligible for federal universal service support. Support will be provided to the carrier only upon the provision of the supported services to consumers. [FN28] We note that ETC designation prior to the provision of service does not mean that a carrier will receive support without providing service. [FN29] We also note that the state commission may revoke a carrier's ETC designation if the carrier fails to comply with the ETC eligibility criteria.

16. In addition, we believe the fact that a carrier may already be providing service within the state prior to designation is not conclusive of whether the carrier can reasonably be expected to provide service throughout the service area, particularly in high-cost areas, prior to designation. While a requirement that a carrier be providing service throughout the service area may not affect the provision of service in lower-cost areas, it is likely to have the effect of prohibiting the ability of carriers without eligibility for support to provide service in high-cost areas. [FN30]

17. Gaps in Coverage. We find the requirement that a carrier provide service to every potential customer throughout the service area before receiving ETC designation has the effect of prohibiting the provision of service in high-cost areas. As an ETC, the incumbent LEC is required to make service available to all consumers upon request, but the incumbent LEC may not have facilities to every possible consumer. [FN31] We believe the ETC requirements should be no *15175 different for carriers that are not incumbent LECs. A new entrant, once designated as an ETC, is required, as the incumbent is required, to extend its network to serve new customers upon reasonable request. We find, therefore, that new entrants must be allowed the same reasonable opportunity to provide service to requesting customers as the incumbent LEC, once designated as an ETC. [FN32] Thus, we find that a telecommunications carrier's inability to demonstrate that it can provide ubiquitous service at the time of its request for designation as an ETC should not preclude its designation as an ETC.

18. State Authority. Finally, although Congress granted to state commissions, under section 214(e)(2), the primary authority to make ETC designations, we do not agree that this authority is without any limitation. [FN33] While state commissions clearly have the authority to deny requests for ETC designation

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without running afoul of section 253, the denials must be based on the application of competitively neutral criteria that are not so onerous as to effectively preclude a prospective entrant from providing service. We believe that this is consistent with sections 214(e), 253, and 254, as well as the decision of the United States Court of Appeals for the Fifth Circuit in *Texas Office of Public Utility Counsel v. FCC*. [FN34] We reiterate, however, that the state commissions are primarily responsible for making ETC designations. Nothing in this Declaratory Ruling is intended to undermine that responsibility. In fact, it is our expectation that the guidance provided in this Declaratory Ruling will enable state commissions to move expeditiously, in a pro-competitive manner, on many pending ETC designation requests.

B. Section 253(b) Analysis

1. Background

19. Section 253(b) preserves the state's authority to impose a requirement affecting *15176 the provision of telecommunications services in certain circumstances. [FN35] Section 253(b) allows states to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications service, and safeguard the rights of consumers. [FN36] Section 253(d) requires that we preempt such requirements unless we find that they meet each of the relevant criteria set forth in section 253(b). The Commission has preempted state regulations for failure to satisfy even one of the relevant criteria. [FN37]

2. Discussion

20. We find that a requirement to provide the supported services throughout the service area prior to designation as an ETC does not fall within the "safe harbor" provisions of section 253(b). To the contrary, we find that this requirement is not competitively neutral, consistent with section 254, or necessary to preserve and advance universal service. We therefore find that a requirement that obligates new entrants to provide supported services throughout the service area prior to designation as an ETC is subject to our preemption authority under section 253(d).

21. Competitive Neutrality. We find that the requirement to provide service prior to designation as an ETC is not competitively neutral. We believe this finding is consistent with the Commission's determination in the Universal Service Order that "[c]ompetitive neutrality means that universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another." [FN38] At the outset, we believe that, to meet the competitive neutrality requirement in non-rural telephone company service areas, the procedure for designating carriers as ETCs should be functionally equivalent for incumbents and new entrants. [FN39] As discussed above, requiring the actual provision of

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supported services throughout the service area prior to ETC designation unfairly skews the universal service support mechanism in favor of the incumbent LEC. As a practical matter, the carrier most likely to be providing all the supported services throughout the requested designation area before ETC designation is the incumbent LEC. [FN40] Without the *15177 assurance of eligibility for universal service funding, it is unlikely that any non-incumbent LEC will be able to make the necessary investments to provide service in high-cost areas.

22. We are not persuaded that such a requirement is competitively neutral merely because the requirement to provide service prior to ETC designation applies equally to both new entrants and incumbent LECs. [FN41] We recently concluded that the proper inquiry is whether the effect of the legal requirement, rather than the method imposed, is competitively neutral. [FN42] As discussed above, we find that the result of such a requirement is to favor incumbent LECs over new entrants. Unlike a new entrant, the incumbent LEC is already providing service and therefore bears no additional burden from a requirement that it provide service prior to designation as an ETC. We therefore find that requiring the provision of supported services throughout the service area prior to ETC designation has the effect of uniquely disadvantaging new entrants in violation of section 253(b)'s requirement of competitive neutrality.

23. Consistent with Section 254 and Necessary to Preserve and Advance Universal Service. We find that the requirement to provide service prior to designation as an ETC is not consistent with section 254 or "necessary to preserve and advance universal service." [FN43] To the contrary, we find that such a requirement has the effect of prohibiting the provision of service in high-cost areas. As discussed above, this requirement clearly has a disparate impact on new entrants, in violation of the competitive neutrality and nondiscriminatory principles embodied in section 254. [FN44] 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. If new entrants are not provided with the same opportunity to receive universal service support as the incumbent LEC, such carriers will be discouraged from providing service and competition in high-cost areas. [FN45] Consequently, under an interpretation of section 214(e) that requires new entrants to provide service throughout the service area prior to designation as an *15178 ETC, the benefits that may otherwise occur as a result of access to affordable telecommunications services will not be available to consumers in high-cost areas. We believe such a result is inconsistent with the underlying universal service principles set forth in section 254(b) that are designed to preserve and advance universal service by promoting access to telecommunications services in high-cost areas. [FN46]

24. A new entrant can make a reasonable demonstration to the state commission of its capability and commitment to provide universal service without the actual provision of the proposed service. There are several possible methods for doing so, including, but not limited to: (1) a description of the proposed service technology, as supported by appropriate submissions; (2) a demonstration of the extent to which the carrier may otherwise be providing telecommunications services within the state; [FN47] (3) a description of the extent to which the carrier has entered into interconnection and resale agreements; [FN48] or, (4) a sworn affidavit signed by a representative of the carrier to ensure compliance with the obligation to offer and advertise the supported services. [FN49] We caution that a

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accomplishment of the full objectives of Congress in promoting competition and access to telecommunications services in high-cost areas. [FN58] To the extent that a state's requirement under section 214(e)(1) that a new entrant provide service throughout the service area prior to designation as an ETC also involves *15180 matters properly within the state's intrastate jurisdiction under section 2(b) of the Act, [FN59] such matters that are inseparable from the federal interest in promoting universal service in section 254 remain subject to federal preemption. [FN60]

28. Section 214. We find that the requirement that a carrier provide service throughout the service area prior to its designation as an ETC conflicts with the meaning and intent of section 214(e)(1). Section 214(e)(1) provides that a common carrier designated as an eligible telecommunications carrier shall "offer" and advertise its services. [FN61] The statute does not require a carrier to provide service prior to designation. As discussed above, we have concluded that a carrier cannot reasonably be expected to enter a high-cost market prior to its designation as an ETC and provide service in competition with an incumbent carrier that is receiving support. We believe that such an interpretation of section 214(e) directly conflicts with the meaning of section 214(e)(1) and Congress' intent to promote competition and access to telecommunications service in high-cost areas. [FN62]

29. While Congress has given the state commissions the primary responsibility under section 214(e) to designate carriers as ETCs for universal service support, we do not believe that Congress intended for the state commissions to have unlimited discretion in formulating eligibility requirements. Although Congress recognized that state commissions are uniquely suited to make ETC determinations, we do not believe that Congress intended to grant to the states the authority to adopt eligibility requirements that have the effect of prohibiting the provision of service in high-cost areas by non-incumbent carriers. [FN63] To do so effectively undermines congressional intent in adopting the universal service provisions of section 254.

30. Section 254. Consistent with the guidance provided above, we find a requirement that a carrier provide service prior to designation as an ETC inconsistent with the underlying principles and intent of section 254. Specifically, section 254 requires the Commission to base policies for the advancement and preservation of universal service on principles that include promoting access to telecommunications services in high-cost and rural areas of the nation. [FN64] Because section 254(e) provides that only a carrier designated as an ETC under section 214(e) may be eligible to receive federal universal service support, an interpretation of section 214(e) requiring carriers to provide service throughout the service area prior to designation as an ETC *15181 stands as an obstacle to the accomplishment of the congressional objectives outlined in section 254. [FN65] If new entrants are effectively precluded from universal service support eligibility due to onerous eligibility criteria, the statutory goals of preserving and advancing universal service in high-cost areas are significantly undermined.

31. In addition, such a requirement conflicts with the Commission's interpretation of section 254, specifically the principle of competitive neutrality adopted by the Commission in the Universal Service Order. [FN66] In the

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Universal Service Order, the Commission stated 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 pro-competitive, de-regulatory national policy framework." [FN67] As discussed above, a requirement to provide service throughout the service area prior to designation as an ETC violates the competitive neutrality principle by unfairly skewing the provision of universal service support in favor of the incumbent LEC. As stated in the Universal Service Order, "competitive neutrality will promote emerging technologies that, over time, may provide competitive alternatives in rural, insular, and high cost areas and thereby benefit rural consumers." [FN68] Requiring new entrants to provide service throughout the service area prior to ETC designation discourages "emerging technologies" from entering high-cost areas. In addition, we note that section 254(f) provides that, "[a] State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service." [FN69] For the reasons discussed extensively above, we find an interpretation of section 214(e) requiring the provision of service throughout the service area prior to designation as an ETC to be inconsistent with the Commission's universal service policies and rules.

***15182** IV. ORDERING CLAUSES

32. Accordingly, IT IS ORDERED that pursuant to sections 4(i), 253, and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 253, and 254, and section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, and Article VI of the U.S. Constitution, that this Declaratory Ruling IS ADOPTED.

33. IT IS FURTHER ORDERED that Western Wireless' Petition for Preemption of an Order of the South Dakota Public Utilities Commission shall be placed in abeyance pending resolution of the appeal.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Secretary

FN1. The Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion, issue a declaratory ruling terminating a controversy or removing uncertainty. See 5 U.S.C. § 554(e), 47 C.F.R. § 1.2.

FN2. See, e.g., Letter from Competitive Universal Service Coalition, to Chairman William E. Kennard, FCC, dated March 8, 2000 at 2, 6; Letter from Gene DeJordy, **Western Wireless**, to Chairman William E. Kennard, FCC, dated March 29, 2000 at 1-2; Petition for Preemption of an Order of the South Dakota Public Utilities Commission, filed by **Western Wireless** (June 23, 1999) (**Western Wireless** petition);

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The Filing by GCC License **Corporation** for Designation as an Eligible Telecommunications Carrier, Notice of Appeal to the Supreme Court of South Dakota, Civ. 99-235, filed by the South Dakota Public Utilities Commission (May 10, 2000) (South Dakota PUC Notice of Appeal).

FN3. See Western Wireless petition. Comments cited herein are in response to this petition. See also The Filing by GCC License Corporation for Designation as an Eligible Telecommunications Carrier, Finding of Facts and Conclusions of Law; Notice of Entry of Order, Before the Public Utilities Commission of the State of South Dakota, TC98-146 (May 19, 1999).

FN4. Filing by GCC License Corporation for Designation as an Eligible Telecommunications Carrier, Findings of Fact, Conclusions of Law, and Order, Civ. 99-235 (SD Sixth Jud. Cir. March 22, 2000) (South Dakota Circuit Court Order) (concluding that the South Dakota PUC "erred as a matter of law by determining that an applicant for ETC designation must first be providing a universal service offering to every location in the requested designated service area prior to being designated an ETC").

FN5. 47 U.S.C. § 253(d) (emphasis added).

FN6. See South Dakota Codified Laws § 15-26A-38.

FN7. South Dakota PUC Notice of Appeal.

FN8. 47 U.S.C. § 254(e).

FN9. 47 U.S.C. § 214(c)(2).

FN10. 47 U.S.C. § 214(e)(1).

FN11. See, e.g., American Communications Services, Inc., MCI Telecommunications Corp. Petition for Expedited Declaratory Ruling Preempting Arkansas Telecommunications Regulatory Reform Act of 1997 Pursuant to Sections 251, 252, and 253 of the Communications Act, as amended, Memorandum Opinion and Order, CC Docket No. 97-100, FCC 99-386 (rel. Dec. 23, 1999); Petition of Pittencrieff Communications, Inc., for Declaratory Ruling Regarding Preemption of the Texas Public Utility Regulatory Act of 1995, Memorandum Opinion and Order, File No. WTB/POL 96-2, 13 FCC Rcd 1735 (1997) aff'd CTIA v. FCC, 168 F.3d 1332 (D.C. Cir. 1999) (Pittencrieff Communications, Inc.); Silver Star Telephone Company, Inc., Petition for Preemption and Declaratory Ruling, Memorandum Opinion and Order, CCB Pol 97-1, 12 FCC Rcd 15639 (1997) (Silver Star) reconsideration denied, 13 FCC Rcd 16356 (1998) aff'd, RT Communications, Inc. v. FCC, 201 F.3d 1264 (10th Cir. 2000).

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FN12. 47 U.S.C. § 253(a).

FN13. 47 U.S.C. § 253(b).

FN14. Pittencrieff Communications, Inc., 13 FCC Rcd at 1752, para. 33.

FN15. For example, in Silver Star, the Commission preempted a Wyoming statute for its failure to satisfy the "competitive neutrality" criterion. Silver Star, 12 FCC Rcd at 15658-60, paras. 42, 45.

FN16. 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.").

FN17. Louisiana Public Service Commission v. FCC, 476 U.S. 355, 368 (1986).

FN18. Id. at 368-369 (citations omitted).

FN19. Id. at 369; Fidelity Federal Sav. And Loan Ass'n v. De La Cuesta, 458 U.S. 141, 153-54 (1982); City of New York v. FCC, 486 U.S. 57, 64 (1988) ("[t]he statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof").

FN20. See 47 U.S.C. § 253(a).

FN21. See The Petition of the State of Minnesota for a Declaratory Ruling Regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way, Memorandum Opinion and Order, CC Docket No. 98-1, FCC 99-402 (rel. Dec. 23, 1999) (concluding that an agreement between a developer and the State creates a "legal requirement" subject to section 253 preemption) at paras. 17-18 (Minnesota Declaratory Ruling). "We believe that interpreting the term 'legal requirement' broadly, best fulfills Congress' desire to ensure that states and localities do not thwart the development of competition." Id.

FN22. See, e.g., ALTS comments at 3-5; AT&T comments at 7-9; CTIA reply comments at 4; Minnesota PUC comments at 2; PCIA comments 4-5; Washington UTC reply comments at 3.

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FN23. Western Wireless petition at 8.

FN24. See 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) (Minnesota PUC Order) at 7.

FN25. 47 U.S.C. § 214(e)(1).

FN26. See, e.g., **Western Wireless Corporation** Designated Eligible Carrier Application, Findings of Fact, Conclusions of Law and Order, North Dakota Public Service Commission, Case No. PU-1564-98-428 (Dec. 15, 1999) (North Dakota Order); Minnesota PUC Order. See also Washington UTC reply comments at 3-5.

FN27. Federal-State Joint Board on Universal Service, Report and Order, CC Docket No. 96-45, 12 FCC Rcd 8876, 8853, para. 137 (1997), as 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) cert. granted, 120 S.Ct. 2214 (U.S. June 5, 2000) (No. 99-1244) (Universal Service Order) (emphasis in original).

FN28. Universal Service Order, 12 FCC Rcd 8853, para. 137.

FN29. Washington UTC reply comments at 4.

FN30. ALTS comments at 4-5.

FN31. See Minnesota PUC Order at 11, concluding that, "[a]ll carriers, but especially rural carriers, have pockets within their study areas where they have no customers or facilities. If development occurs, they have to build out to the new customer or customers. Minnesota Cellular appears to have the same build-out capacity as the incumbents, and the potential need for build-out is no reason to deny ETC status." See also North Dakota Order at para. 36, concluding that, "[a] requirement to be providing the required universal services to 100% of a service area before receiving designation as an ETC could be so onerous as to prevent any other carrier from receiving the ETC designation in any service area and would require the Commission to rescind the ETC designation already given to North Dakota ILECs and Polar Telecom, Inc."

FN32. See, e.g., Minnesota PUC Order at 10-11; North Dakota Order at para. 36; Washington UTC reply comments at 5-6. See also South Dakota Circuit Court Order, Conclusions of Law at para. 12.

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FN33. See, e.g., Coalition of Rural Telephone Companies comments at 12 (contending that state decisions under section 214(e) should not be reviewed under section 253); South Dakota PUC comments at 9 (contending that preemption may not be granted because the South Dakota PUC exercised a power lawfully delegated to it by Congress in a manner consistent with federal law).

FN34. See Texas Office of Public Utility Counsel v. FCC, 183 F.3d 393, 418 n.31 (5th Cir. 1999) cert. granted, 120 S.Ct. 2214 (U.S. June 5, 2000) (No. 99-1244) ("if a state commission imposed such onerous eligibility requirements that no otherwise eligible carrier could receive designation, that state commission would probably run afoul of § 214(e)(2)'s mandate to 'designate' a carrier or 'designate' more than one carrier.").

FN35. 47 U.S.C. § 253(b). Section 253(c) sets forth additional situations, which are not present here, in which a state or local government requirement that inhibits entry may still be acceptable.

FN36. 47 U.S.C. § 253(b).

FN37. For example, in Silver Star, the Commission preempted a Wyoming statute for its failure to satisfy the "competitive neutrality" criterion. Silver Star, 12 FCC Rcd at 15658-60, paras. 42, 45.

FN38. Universal Service Order, 12 FCC Rcd at 8801, para. 47.

FN39. We thus would be troubled by a process in which the incumbent LEC were able to self-certify that it meets the criteria for ETC designation, while new entrants were subject to a more rigorous, protracted state proceeding.

FN40. The 1996 Act required carriers to receive an eligible telecommunications carrier designation under section 214(e) to become eligible for federal high-cost support. 47 U.S.C. § 254(e).

FN41. South Dakota PUC comments at 10; South Dakota Independent Telephone Coalition at 31.

FN42. Minnesota Declaratory Ruling at para. 51 (emphasis added). "We do not believe that Congress intended to protect the imposition of requirements that are not competitively neutral in their effect on the theory that the non-neutral requirement was somehow imposed in a neutral manner. Moreover, we do not believe that this narrow interpretation is appropriate because it would undermine the primary purpose of section 253 - ensuring that no state or locality can erect legal barriers to entry that would frustrate the 1996 Act's explicit goal of

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opening all telecommunications markets to competition."

FN43. 47 U.S.C. § 253(b).

FN44. Universal Service Order, 12 FCC Rcd at 8801, para. 48 ("We agree with the Joint Board that an explicit recognition of 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 pro-competitive, de-regulatory national policy framework.").

FN45. The Commission recognized that, in order to promote competition and the availability of affordable access to telecommunications service in high-cost areas, there must be a competitively neutral support mechanism for competitive entrants and incumbent LECs. Universal Service Order, 12 FCC Rcd at 8932, para. 287

FN46. See 47 U.S.C. § 254(b).

FN47. See North Dakota Order at para. 39.

FN48. See North Dakota Order at para. 34.

FN49. Washington UTC reply comments at 5.

FN50. 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 PSC, 476 U.S. at 368-69.

FN51. Louisiana PSC, 476 U.S. 368-69, citing Fidelity Federal Savings and Loan Assn. v. De la Cuesta, 458 U.S. 141; Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691.

FN52. See generally section 254.

FN53. 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 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

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Sess. at 113 (Joint Explanatory Statement).

FN54. See 47 U.S.C. § 254(b)(3).

FN55. Universal Service Order, 12 FCC Rcd at 8801-8803, paras. 47-51.

FN56. Universal Service Order, 12 FCC Rcd at 8802, para. 49.

FN57. 47 U.S.C. § 254(f).

FN58. See Joint Explanatory Statement at 113.

FN59. 47 U.S.C. § 152(b).

FN60. See Louisiana Public Service Commission v. FCC, 476 U.S. at 368-69; 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.

FN61. 47 U.S.C. § 214(e)(1).

FN62. See Joint Explanatory Statement at 113. See also supra section III.B for discussion of competitive neutrality.

FN63. See Texas Office of Public Utility Counsel v. FCC, 183 F.3d at 418 n.31.

FN64. See 47 U.S.C. § 254(b)(3).

FN65. 47 U.S.C. § 254(e).

FN66. Universal Service Order, 12 FCC Rcd at 8801, para. 47.

FN67. Universal Service Order, 12 FCC Rcd at 8801-02, para. 48 (emphasis added).

FN68. Universal Service Order, 12 FCC Rcd at 8803, para. 50.

FN69. 47 U.S.C. § 254(f).

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***15183** DISSENTING STATEMENT OF COMMISSIONER HAROLD FURCHTGOTT-ROTH

Re: Federal-State Board on Universal Service, **Western Wireless Corporation**
 Petition for Preemption of an Order of the South Dakota Public Utilities
 Commission, Declaratory Ruling, CC Docket No. 96-45.

I dissent from today's Declaratory Ruling. It is not necessary for the Commission to issue this advisory statement, and its ruling is inconsistent with section 253's plain mandate and with past Commission precedent interpreting that provision. Indeed, the Commission rests its section 253 analysis upon a factual predicate that does not exist. Moreover, the South Dakota PUC has permissibly interpreted section 214(e)(1), and it is inappropriate for the Commission to override the PUC's determination.

This Declaratory Ruling Is Unnecessary. To begin with, there is no need for the Commission to issue an advisory statement concerning the South Dakota Public Utilities Commission's decision. A South Dakota trial court has vacated the PUC's order, and an appeal is currently pending in the South Dakota Supreme Court. [FN1] There is no reason to think that the state supreme court will not appropriately resolve the issue. Further, contrary to the Commission's assertions, [FN2] this order will be of no assistance to other state commissions. No other state commissions have interpreted section 214 in the way that the South Dakota PUC has done, nor have other state commissions indicated that they plan to adopt the South Dakota PUC's interpretation of section 214. There is therefore no need for the Commission to offer ""guidance" on this issue.

The Commission Has Improperly Applied Section 253. Not only is the Commission's ruling unnecessary, but also its preemption analysis is faulty. Oddly, although the Commission claims that the purpose of this order is to ""provide guidance to remove uncertainty and terminate controversy regarding whether section 214(e)(1) ... requires a common carrier to provide supported services throughout a service area prior to being designated an eligible telecommunications carrier," [FN3] it devotes the bulk of its discussion to preemption under section 253.

First, even if it were appropriate for the Commission to issue a statement regarding its understanding of section 214(e) - which it is not - there is no reason for it also to address section 253 preemption. Moreover, by issuing an advisory statement regarding section 253, the Commission wades into dangerous waters. Section 253(d) specifies that the Commission should ***15184** preempt state regulations only "to the extent necessary to correct ... a violation or inconsistency [with sections 253(a) and (b)]." In view of this statutory directive, it is inappropriate for the Commission to issue any advisory statement regarding section 253. Quite simply, how can it be ""necessary" for the Commission to act to correct a violation of sections 253(a) or (b) where, as here, a court has vacated the state PUC's order, and no state requirement even exists?

Even assuming that the South Dakota PUC's order presented an issue that could appropriately be addressed under section 253, the Commission's application of that provision to South Dakota's requirement is inconsistent with the statute's plain language. Section 253(a) proscribes only those state requirements that "may

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prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." [FN4] It is impossible to understand how failing to assign a new carrier eligible telecommunications carrier status could ""prohibited" or had the "effect of prohibiting" it from providing service in South Dakota. The Declaratory Ruling asserts that "[a] new entrant faces a substantial barrier to entry if the incumbent local exchange carrier (LEC) is receiving universal service support that is not available to the new entrant for serving customers in high-cost areas." [FN5] Amazingly, however, the order leaves out the fact that in the non-rural areas of South Dakota, the incumbent does not receive federal universal support for any of the non-rural lines it serves. In other words - and contrary to the linchpin of the Commission's reasoning here - designation as an ETC confers no benefit at all upon the non-rural incumbent carrier that has received that status, and there is no factual basis for concluding that another carrier's lack of ETC status could have the effect of prohibiting that carrier from offering service.

To be sure, incumbent carriers that serve rural areas in South Dakota do receive some federal universal service support. But whether to designate more than one carrier as an ETC in these rural areas lies entirely within the South Dakota PUC's discretion, and I do not understand the majority to question that principle, which is dictated by the 1996 Act and our precedent. [FN6] A state commission remains free to decline to grant an applicant ETC status for rural areas, based on public interest considerations, and this order can have no effect on its exercise of that discretion.

In addition to being incompatible with section 253's plain language, the Commission's interpretation of this provision is not consistent with this agency's precedent. The Commission *15185 pretends that its prior decisions support its preemption of the South Dakota PUC's order. But an examination of the facts of these cases demonstrates just the opposite. In its past decisions, the Commission has indicated that section 253 preemption is appropriate only if a state requirement is so burdensome it effectively precludes a provider from providing service, and it previously has refused to preempt state requirements that fall short of that standard. [FN7]

For example, the majority cites Pittencrieff Communications, Inc. as support for its preemption analysis here. [FN8] But the Commission did not preempt the Texas requirement at issue in that case, which required all carriers, including the petitioner, a commercial mobile radio service provider operating in Texas, to contribute to the state universal service fund. [FN9] The Commission ruled that the requirement did not prohibit a CMRS provider from entering the market since it applied to all telecommunications providers operating in Texas. [FN10] Indeed, the logic applied in Pittencrieff compels the conclusion that preemption is inappropriate here - the South Dakota PUC's requirement that, in order to qualify as an eligible telecommunications carrier under section 214(e), a carrier must currently be providing service to subscribers, applies to incumbents and new entrants alike. [FN11]

The Commission's decision is also at odds with its recent decision rejecting Minnesota's petition for a declaration that its contract with a fiber optics developer was permissible under the 1996 Act. Under the contract at issue, the developer was to receive exclusive access to freeway rights-of-way in Minnesota in

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exchange for installing 1,900 miles of fiber optic cable and allowing the state to use some of that cable. For procedural reasons, the Commission did not preempt Minnesota's contract. [FN12] Nevertheless, it determined that the contract posed grave problems under section 253, in that it gave a single developer what amounted to a monopoly on freeway rights-of-way. The contract would essentially have precluded later entrants from gaining access to the freeway rights-of-way to lay their own fiber optic cable for ten years, [FN13] and it would have been prohibitively expensive for competitors to purchase alternative rights-of-way. [FN14] In view of these facts, the Commission determined that the agreement potentially ran afoul of section 253 because it singled out one provider for preferential treatment, while *15186 effectively prohibiting others from entering the market altogether. Similarly, in New England Public Communications Council Petition for Preemption Pursuant to Section 253, [FN15] a state requirement had the effect of completely preventing independent payphone providers from entering the payphone market, in direct contravention of section 276 of the 1996 Act. [FN16] Consistent with section 253(a), the Commission preempted the requirement.

The South Dakota PUC, by contrast, has not accorded preferential treatment to any carrier. Rather, it has simply directed that a carrier that wishes to be designated an eligible telecommunications carrier under section 214 show that it currently provides service in the areas in which it seeks ETC status. Even if ETC status conferred some benefit on a carrier (which it clearly does not), I do not understand how a generally applicable rule such as this one could "prohibit" or have the "effect of prohibiting" the ability of a carrier to provide telecommunications services within the meaning of section 253.

The South Dakota PUC's Construction of Section 214(e) Is Permissible. The South Dakota PUC, in ruling that a carrier may not receive ETC designation unless it currently provides service throughout the service area, has permissibly construed section 214(e)(1). That provision states that a common carrier designated as an eligible telecommunications carrier "shall, throughout the service area for which the designation is received ... offer the services that are supported by Federal universal service support mechanisms under section 254(c). [FN17] The verbs "shall" and "offer" are used the present tense, and the South Dakota PUC reasonably concluded that these terms mean that a carrier must presently offer its service throughout the service area before it may be designated an ETC and may not merely intend to offer that service at some point in the future. Although other state commissions might interpret section 214(e)(1) differently, the South Dakota PUC's interpretation of that provision is clearly permissible.

Indeed, in order to override the South Dakota PUC's determination and reach the outcome it prefers, the Commission must manufacture a far more strained definition of the term "to offer." "To offer," the Commission reasons, has nothing to do with whether an entity actually provides service or is immediately capable of providing that service upon a customer's request. The Commission stretches the statute's language past the breaking point. If Congress had intended for carriers to be eligible telecommunications carriers based simply on a readiness to provide service, it could easily have said so. And the Commission's construction of section 214(e)(1) effectively reads out of the Act one of the provision's chief requirements. If carriers may qualify for ETC status based merely on their "readiness" to make service available, section 214(e)(1) becomes nothing more than a self-certification provision, a result that is plainly at odds with the

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statute's intent. It is elementary that a construction that renders a statutory provision superfluous must be avoided, and the Commission has ignored that principle here. [FN18]

* * * * *

*15187 Because the Commission's decision is unnecessary, inconsistent with sections 253, and improperly overrides the South Dakota PUC's application of section 214(e), I dissent from this Declaratory Ruling.

FN1. See Federal-State Board on Universal Service, **Western Wireless Corporation** Petition for Preemption of an Order of the South Dakota Public Utilities Commission, Declaratory Ruling, CC Docket No. 96-45, at ¶ 3 (hereinafter "Declaratory Ruling"); Filing by GCC License **Corporation** for Designation as an Eligible Telecommunications Carrier, Findings of Fact, Conclusions of Law, and Order, Civ. 99-235 (S.D. Sixth Jud. Cir. March 22, 2000).

FN2. See Declaratory Ruling at ¶ 1.

FN3. Declaratory Ruling at ¶ 1.

FN4. See 47 U.S.C. § 253(a) (emphasis added).

FN5. Declaratory Ruling at ¶ 12.

FN6. See 47 U.S.C. §214(e)(2) ("Upon request and consistent with the public interest, convenience, and necessity, the State commission may, in the case of an areas served by a rural telephone company ... 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 [§ 214(e)(1)].") (emphasis added); Federal-State Joint Board On Universal Service, 12 FCC Rcd 8776 [¶ 135] (1997) ("[T]he discretion afforded a state commission under section 214(e)(2) is the discretion to decline to designate more than one eligible carrier in an area that is served by a rural telephone company; in that context, the state commission must determine whether the designation of an additional eligible carrier is in the public interest.").

FN7. See, e.g., The Petition of the State of Minnesota for a Declaratory Ruling Regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way, Memorandum Opinion and Order, CC Docket No. 98-1, ¶ 32 (rel. Dec. 23, 1999) (hereinafter "Minnesota Declaratory Ruling").

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FN8. Declaratory Ruling at ¶ 7.

FN9. See Pittencrieff, 13 FCC Rcd 1735 [¶ 2].

FN10. See *id.* at 1751-1752, ¶ 32.

FN11. See Declaratory Ruling at ¶ 23.

FN12. See Minnesota Declaratory Ruling, *supra* note 21, at ¶ 64.

FN13. See *id.* at ¶¶ 1 & 19.

FN14. See *id.* at ¶¶ 22-36.

FN15. 11 FCC Rcd 19713 (1996) (hereinafter "New England Public Communications").

FN16. See New England Public Communications, 11 FCC Rcd at 19726-19727 [¶¶ 27-30].

FN17. 47 U.S.C. § 214(e).

FN18. See, e.g., *Kawaauhau v. Geiger*, 523 U.S. 57, 62 118 S.Ct. 974, 977 (1998);
United States v. Menasche, 348 U.S. 528, 538-539, 75 S.Ct. 513, 519- 520 (1955).

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BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendrayner
Ellen Gavin
Marshall Johnson
Phyllis A. Reha
Gregory Scott

Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of the Petition of Midwest Wireless
Communications, LLC, for Designation as an
Eligible Telecommunications Carrier (ETC)
Under 47 U.S.C. § 214(e)(2)

ISSUE DATE: March 19, 2003

DOCKET NO. PT-6153/AM-02-686

ORDER GRANTING CONDITIONAL
APPROVAL AND REQUIRING FURTHER
FILINGS

PROCEDURAL HISTORY

On May 7, 2002, Midwest Wireless Communications, LLC (the Company) filed a petition under the federal Telecommunications Act of 1996 (the Act)¹ asking this Commission to designate it an "eligible telecommunications carrier" (ETC) in areas in central and southern Minnesota where it is currently licensed to provide cellular phone service. The Company needs the designation to qualify for subsidies from the federal universal service fund.

On July 5, 2002, the Commission issued its ORDER REQUIRING ADDITIONAL FILINGS, VARYING TIME PERIOD AND NOTICE AND ORDER FOR HEARING. In its order, the Commission granted the request of Citizens Telecommunications Company (Citizens), Frontier Communications of Minnesota, Inc. (Frontier), the Minnesota Department of Commerce (the Department) and the Minnesota Independent Coalition (MIC) to require the Company to provide additional information. The Commission also referred the matter to an administrative law judge (ALJ) for a contested case proceeding.

The Company made supplemental filings on July 15, July 22, and November 4, 2002.

Following hearings, the ALJ filed her Findings of Fact, Conclusions of Law and Recommendation (ALJ's Report) on January 2, 2003, recommending granting the Company's request. The Commission received exceptions to the ALJ's Report on January 10 from the Department, MIC, and jointly from Citizens and Frontier. The Company filed replies to these exceptions on January 21.

The case came before the Commission for decision on February 13, 2003.

¹ Pub. L. No. 104-104, 110 Stat. 56, codified throughout title 47, United States Code.

FINDINGS AND CONCLUSIONS

I. Historical Background

The federal Telecommunications Act of 1996 is designed to open the nation's telecommunications markets to competition. Its universal service provisions are designed to keep competition from driving rates to unaffordable levels for "low-income consumers and those in rural, insular, and high cost areas"² by subsidizing those rates. Only carriers that have been designated ETCs are eligible to receive these subsidies.³

Traditionally rural rates, which otherwise would have reflected the higher costs of serving sparsely-populated areas, were subsidized explicitly by payments from federal universal service funds and implicitly by requiring carriers to average rural and urban costs when setting rates.⁴

Competition calls into question the continued viability of subsidizing rural rates through averaged pricing. While no one was sure how competition would develop, many credible scenarios suggested that it would first appear in urban areas, for two reasons: First, urban areas cost less to serve. Second, urban rates are often inflated to finance rural subsidies, a cost that new entrants without rural customers would not incur. Together, these factors made urban markets the logical starting point for new entrants seeking to underprice the incumbents. This urban-first scenario could threaten the affordability of telecommunications services in rural, insular and high-cost areas.

In addition, to promote access to telecommunications by people with low income, Congress provided programs to subsidize both the cost of initiating residential telephone service (Link Up⁵) and ongoing residential telephone bills (Lifeline⁶).

Congress directed the Federal Communications Commission (FCC) to work with the states through a Federal-State Joint Board to overhaul existing universal service support systems.⁷ The Act required the FCC to determine which services qualified for subsidies. It authorized the states to determine which carriers qualified for universal service funding.⁸ The Act's term for these carriers was "eligible telecommunications carriers."

² 47 U.S.C. § 254(b)(3).

³ 47 C.F.R. § 54.201(a)(1). However, carriers may receive subsidies for providing toll-free access to Internet service providers, or for providing designated services to eligible schools and libraries, without obtaining ETC status. 47 C.F.R. § 54.621(a).

⁴ *In the Matter of Federal-State Joint Board on Universal Service, Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Docket Nos. 96-45, 00-256 Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking (May 10, 2001) ¶ 13, quoting Ninth Report and Order, 14 FCC Rcd at 20441, ¶ 15.

⁵ 47 C.F.R. § 54.411.

⁶ 47 C.F.R. § 54.401.

⁷ 47 U.S.C. § 254.

⁸ 47 U.S.C. § 214(e).

II. The Legal Standard

Applications for ETC status are governed by federal and state law.⁹ The Act's § 214 requires an ETC to offer certain designated services throughout its ETC-designated service area, use at least some of its own facilities in providing these services, and advertise the availability and price of these services.¹⁰ While the list of designated services may change over time,¹¹ FCC rule § 54.101(a) currently designates the following services:

- voice grade access to the public switched network
- local usage
- touch-tone service or its functional equivalent
- single-party service
- access to emergency services, including 911 and enhanced 911
- access to operator services
- access to interexchange services
- access to directory assistance
- toll limitation for qualifying low-income customers

Procedurally, this Commission has the responsibility for designating ETCs in Minnesota except where it lacks jurisdiction over an applicant.¹² The Commission evaluates an application based on the criteria of the Act, the FCC, and the state itself.¹³ State-imposed criteria should be "competitively neutral" so as not to favor incumbents, competitors, or any particular technology.¹⁴

The Commission must grant ETC status to any qualified applicant, provided that the applicant is not seeking to serve exchanges in which the incumbent telephone company is a rural telephone company. For these areas the state commission must first make a finding that designating more than one carrier is in the public interest.¹⁵ This requirement reflects Congressional concern that some thinly-populated areas might not be able to support more than one carrier.

⁹ 47 U.S.C. §§ 254, 214; 47 C.F.R. § 54.101; Minn. Rules parts 7811.1400 and 7812.1400.

¹⁰ 47 U.S.C. § 214(e).

¹¹ 47 U.S.C. § 254(c)(1).

¹² 47 U.S.C. § 214(e)(6).

¹³ See *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) (state may impose own criteria, in addition to federal criteria, when evaluating requests for ETC status).

¹⁴ 47 U.S.C. § 254(b)(7); *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45 Report and Order, 12 FCC Rcd 8776, 8801-03 ¶¶ 46-51 (USF First Report and Order).

¹⁵ 47 U.S.C. § 214(e)(2). Each grant of ETC status must be consistent with the public interest, convenience and necessity. Minn. Rules part 7811.1400, subp. 2; 7812.1400, subp. 2. "Rural telephone company" is defined at 47 U.S.C. § 153(47).

III. The Company's Application

The FCC has granted the Company a license to provide commercial mobile radio service (CMRS, or cellular phone service) throughout a swath of southern Minnesota. The Company requested ETC designation – including the duties to serve and the opportunities to receive subsidies – for this entire area. The Company's proposed service area includes territories served by fifty telephone companies, including rural telephone companies.

The Company proposes to provide service through both its conventional cellular offerings and through a new Basic Universal Service (BUS) offering. BUS is designed to compete with wireline service, providing the customary basic functionalities of wireline service including those required for ETC designation. But BUS would permit a customer to place toll-free calls over a larger area than would most of the competing wireline services.

The Company seeks subsidies calculated on the basis of the number of subscribers it acquires for all of its service offerings, regardless of the subscribers' rate plan. This request has proven controversial because, according to the Department, some of these rate plans fail to provide all of the services required for ETC designation.

IV. Evaluation

Having reviewed the record and provided all parties with an opportunity to be heard, the Commission finds the analysis of the ALJ persuasive. Consequently, the Commission will accept, adopt and incorporate the ALJ's Findings of Fact, Conclusions of Law and Recommendation, including the recommendation to grant the Company's petition for ETC designation. Consistent with the Commission's practice, however, this grant is made provisionally, pending review and approval of a compliance filing designed to address concerns identified by the ALJ and the parties.

The contents of the compliance filing, and the Commission's analysis in general, are set forth below.

A. Offering Necessary Services

The ALJ's Report concludes that the Company's proposal demonstrates an ability and commitment to provide all the services required for ETC designation throughout the requested service area. See ALJ's Report at ¶¶ 15, 19-25. But parties take exception to this conclusion, arguing that some of the Company's rate plans fail to incorporate all the required services, and that the Company has failed to demonstrate ability and commitment to serve all parts of its proposed service area.

1. Rate Plans

Among the services required for ETC designation is "local usage," defined as "an amount of minutes of use of exchange service, prescribed by the [FCC], provided free of charge to end users."¹⁶ To date, the FCC has not prescribed the minimum number of calling minutes necessary to fulfill this requirement.

¹⁶ 47 C.F.R. § 54.101(2).

The Department and MIC agree that the Company's BUS rate plan provides all the required services, but argue that some of the Company's other rate plans do not provide adequate local service. While the BUS plan offers unlimited local calling toll-free, the Company's other plans offer only a limited number of minutes of toll-free calling each month, or none at all. In response to these concerns, the Company pledges to comply with all minimum local usage requirements that the FCC might establish in the future. Nevertheless, the Department and MIC recommend denying the Company's ETC designation. Alternatively, they recommend granting the designation only with respect to the Company's BUS offering, as was done in another state.¹⁷

The Commission is not persuaded to grant either form of relief. Nothing in the Act or FCC rules prohibits an ETC from offering a variety of rate plans, provided that at least one rate plan offers all the required services. In the present case, no party disputes that the BUS plan provides all the required services, including adequate local usage. That is sufficient. As the ALJ remarked, if the Company wants to offer a rate plan with "premium features or an expanded calling area as well, 'that is between the company and the customer.'" ¹⁸

Furthermore, the practice of restricting the Company's ETC designation to a specific service plan would be discriminatory, contravening the FCC's admonition to remain competitively neutral. The Commission has not imposed similar restrictions on other ETCs. For example, some ETCs offer measured local service -- that is, they offer an optional service plan that involves an incremental charge for each minute of use. By the Department's and MIC's reasoning, such measured service plans do not provide "local usage,"¹⁹ yet the Commission has not limited the subsidies paid to ETCs offering such plans. The Commission is disinclined to single out the Company for such limitations.

2. Ability and Commitment to Serve

MIC, Citizens and Frontier also object to the ALJ's conclusion that the Company has demonstrated an ability and commitment to provide the required services throughout its entire service area. They note that the Company does not yet have facilities to serve some parts of the area. The Company declined to provide an estimate of when it would build such facilities, but has acknowledged that building new cellular towers typically takes from 12 to 15 months. MIC, Citizens and Frontier argue that if the Company is going to receive ETC designation, the Commission should impose a timetable on the Company's plans for building out its infrastructure just as the Commission imposed on incumbent telephone companies in the *Ely*²⁰ and *Tofte*²¹ cases.

¹⁷ *In the Matter of the Application of WWC Texas RSA Ltd. Partnership for Designation as an Eligible Telecommunications Carrier Pursuant to 47 U.S.C. § 214(e) and PUC Subst. R. 26.418*, Docket No. 22278, SOAH Docket No. 473, 00-1167, ORDER (October 30, 2000).

¹⁸ ALJ Report at ¶ 47, quoting *In the Matter of Minnesota Cellular Corporation's Petition for Designation as an Eligible Telecommunications Carrier*, Docket No. P-5695/M-98-1285 ORDER GRANTING PRELIMINARY APPROVAL AND REQUIRING FURTHER FILINGS (October 27, 1999).

¹⁹ 47 C.F.R. § 54.101(a)(2).

²⁰ *In the Matter of Petition for Assignment of an Eligible Telecommunications Carrier to Provide Service in Unassigned Territory in Northern Minnesota*, Docket No. P-407/EM-98-1193 (July 28, 1999).

²¹ *In the Matter of the Request for Service in Qwest's Tofte Exchange*, Docket No. P-421/CP-00-686 (June 21, 2002).

The Company opposes this proposal as discriminatory, noting that the Commission did not impose similar requirements on incumbent telephone companies as a condition of receiving ETC status. The Commission agrees.

A company need not have all its facilities in place before it receives ETC designation.²² And, while *Ely* and *Tofte* illustrate that the Commission occasionally imposes deadlines on a telephone carrier's construction plans, these cases are easily distinguishable from the present case: Neither case arose as a result of the carrier's request for ETC designation; rather, they arose as a result of unfulfilled customer requests for service.

Indeed, *Tofte* supports the Company's position. Qwest's predecessor was designated an ETC in the Tofte exchange in 1997,²³ and had "carrier of last resort" obligations predating that time. Yet the Commission did not begin imposing construction deadlines when it granted ETC designation; the need to impose a construction schedule only arose years later when customer complaints made the Commission aware that a problem existed.

Here the Company is able to offer its services through approximately 200 cell sites in and around the state, and has pledged to build an additional 15 cell sites upon designation as an ETC. The Company has pledged to meet customer orders for new service through a variety of measures including additional cell sites, cell extenders, rooftop antennae, high-powered phones, and the resale of existing service. In addition, the Company has stated that it is willing to address a customer's request for service by developing a schedule for extending service. The ALJ regards these assurances as adequate for the purpose of granting ETC designation. The Commission agrees.

If and when evidence arises that the Company has failed to fulfill its ETC obligations, the Commission may pursue remedial actions including the revocation of the Company's ETC designation.²⁴ But that matter is beyond the scope of the current docket.

²² *In the Matter of the Federal-State Joint Board on Universal Service, Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission*, CC Docket No. 96-45, FCC 00-248, Declaratory Ruling ¶¶ 12-13 (July 11, 2000).

²³ *In the Matter of the Request by Members of MIC for Designation as Eligible Telecommunications Carrier and Temporary Restriction of Certain Toll Restriction Services; In the Matter of the Request by Certain Other Incumbent LECs for ETC Designation*, Docket No. P-999/M-97-1270 ORDER DESIGNATING PETITIONERS AS ELIGIBLE TELECOMMUNICATIONS CARRIERS, ALLOWING ADDITIONAL TIME TO PROVIDE CERTAIN SERVICES, APPROVING RATE REDUCTIONS FOR QUALIFIED LOW-INCOME CUSTOMERS, AND REQUIRING FILINGS (December 23, 1997).

²⁴ 47 U.S.C. § 254(e); *In the Matter of Federal-State Joint Board on Universal Service, Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission*, Declaratory Ruling, CC Docket No. 96-45, 15 FCC Rcd 15168, 15174 ¶ 15 (2000).

B. Advertising Necessary Services

The Act requires an ETC to advertise the availability and price of the required services throughout the designated service area using media of general distribution.²⁵ An ETC must also publicize the availability of Link-Up and Lifeline services in a manner reasonably designed to reach those likely to qualify for those services.²⁶

After the Department asked the Company to elaborate on its advertising plans, the Company agreed to work with the Commission's staff and the Department to reach agreement on an acceptable advertising plan within 30 days of ETC designation. On this basis, the ALJ found that the Company demonstrated an ability and commitment to fulfill this advertising obligations.

Having reviewed the record and provided all parties with an opportunity to comment, the Commission will adopt the recommendation of the ALJ. The Company has demonstrated its willingness and ability to advertise the required services.

C. Using Own Facilities

The Act requires an ETC to use at least some of its own facilities to provide the designated services in its service area. As noted above, the Company currently is able to offer its services through approximately 200 cell sites in and around the state, and has pledged to build an additional 15 cell sites upon designation as an ETC. The Company has pledged to meet customer orders for new service through a variety of measures including additional cell sites, cell extenders, rooftop antennae, and high-powered phones, among other things. In addition, the Company has stated that it is willing to address a customer's request for service by developing a schedule for extending service.

The Commission concludes that the Company has demonstrated a willingness and commitment to employ at least some of its own facilities in providing the designated services to its customers.

D. Public Interest

1. The Legal Standard

While the Act generally requires a state commission to designate all qualifying applicants as ETCs, that is not true for areas served by rural telephone companies. For those areas, a state commission must first make a finding that designating more than one ETC would be in the public interest.²⁷ As noted above, the Company seeks ETC designation for areas served by rural telephone companies, and therefore this Commission must determine whether granting the Company's petition would be in the public interest.

When the FCC has had to make this determination, it has considered 1) whether customers are likely to benefit from increased competition, 2) whether designation of an ETC would provide benefits not available from incumbent carriers, and 3) whether customers would be harmed if the incumbent

²⁵ 47 U.S.C. § 214(e)(1)(B).

²⁶ 47 C.F.R. §§ 54.504(b), 54.411(d).

²⁷ 47 U.S.C. § 214(e)(2).

carrier exercised its option to relinquish its ETC designation.²⁸ But states may add their own criteria, so long as they do not regulate the entry or rates of a CMRS provider.²⁹

The Department and MIC argue that the public interest standard requires consideration of additional factors, such as the affordability of the Company's services and the effect of the Company's ETC status on the federal universal service fund.

2. FCC Standard

Applying the FCC's standard, the ALJ concludes that granting the Company's request would promote the public interest. It would increase customer choice and provide new services and functionalities made possible by wireless technology that are not provided by the incumbents. Customers would not merely have the option of a cheaper version of the incumbent's service; they would have the option of mobility, broader calling scopes, numeric paging and text messaging, and the like. Also, the ALJ states that granting the Company's petition would enhance competition, encouraging all providers to make infrastructure investments and promote quality service. The ALJ could not identify any harm to consumers as a result of granting the Company's petition. Finally, the ALJ notes that the harm to incumbent ETCs from increased competition is mitigated by the fact that, due to the FCC's subsidy formulas, incumbents do not lose much high-cost subsidy even if they lose a customer to a competitor.³⁰

The Commission finds the ALJ's reasoning persuasive. Additionally, the Commission has previously found that the risk that an incumbent carrier would surrender its ETC designation does not warrant withholding ETC designation from a competitor.³¹

While the Commission finds the ALJ's Report persuasive, MIC does not. The fact that the Company provides competition and services today demonstrates to MIC that the Company does not need high-cost subsidies. Consequently, MIC argues, there is no basis for concluding that the subsidies will cause any of these alleged benefits.

Admittedly, proving causation is difficult because no one can know what the Company would do in the future in the absence of federal subsidies. The Commission can only observe that the Company claims that the federal subsidies will make it financially viable to build 15 additional towers, and that the Company pledges to use the subsidies only for their intended purposes. This is not much different than the level of evidence that the Commission requires to certify that the state's ETCs will use the federal high-cost subsidies only for the provision, maintenance and upgrading of facilities and

²⁸ *In the Matter of Federal State Joint Board on Universal Service, RCC Holdings, Inc. Petition for Designation as an Eligible Telecommunications Carrier Throughout its Licensed Service Area in the State of Alabama*, CC Docket No. 96-45, DA 02-3181, Memorandum Opinion and Order ¶¶ 22-25 (November 26, 2002) (RCC/Alabama Order).

²⁹ See *Texas Office of Public Utility Counsel*, supra.

³⁰ ALJ Report at ¶¶ 33-38. An overview of the current subsidy programs can be found in *In the Matter of Federal State Joint Board on Universal Service*, CC Docket No. 96-45, Public Notice, FCC 03J-1 (February 7, 2003).

³¹ See *In the Matter of Minnesota Cellular Corporation's Petition for Designation as an Eligible Telecommunications Carrier*, Docket No. P-5695/M-98-1285 (October 27, 1999) at 18.

services for which the support is intended.³² For such certifications, however, the Commission also required ETCs to file affidavits, additional documentation pertaining to the amount of federal high-cost support received for the prior year, and the ETC's operational and capital expenditures.³³

The ALJ recommends that the Company be required to make a compliance filing containing, among other things, "all information the state typically gathers from ETCs to make its annual certification that ETCs in Minnesota are using high-cost funds...." ALJ's Report at ¶ 62. The Commission will adopt this recommendation as a reasonable effort to document the Company's intentions.

3. Affordability

While acknowledging the importance of "affordability" to promoting the public interest, the ALJ concludes that in this case market forces can address this issue adequately. Competitive carriers do not have monopoly power to exploit; consequently, they can only win customers (and federal subsidies) by offering a service with an attractive combination of quality and price. The ALJ observes that the Company had demonstrated its capacity to do so, attracting 88,000 customers already.

If the Commission desires a more objective basis upon which to judge the affordability of the Company's services, the ALJ notes that the Company's BUS rate plan is priced at \$14.99 per month for unlimited local usage. The ALJ concludes that this combination of rates and quality is affordable by any standard.

The Department takes issue with the ALJ's analysis of affordability, arguing that the facts cited by the ALJ are taken out of context. The Department notes that the Company's 88,000 subscribers represent a small percentage of the roughly 1 million people that live within the Company's Minnesota service territory. And the Company's offer to provide its BUS rate plan for \$14.99 per month fails to reflect the cost of buying, installing and activating various equipment at the customer's premises. It does not reflect the cost of paying a deposit. It does not reflect any liabilities arising out of long-term contracts and leases. It does not reflect the costs imposed by possibly onerous service agreements. And it does not reflect the burden of unresponsive network maintenance policies, or billing and payment policies.

Moreover, there was some dispute about whether all the necessary equipment for BUS was still being manufactured and would remain available to customers.³⁴

The Department asks that the Commission not grant final approval to the Company's petition until it has resolved all these issues. The Department notes that the ALJ shared some of these concerns, recommending that the Company make a filing containing –

³² 47 C.F.R. § 54.313(a) (pertaining to non-rural telephone companies); 47 C.F.R. § 54.314(a) (pertaining to rural telephone companies). See, for example, *In the Matter of Annual Certifications Related to Eligible Telecommunications Carriers' (ETCs) Use of Federal Universal Service Support*, Docket No. P-999/M-02-1403 ORDER CERTIFYING ETC'S USE OF FEDERAL HIGH-COST SUBSIDY (December 23, 2002).

³³ *Id.*, NOTICE OF FILING DEADLINE (August 22, 2002).

³⁴ ALJ's Report at n.23.

information specifying all rates, terms, and conditions applicable to its BUS plan, including the option for customer premise equipment and the charges it plans to assess for it ... and its proposed customer service agreement.³⁵

The Commission finds merit in the Department's concerns. The fact that the Company has acquired 88,000 customers speaks well of its ability to offer affordable service generally, but it says nothing about the affordability of the BUS rate plan specifically. If affordability has any meaning, it cannot be restricted only to a consideration of recurring costs; affordability must take account of one-time costs, customer contract terms, and simple availability, among other things. To the extent those matters remain unresolved, the issue of the BUS's affordability remains unresolved.

To its credit, the Company has sought to clarify these matters. In its replies to exceptions, the Company denies that there is any basis to doubt that the relevant equipment will continue to be available to consumers. Furthermore, at hearing the Company agreed to make a compliance filing setting forth all relevant customer charges and the terms of customer contracts and leases. The Company committed to leasing the relevant equipment needed inside the customer's home for the BUS offering for \$5.00 per month. The Company agreed to provide all other equipment needed to get the BUS offering to the customer at no charge. Finally, the Company committed to limit installation charges to no more than \$35; where installation merely requires placing a small antenna on a customer's roof, the Company would provide the installation free of charge.

The Commission finds these commitments encouraging. Having heard from all parties, the Commission sees the wisdom in the ALJ's recommendation to require a compliance filing. The Commission will elaborate on the ALJ's recommendation, directing the Company to file a tariff with terms and rates for the BUS, with Lifeline and Link-Up and other services which may be added to a universal service offering. In addition, the Company shall file its customer service agreement with customer service and dispute resolution policies; network maintenance policies with procedures for resolving service interruptions and any customer remedies; billing and payment policies; and deposit policies. Finally, the Company shall include a statement of its understanding of its federal obligations regarding its service area. With this information, the Commission will be better able to resolve any doubts about whether granting the Company's petition is in the public interest.

4. Effect on Federal Universal Service Fund

The Company anticipates recovering between \$6 million to \$8 million annually if it is designated an ETC throughout its licensed service territory in Minnesota.

MIC questions whether this is a prudent use of public funds. MIC cautions that permitting the Company to receive federal Universal Service subsidies will cause all telecommunications carriers to make larger contributions to the federal Universal Service Fund. MIC argues for denying the Company's ETC petition, or at least restricting the ETC designation to the Company's BUS service.

The Commission will decline both proposals. It may well be true that adding more ETCs will cause the size of the federal Universal Service Fund to grow, requiring larger contributions. But this fact alone does not persuade the Commission to withhold the Company's designation.

³⁵ ALJ's Report at ¶ 62.

Various reasons support the Commission's conclusion. First, the FCC has concluded that the financial impact on the federal fund of designating a carrier as an ETC is irrelevant to whether a carrier should be so designated.³⁶

Second, if this Commission were inclined to consider the impact on the federal fund, it would discover that the Company's projected subsidy would increase the fund's size by roughly 0.25%. The Commission is not persuaded that this level of impact warrants singling out the Company for special consideration.

MIC argues that the Commission should consider not merely the cost of the Company's subsidies, but the cost of the subsidies that might be paid to all CMRS providers licensed to provide service in the Company's service territory, or in the entire state, assuming all CMRS providers in the state became ETCs. The Commission disagrees. The issue before the Commission is the Company's petition, and no one else's. In this docket the Commission will decline to consider the effect of other CMRS companies' subsidies, just as the Commission has not considered the effect of the incumbent ETCs' subsidies. To do otherwise would violate the principle of competitive neutrality.

Third, Minnesota telecommunications carriers -- and indirectly, Minnesota ratepayers -- are already paying into the fund; it would be inequitable for qualified Minnesota providers and Minnesota ratepayers not to derive the benefit of the fund, too.

Finally, the FCC has initiated a proceeding to re-consider how universal service support is distributed.³⁷ To the extent that these issues warrant further review, they will be addressed and remedied holistically in the federal docket. Thus, these issues need not be addressed on a piecemeal basis in company-specific dockets such as this.

5. Conclusion

The Commission tentatively finds that granting the Company's petition would be in the public interest. Customers would be likely to benefit from increased competition, including the provision of services and functionalities that the incumbent providers do not offer. No customer harms are foreseeable. The Commission has cause to find that the BUS service is affordable, although it will await the Company's compliance filing on this question. And the Commission is not persuaded that concerns about the size of the federal Universal Service Fund require the Company's ETC designation to be withheld or limited in scope.

E. Service Area Disaggregation

1. Legal Standard

A carrier must offer and advertise the required basic services throughout any "service area" for which the carrier is designated an ETC. While state commissions establish service area boundaries, those boundaries typically coincide with the service territory boundaries or exchange area boundaries of incumbent landline carriers. The Act defines "service area" as --

³⁶ RCC/Alabama Order at ¶ 3.

³⁷ See *In the Matter of Federal-State Joint Board on Universal Service*, Order, FCC 02-307 (rel. Nov. 8, 2002).

a geographic area established by a State commission ... 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.³⁸

A telephone company's "study area" generally comprises the company's entire service territory within the state.³⁹ This default definition assigns all of a rural telephone company's exchanges to one large service area.

Large service areas pose an obstacle to carriers seeking ETC status. The FCC concluded that –

service areas should be sufficiently small to ensure accurate targeting of high cost support and to encourage entry by competitors.... [L]arge service areas increase start-up costs for new entrants, which might discourage competitors from providing service throughout an area because start-up costs increase with the size of a service area and potential competitors may be discouraged from entering an area with high start-up costs. As such, an unreasonably large service area effectively could prevent a potential competitor from offering the supported services, and thus would not be competitively neutral, would be inconsistent with section 254, and would not be necessary to preserve and advance universal service....

[I]f a state adopts a service area that is simply structured to fit the contours of an incumbent's facilities, a new entrant, especially a CMRS provider, might find it difficult to conform its signal or service area to the precise contours of the incumbent's area, giving the incumbent an advantage....⁴⁰

To address these problems, the Act authorized the states to re-define an incumbent's service area, dividing the territory into multiple areas for universal service purposes. But small service areas may pose problems, too. In considering whether to disaggregate a rural telephone company's service territory, the state and the FCC must consider three factors identified by the Joint Board:⁴¹ 1) the risk of "cream skimming," 2) the regulatory status accorded rural telephone companies under the 1996 Act, and 3) any additional administrative burdens that might result from the disaggregation.⁴²

A state may disaggregate a non-rural telephone company's service area at its own discretion. But a rural telephone company's service area may not be disaggregated without the mutual consent of the state and the FCC.⁴³

³⁸ 47 U.S.C. § 214(e)(5); 47 C.F.R. § 54.207.

³⁹ USF First Report and Order at ¶ 172, fn. 434.

⁴⁰ *Id.* at ¶¶ 184-85, footnotes omitted [discussing non-rural service areas].

⁴¹ 47 C.F.R. § 54.207(c)(1)(ii).

⁴² See *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Recommended Decision, 12 FCC Rcd 87, 179-80, ¶¶ 172-74 (1996) (Joint Board Recommendation).

⁴³ 47 C.F.R. § 54.207(c).

2. The Company's Proposal

As noted above, the FCC has authorized the Company to provide commercial mobile radio service (CMRS) throughout a swath of southern Minnesota. The Company seeks ETC designation for its entire service territory. But the boundaries of the Company's licensed service territory do not coincide with the boundaries of the incumbents' underlying service areas.

For most service areas within the Company's service territory, these boundary issues pose no problem. The Company asks the Commission to designate it an ETC in any exchange in its service territory that is served by a non-rural telephone company, since the Commission has the discretion to redefine the service areas of non-rural telephone companies unilaterally. Additionally, where a rural telephone company's entire service area is within the Company's service territory, the Company is willing to be designated an ETC for the entire service area.

But where the Company's authority to provide wireless service extends only part way through a rural telephone company's service area, the Company would be precluded from obtaining ETC designation unless the service area were disaggregated. The Company asks for this relief. That is, the Company seeks to disaggregate the incumbent companies' service areas to the extent necessary to permit the Company to obtain ETC designation throughout its licensed service territory – even if this requires disaggregating below the exchange level.

3. Comment

The ALJ recommends granting the Company's request and petitioning the FCC to disaggregate the service areas. ALJ Report at ¶¶ 55-59.

No party opposes the Company's request, except where the Company seeks ETC designation with respect to fractional parts of an exchange. Citizens and Frontier argue that this aspect of the Company's proposal would provoke customer confusion, frustrate the federal scheme matching subsidies to cost, and increase administrative burdens.

4. Commission Action

In considering whether to disaggregate a rural telephone company's service territory, the FCC directs the Commission to consider three factors identified by the Joint Board: 1) the risk of "cream skimming," 2) the regulatory status accorded rural telephone companies under the 1996 Act, and 3) any additional administrative burdens might result from the disaggregation.⁴⁴

"Cream skimming" may arise if a competitive ETC were to target low-cost exchanges, or low-cost portions of an exchange. Generally, a competitive ETC receives a subsidy for each access line it serves equal to the average subsidy per line that would otherwise be paid to the incumbent carrier in the study area. If a competitive ETC were to target unusually low-cost areas within a study area, the ETC might receive the same subsidies per line as the incumbent while incurring a fraction of the cost per line. The incumbent, in contrast, would be left serving the relatively costly customers.

⁴⁴ See *Joint Board Recommendation*, 12 FCC Rcd at 179-80, ¶¶ 172-74.

But the record does not support the suggestion that the Company is targeting areas based on their cost characteristics. Rather, the Company is targeting all areas within its licensed service territory. Any correlation between the Company's disaggregation proposal and the cost characteristics of the areas the Company seeks to serve appears to be coincidental.

Additionally, the FCC now permits incumbents to disaggregate their own service areas, thereby letting them target their subsidies to their high-cost areas.⁴⁵ Disaggregation reduces the opportunity for cream-skimming; a competitive ETC that targeted only low-cost areas would also receive only low levels of subsidies. Most Minnesota telephone companies, including Citizens⁴⁶ and Frontier,⁴⁷ have elected to disaggregate their own service areas down to the exchange level for universal service purposes, and even to subdivide their exchanges into cost zones. Consequently, the Commission finds little prospect of cream-skimming resulting from disaggregating the exchanges at issue into sub-exchange service areas.

Similarly, disaggregating these service areas is consistent with the regulatory status accorded rural telephone companies under the Act. For example, the Commission has expressly determined that Frontier is a rural telephone company under the Act. This determination entitles Frontier to special status under the Act⁴⁸ and the statutory exemptions granted under this provision, exemptions from interconnection, unbundling and resale requirements, remain unchanged as a result of the disaggregation of Frontier's service area. Further, the disaggregation of Frontier's service area does not reduce the careful consideration, including a determination of public interest, that the Commission must give to any application by a CLEC for ETC status in Frontier's service area.

The Commission is not persuaded that this disaggregation will result in significant additional administrative burdens. Given Citizens' and Frontier's own election to disaggregate their service areas to the exchange and sub-exchange levels, it is difficult to conclude that the resulting administrative challenges can be attributed to this docket.

Finally, the Commission is not persuaded that disaggregating exchanges would prompt much additional customer confusion. While exchange boundaries have long held significance to people in the local telephone business, it is less clear that these boundaries have been so significant to customers. Moreover, customers are generally aware that a cellular phone may have a different calling scope than a landline phone.

For all of these reasons, the Commission finds the Company's request reasonable, and will grant it. The Commission will petition the FCC to disaggregate, for ETC purposes, the incumbents' service areas as requested by the Company.

⁴⁵ 47 C.F.R. § 54.315.

⁴⁶ *In the Matter of Citizens Telecommunications Company, Inc. Election of a Federal High-Cost Universal Service Support Disaggregation Plan*, Docket No. P-407/DP-02-426, ORDER (May 31, 2002).

⁴⁷ *In the Matter of Frontier Communications, Inc. Election of a Federal High-Cost Universal Service Support Disaggregation Plan*, Docket No. P-405/DP-02-425, ORDER (May 31, 2002).

⁴⁸ 47 U.S.C. § 251(f).

V. Conclusion

The Commission will grant preliminary approval to the Company's application, finding that the Company has made a credible showing of its ability and intention to provide a high quality, affordable universal service offering throughout its proposed service area. Final approval will be granted upon Commission review and approval of a filing complying with the requirements discussed in the body of this Order.

ORDER

1. The Commission accept, adopt and incorporate the ALJ's Findings of Fact, Conclusions of Law and Recommendation, and grants preliminary approval to the Company's application for designation as an eligible telecommunications carrier. Final approval is contingent upon Commission review and approval of the compliance filing set forth in paragraph 2.
2. The Company shall make a compliance filing including the following items:
 - (a) information typically gathered from ETCs in the annual certifications,
 - (b) information on rates, terms and conditions applicable to the BUS, including customer premise equipment options and charges,
 - (c) an advertising plan,
 - (d) a tariff with terms and rates for the BUS, with Lifeline and Link-Up and other services which may be added to a universal service offering,
 - (e) a customer service agreement with customer service and dispute resolution policies, network maintenance with procedures for resolving service interruptions and any customer remedies, billing and payment and deposit policies, and
 - (f) a list of the Company's federal obligations regarding its service area.
3. The Commission will petition the FCC to disaggregate, for ETC purposes, the service areas of the relevant incumbent telephone companies to the extent necessary to permit the Company to obtain ETC designation throughout its CMRS licensed service territory.

4. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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1 to evaluate ETC requests from telecommunications carriers² by applying the standards
2 in federal law.³ ETCs must provide basic universal telecommunications service
3 throughout a defined service area. ETCs are eligible to receive a per customer subsidy
4 to provide, maintain, and upgrade facilities and services for basic telecommunications
5 service.⁴

6 ADT has requested the designation throughout the MTA service area.
7 ADT asserted it will provide universal services and will use the USF funds it receives to
8 invest in new cell towers within the Matanuska Telephone Association (MTA) service
9 area. The Rural Coalition (RC)⁵ and the certificated utility, MTA, have actively
10 participated in this docket. We granted intervention to the RC, MTA, ACS Rural LECs,⁶
11 and GCI.⁷

12 During the notice period, we received comments from four of ADT's
13 customers, who all supported ADT's request for ETC status.

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16 ²47 U.S.C. § 153(44), 47 C.F.R. § 54.201.

17 ³47 U.S.C. § 214(e).

18 ⁴47 U.S.C. § 254(e).

19 ⁵For purposes of this proceeding, the Rural Coalition's member companies
20 include Arctic Slope Telephone Association Cooperative; Bristol Bay Telephone
21 Cooperative, Inc.; Bush-Tell, Inc.; Copper Valley Telephone Cooperative, Inc.; Cordova
22 Telephone Cooperative; Interior Telephone Company, Inc.; Ketchikan Public Utilities –
23 Telephone Division; Mukluk Telephone Company, Inc.; Nushagak Telephone
24 Cooperative, Inc.; OTZ Telephone Cooperative, Inc.; United-KUC, Inc.; and United
25 Utilities, Inc.

26 ⁶The ACS Rural Local Exchange Companies (ACS Rural LECs) are:
27 ACS of Fairbanks, Inc. d/b/a Alaska Communications Systems, ACS Local Service, and
28 ACS; ACS of Alaska, Inc. d/b/a Alaska Communications Systems, ACS Local Service,
29 and ACS; and ACS of the Northland, Inc. d/b/a Alaska Communications Systems, ACS
30 Local Service, and ACS.

⁷GCI Communication Corp. d/b/a General Communication, Inc. d/b/a GCI (GCI).

1 In Order U-02-39(5), dated February 10, 2003, we decided we would
2 determine capability and commitment on the basis of filings received to date from the
3 parties, and responses to additional questions posed in Order U-02-39(5). We also
4 determined we would have a hearing to address whether the ADT ETC designation is in
5 the public interest.⁸

6 Discussion

7 State commissions must decide whether or not applications for ETC status
8 should be granted.⁹ Federal law requires us to apply the following criteria to our
9 evaluation of ADT's request for ETC status.¹⁰

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14 ⁸We reserved the right to end the investigation before the public interest hearing
if we found ADT incapable or not committed.

15 ⁹See n. 1.

16 ¹⁰These criteria are derived from Section 214(e)(1) and (2) of the Act which
17 provides:

18 (1) A common carrier designated as an eligible telecommunications carrier under
19 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 –

20 (A) offer the services that are supported by Federal universal service
21 support mechanisms under section 254(c) of this title, either using its own
22 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

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

25 (2)...Before designating an additional eligible telecommunications carrier for an
26 area served by a rural telephone company, the State commission shall find that the
designation is in the public interest.

- 1 • Has ADT demonstrated that it owns at least some facilities?
2 • Has ADT demonstrated it will appropriately advertise its services?
3 • Has ADT demonstrated a capability and commitment to provide the Nine
4 Basic Services required by Federal Communications Commission (FCC)
 regulation?¹¹
5 • Is granting ADT's application in the public interest?

6 State commissions may impose conditions on the granting of ETC
7 applications to assure that the public interest is met.¹²

8 Ownership of Facilities

9 We found in Order U-02-39(5) that ADT meets the facility ownership
10 criteria for ETC status. In that Order, we also concluded that it is reasonable for ADT to
11 use the MTA study area as its universal service area.

12 Advertising Services

13 Section 214(e)(1)(B) of the Act requires an ETC to advertise the
14 availability of the Nine Basic Services (including Link Up and Lifeline)¹³ and the charges
15 for the services using "media of general distribution."

16 When we granted MTA ETC status, we required MTA to meet the
17 following minimum criteria to ensure appropriate and sufficient customer notification of
18 its services:¹⁴

19 a) once every two years MTA must perform community outreach
20 through appropriate community agencies by notifying those agencies
21 of MTA's available services;

22 b) once every two years MTA must post a list of its services on a
23 school or community center bulletin board in each of the utility's
24 exchanges;

25 ¹¹The Nine Basic Services are defined at 47 C.F.R. § 54.101.

26 ¹²*Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999).

¹³Link Up is described at 47 C.F.R. § 54.411, and Lifeline at 47 C.F.R. § 54.405.

¹⁴In the following paragraphs addressing minimum advertising requirements,
 "services" referred to those services for which MTA receives universal service support.
 MTA was not required to advertise nonsupported services.

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c) once a year MTA must provide a bill stuffer indicating its available services; and

d) once a year MTA must advertise its services through a general distribution newspaper at the locations it serves.¹⁵

We believe these standards are also appropriate for ADT. ADT has agreed to comply with our interpretation of what advertising was required by Section 214.

Capability and Commitment

We established in Order U-02-39(5) that we would concentrate on ADT's provision of the nine basic services required by the FCC.¹⁶ Our ruling was based on the FCC's guidelines.¹⁷ The parties cited many cases, none of which persuaded us to modify our decision.

¹⁵Order U-97-187(1), dated December 19, 1997, at 16.

¹⁶Order U-02-39(5) at 6.

¹⁷We held in Order U-02-39(5) that we would follow the FCC guideline that ADT "must make a reasonable demonstration of its capability and commitment to provide the services required of an ETC throughout the service area for which it seeks ETC status. ADT does not need to provide detailed specifications of all aspects of its technical and financial abilities. ADT must, however, provide enough information to credibly demonstrate its ability." Order U-02-39(5) at 4. *In Re Federal-State Joint Bd. on Universal Service; Western Wireless Petition For Preemption of an Order of the South Dakota Public Utilities Commission*, CC Docket No. 96-45, Declaratory Ruling, 15 FCC Rcd. 15168, para. 24 (2000) (*South Dakota Order*).

1 ADT need not provide detailed specifications of all aspects of its technical
2 and financial abilities. However, ADT must provide enough information to demonstrate
3 its ability to provide each of following Nine Basic Services designated by the FCC¹⁸ or
4 obtain a waiver.¹⁹

- 5 1) Voice grade access to the public switched network (including Lifeline
6 and Link Up services),
- 7 2) Local usage,
- 8 3) Dual tone multi-frequency signaling or its functional equivalent,
- 9 4) Single-party service or its functional equivalent,
- 10 5) Access to emergency services,
- 11 6) Access to operator services,
- 12 7) Access to interexchange services,
- 13 8) Access to directory services, and
- 14 9) Toll limitation for qualifying low-income consumers.

15 ADT is a wireless personal communications service licensee that currently
16 provides service in the MTA service area, Juneau, Fairbanks, and Kenai through more
17 than 50 cell sites.²⁰ ADT operates 15 cell sites within the proposed ETC service area.
18 ADT has a staff of 60, which includes experienced engineers and technical support
19 personnel. ADT began providing service in Alaska in November 1998.

21 ¹⁸See n. 11.

22 ¹⁹The FCC allows a state commission to grant waiver of the requirement to
23 provide single-party, access to enhanced 911, and toll limitation services to allow
24 additional time for a carrier to complete network upgrades necessary to provide service.
47 C.F.R. § 54.101(c).

25 ²⁰*Alaska DigiTel, LLC's Response to Order Requiring Filing and Addressing*
26 *Eligible Telecommunications Carrier Criteria (ADT's Response)*, filed March 10, 2003,
at 2.

1 ADT's years of experience deploying wireless service reasonably
2 demonstrates its technical knowledge and basic abilities to provide wireless
3 telecommunications service. The parties do not dispute ADT's technical competence.
4 Instead, their arguments have centered on whether ADT has the financial ability and
5 intent to build out its facilities throughout the MTA service area.

6 The RC asserts ADT has not shown a study area-wide capability and
7 commitment and thus is prepared only to serve a small portion of the MTA study area
8 for the foreseeable future.²¹ The RC also asserts that ADT proposes a meager network
9 build-out in the next two years. The RC provides financial information showing that
10 even with universal service funding, ADT lacks resources to complete its proposed
11 expansion.²² The RC argued that ADT did not provide enough credible evidence to
12 demonstrate its capability and commitment. The RC also stated that ADT provided no
13 verifiable data for service quality.

14 MTA asserts that ADT has not shown that it would ever be able to serve
15 the entire MTA study area, and that this ability is a prerequisite to receipt of ETC status,
16 unless the FCC and RCA mutually agree to a different definition of the company's
17 service area.²³

18 ADT admits that its current facilities do not cover the entire MTA service
19 area, and that it could not build out to many areas where demand for service existed
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22 ²¹*Rural Coalition's Reply to Alaska DigiTel, LLC's Capability and Commitment*
23 *Filing (RC's Reply)*, filed March 24, 2003, at 1-2.

24 ²²*Id.* at 2.

25 ²³*Matanuska Telephone Association's Reply to Alaska DigiTel, LLC's Response*
26 *to Order Requiring Filings and Addressing Eligible Telecommunications Carrier Criteria*
(MTA's Reply), filed March 24, 2003, at 8-9.

1 without access to federal USF. ADT commits to begin construction of six new cell sites
2 in the first 24 months after it obtains USF. During the first year after obtaining funding,
3 ADT plans to construct facilities in Big Lake, Willow, and Talkeetna, Alaska. In its
4 second year of funding, ADT plans to begin construction of facilities in Trapper Creek,
5 Petersville, and Cantwell, Alaska. ADT estimates a construction cost of \$250,000 per
6 cell site. ADT states that the total construction costs would likely exceed ADT's
7 projected support for the first two years.

8 ADT may not be able to serve the entire MTA service area with its own
9 facilities for several years. However, this does not preclude ETC status. ADT is not
10 required to provide service using only its own facilities. Federal law specifies that an
11 ETC may provide service through a combination of its own facilities and resale.²⁴
12 Therefore, ADT need not prove its ability to build facilities through every portion of
13 MTA's service area. ADT must demonstrate that its method of providing service
14 throughout the MTA area is reasonable.

15 ADT proposes to provide service throughout the MTA service area using
16 its own facilities or, if necessary, a combination of its own facilities and resale of another
17 carrier's services. ADT describes a 7-step plan for serving customers.²⁵

18 a) if ADT can serve within its existing network, ADT will immediately serve
19 the customer;

20 b) if the customer is not in an area where ADT currently provides service,
21 ADT will:

22 Step 1: determine whether the customer's equipment can be modified or
23 replaced to provide acceptable service;

24
25 ²⁴47 U.S.C. § 214(e)(1)(A).

26 ²⁵ADT's Response at 9-10.

1 Step 2: determine whether a roof-mounted antenna or other network
2 equipment can be deployed at the premises to provide service;

3 Step 3: determine whether adjustments at the nearest cell site can be
4 made to provide service;

5 Step 4: determine whether a cell-extender or repeater can be employed
6 to provide service;

7 Step 5: determine whether there are any other adjustments to network or
8 customer facilities that can be made to provide service;

9 Step 6: explore the possibility of offering the resold services of carriers
10 with facilities available to that location;

11 Step 7: determine whether an additional cell site can be constructed to
12 provide service, and evaluate the costs and benefits of using scarce high-cost support
13 to serve the number of customers requesting service.
14

15 ADT states that if there is no possibility of providing service short of
16 constructing a new cell site, it will report to the commission, providing the proposed cost
17 of construction and the company's position on whether the request for service is
18 reasonable and whether high-cost funds should be expended on the request.²⁶
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20 We find ADT's plan is a reasonable means for ADT to provide service
21 throughout the MTA service area upon reasonable customer request. We will address
22 any ADT requests to deny service on a case-by-case basis.
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25 ²⁶*Direct Testimony of Stephen M. Roberts on Behalf of Alaska DigiTel, LLC*
26 (*Roberts Direct Testimony*), filed March 17, 2003, at 14.

1 We do not find MTA's and the RC's arguments that ADT lacks the
2 financial capability to live up to its universal service commitments persuasive. ADT's
3 proposal demonstrates a reasonable commitment to serve and is adequate for our
4 purposes in this docket.

5 The RC and MTA challenge the financial viability of ADT's plans to
6 expand during the first two years.²⁷ We find that ADT's 7-step plan for providing service
7 documents a reasonable strategy for providing service throughout the study area. We
8 note that if ADT fails to serve throughout its designated service area, we would have
9 cause to revoke its ETC status.

10 ADT is not required to provide service where there are no prospective
11 customers. The FCC has determined an ETC must only provide service upon
12 "reasonable request" and should be treated similarly to the incumbent on this point:

13 Gaps in Coverage. We find the requirement that a carrier provide
14 service to every potential customer throughout the service area before
15 receiving ETC designation has the effect of prohibiting the provision of
16 service in high-cost areas. As an ETC, the incumbent LEC is required to
17 make service available to all consumers upon request, but the incumbent
18 LEC may not have facilities to every possible consumer. We believe the
19 ETC requirements should be no different for carriers that are not incumbent
20 LECs. ***A new entrant, once designated as an ETC, is required, as the
21 incumbent is required, to extend its network to serve new customers
22 upon reasonable request. We find, therefore, that new entrants must be
23 allowed the same reasonable opportunity to provide service to
24 requesting customers as the incumbent LEC, once designated as an
25 ETC.*** (Emphasis added.) Thus, we find that a telecommunications carrier's
26 inability to demonstrate that it can provide ubiquitous service at the time of its
request for designation as an ETC should not preclude its designation as an
ETC. (Footnotes omitted.)²⁸

22 We agree with the FCC's conclusion. We find reasonable ADT's 7-step plan and its
23 stated commitment to serve all reasonable requests.

24 _____
25 ²⁷RC's Reply at 10; MTA's Reply at 2.

26 ²⁸South Dakota Order at para. 17.

1 *Emergency Services*

2 The parties alleged that ADT failed to direct emergency calls to the correct
3 emergency response center in Palmer and instead directed the calls to Anchorage.
4 ADT agreed that the calls should not have been directed to Anchorage, and worked to
5 resolve the matter. As of April 15, 2003, ADT was processing 911-calls to the Palmer
6 Public Service Access Point (PSAP).²⁹ Therefore, by the date of hearing, the
7 allegations about misdirected emergency calls were resolved.

8 The RC and MTA challenged ADT's ability to provide adequate
9 emergency services, claiming that ADT only asserted an ability to provide undefined
10 "M-911" service.³⁰ ADT asserted that it complies with all federal phase-in requirements
11 for emergency services that apply to wireless carriers; and no party provided
12 contradictory evidence. We conclude that ADT has adequately demonstrated its ability
13 to meet the emergency services requirement associated with ETC status.

14 *Lifeline and Link Up Services*

15 ADT committed to provide Lifeline and Link Up services. However, when
16 developing its proposed level of Lifeline and Link Up discounts and its proposed
17 customer eligibility criteria, ADT may not have taken into account that all of Alaska is
18 deemed tribal land and eligible for enhanced Lifeline and enhanced Link Up services
19 under the FCC rules. We require ADT to revise its proposed level of Lifeline and Link
20 Up services to recognize the higher level of support offered to tribal land areas, or
21 explain why this should not occur. Within 30 days of the date of this Order, ADT is
22 required to file the following information with us:

23 _____
24 ²⁹*Prefiled Reply Testimony of Clay Dover on Behalf of Alaska DigiTel, LLC*
 (*Dover Reply Testimony*), filed May 5, 2003, at 7.

25 ³⁰*RC's Reply* at 13-14; *MTA's Reply* at 21-22. See *Roberts Direct Testimony* at 4.

1 a) the base local rate(s) and description of service for the service offerings
2 upon which the Lifeline and Link Up discounts will be applied;

3 b) the Lifeline and Link Up discounts that it will apply;

4 c) the means test that it will use to determine whether a customer is
5 qualified for Lifeline or Link Up services; and
6

7 d) how ADT will ensure that Lifeline customers will not be disconnected for
8 failure to pay their "local" bill.

9 ADT shall update the filed information within 30 days of any change. This
10 additional filing will clarify ADT's commitment to provide Lifeline and Link Up services.

11 Public Interest Determination

12 We focus our public interest determination on the potential benefits the
13 consumer could receive from the ETC designation of ADT. Elements we consider in
14 determining public interest include:

- 15 • New choice for customers
- 16 • Affordability
- 17 • Quality of service
- 18 • Service to unserved customers
- 19 • Comparison of benefits to public cost.

20 We also consider the record to determine if there is material harm to any ratepayer in
21 granting the ETC application.

22 *New Choice for Customers*

23 During the hearing to consider the issue of public interest, ADT provided
24 evidence that, with ETC designation and associated USF funds, customers will have
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1 improved access to ADT's network and more choices in telecommunication services.³¹
2 ADT distinguishes its service offerings from other competing wireless carriers by noting
3 it will be providing services available to any customer on reasonable request, and it will
4 offer Lifeline and Link Up services, and E-911 services.

5 We conclude that granting the ETC application will improve customers'
6 ability to obtain ADT wireless services. Two consumers supported the ADT application
7 because of the increased coverage ADT would offer, improving access to emergency
8 and other critical services as well as quality of life.³² As ADT invests in its network,
9 competing companies' investment incentives may increase.

10 Granting the application will also provide customers more choices for
11 meeting their communications needs. Low-income customers who otherwise would be
12 unable to afford wireless service will be able to obtain service using the discounts
13 provided under the Lifeline and Link Up programs. ADT customers will also have a
14 choice in local calling areas, including an option for a wider local calling area than
15 offered by the incumbent MTA.

16 The public interest is also served by the mobility of ADT's service. Mobile
17 service adds public convenience and provides critical access to health and safety
18 services, not just at the customer's home as the incumbent's system provides, but when
19 the customers are away from their residences.

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³¹*Id.* at 2.

25 ³²See letters from Sarah Palin and the Mat-Su Community Transit, received
26 May 20, 2003.

1 *Affordability*

2 While ADT did not offer a rate plan for basic universal service, it did
3 demonstrate a wide array of offerings. Combined with the ability to make calls into
4 metropolitan Anchorage without long distance charges, these offerings could lower
5 costs for consumers. We do not require proof of lower cost because the MTA offerings
6 differ so extensively from ADT's that their costs cannot be meaningfully compared.

7 *Quality of Service*

8 We do not currently regulate the quality of service by ADT, nor do we have
9 sufficient evidence to warrant defining quality of service standards to apply to wireless
10 carriers. However, we will review service quality issues if we receive customer
11 complaints about ADT's service. This decision does not preclude us from considering
12 ETC service quality in a regulations docket upon petition or our election.

13 *Service to Unserved Customers*

14 ADT asserted the designation would allow it to accomplish build-out of six
15 additional cell sites.³³ ADT expects to reach unserved customers in Trapper Creek,
16 Petersville and Cantwell.³⁴

17 The RC claims the designation will not provide benefit, and that ADT
18 wants the benefits of ETC status without the commensurate obligations to serve
19 hard-to-reach customers.³⁵ MTA argues that ADT makes no firm commitment regarding
20 its six cell sites and that ADT would not achieve economic viability regarding the site
21 additions even with support. MTA believes that rather than constructing facilities in
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24 ³³*Id.* at 9.

25 ³⁴*Id.* at 9, 12.

26 ³⁵*Prefiled Testimony of Jack H. Rhyner*, filed April 14, 2003, at 10.

1 areas like Trapper Creek, Petersville, and Cantwell, ADT will instead use its funding to
2 benefit the high-density, lower cost areas that ADT already serves.

3 We find nothing in the record to substantiate MTA's claim; rather, ADT has
4 clearly stated on the record it would seek out new customers. Two letters filed by
5 consumers suggests that customers in the MTA area may at times be without wireline
6 service and that these customers may desire ADT's services.³⁶ We conclude that by
7 granting this application, we will improve the ability of customers not now served by
8 wireline to obtain access to wireless service. As an ETC, ADT will be obligated to
9 provide service to currently unserved consumers upon reasonable request.

10 *Comparison of Benefits to Public Cost*

11 The RC and MTA argued that we should not grant ADT ETC status unless
12 we can prove that the benefits of the designation would exceed the public costs. We
13 find no support in the law for application of this standard to our review of ADT's ETC
14 application. Furthermore, we find that while improvement in public safety and
15 convenience and other public benefit factors cannot easily be quantified, they provide
16 substantial benefit to the public.³⁷ There was no credible evidence in the record of
17 countervailing public costs.

18 *Considerations of Material Harm*

19 We considered whether there would be any material harm in granting the
20 ETC application. The record is virtually silent concerning substantive harm specific to

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22 ³⁶See letters from Sharla Toller and Becky and Steve DeBusk, received
23 May 20, 2003.

24 ³⁷The FCC has indicated that concerns about the financial impact of designating
25 competitors as ETCs on the federal fund are not relevant to designating a particular
26 carrier as an ETC. *In Re Federal State Joint Bd. on Universal Service; RCC Holdings, Inc. Petition for Designation as an Eligible Telecommunications Carrier Throughout its Licensed Service Area in the State of Alabama*, CC Docket No. 96-45, Memorandum Opinion and Order, 17 F.C.C.R. 23532, para. 3 (2002).

1 MTA or to customers in the MTA service area. MTA admits that its own federal funding
2 will likely not be affected by our decision to grant the application.³⁸ There is no
3 evidence that MTA will lose a significant number of customers as a result of increased
4 competition by wireless services. There is no evidence that consumer local rates will
5 increase or that quality or availability of service will decrease as a result of granting the
6 application. We did not find persuasive evidence in this proceeding suggesting generic
7 harm to either the federal universal service fund or to customers generally by granting
8 the application. We find no evidence to suggest that any material harm will occur.

9 In summary, we find that granting ETC status to ADT is in the public
10 interest. We previously concluded that ADT adequately demonstrated that it met all
11 other criteria necessary to allow award of ETC status. We therefore grant ETC status to
12 ADT.

13 Conditions on ETC Status

14 Various parties have recommended that we should place quality of service
15 requirements on ADT as a condition of ETC status. We will not develop quality of
16 service standards for wireless carriers in this proceeding. We lack a record
17 demonstrating that such standards are needed. We will consider wireless quality of
18 service standards in the future, provided a need for such standards is proved.

19 When GCI obtained ETC status for the ACS Rural LECs' study areas, we
20 prohibited GCI from applying for support for a study area until it had filed a certificate,
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23 ³⁸MTA's Reply at 29. MTA qualified its answer by stating that its support would
24 not decrease, but only under the current rules, and that the FCC and the Federal-State
25 Joint Board on Universal Service were actively considering proposals to change the
26 federal universal service program. While that may be the case, we cannot assume that
federal policies will necessarily change to disadvantage MTA or that our decision to
grant ADT ETC status will as a result harm MTA in the long term.

1 supported by an affidavit, demonstrating availability of service and advertising thereof.³⁹

2 We will not place a similar requirement on ADT for the following reasons:

3 a) ADT has applied for service in only one study area, unlike the GCI
4 request for ETC status in multiple study areas;

5 b) GCI indicated it would phase-in service. In comparison, ADT has
6 provided a 7 Step plan for providing service throughout the study area;

7 c) When we granted GCI ETC status, companies had not implemented
8 plans to disaggregate support below the study area level.

9 The RC urges us to levy conditions on ADT to verify that ADT meets its
10 obligations and to ensure parity between new ETCs and the incumbent local exchange
11 carrier. We may require conditions within narrow bounds set by the Act and further
12 identified in the Texas Office of Public Utility decision.⁴⁰ The parties argued about the
13 extent of our authority.⁴¹ In a number of recent decisions on ETC designation, state
14 commissions that granted ETC status attached significant conditions on commercial
15 mobile radio service carriers.⁴²

16 ADT argues that the competitive market makes conditions of service
17 quality and affordability redundant. ADT urges us to annually review the way USF funds
18 are spent to monitor service quality.⁴³

19 Many of the proposed conditions are designed to protect incumbent
20 carriers from market participation concerns by a competitive ETC, such as cream

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22 ³⁹See Order U-01-11(1), dated August 28, 2001.

23 ⁴⁰See n. 12.

24 ⁴¹Tr. 159, 211.

25 ⁴²Tr. 211, 215.

26 ⁴³*Rebuttal Testimony of Don Wood on Behalf of Alaska DigiTel, LLC*, filed
May 5, 2003, at 14; Tr. 371-72, 379.

1 skimming. The FCC has previously rejected rural incumbent carriers' suggestions to
2 adopt eligibility criteria beyond those set forth in Section 214(e) to prevent competitive
3 carriers from attracting only the most profitable customers, providing substandard
4 service, or subsidizing unsupported services with universal service funds. The FCC
5 concluded that the statutory requirements limiting ETCs, and requiring them to offer
6 services throughout the area and to use support only for the intended services, were
7 sufficient.⁴⁴ Similarly, we find little evidence that further protections are needed to
8 protect MTA's place in the market.

9 *Annual Certification*

10 Each year we open a proceeding and issue an order requiring information
11 from the economically regulated ETCs operating in Alaska so that we may make our
12 annual certification to the FCC concerning use of federal universal service funds under
13 47 C.F.R. § 54.314. As an ETC, MTA submits data in these annual proceedings.

14 Under federal regulations, an ETC not subject to our jurisdiction that
15 desires to receive federal universal service support must file an annual certificate with
16 the federal fund administrator and the FCC stating that all federal high-cost support
17 received will be used only for the provision, maintenance, and upgrading of facilities and
18 services for which the support is intended. We do not economically regulate ADT, and
19 therefore, under federal law, ADT would normally only file its certification with the FCC.
20 We are not required to certify to the FCC whether ADT will appropriately use federal
21 universal service funds. However, in order to monitor the continued appropriate use of
22 universal service funding in our competitive rural markets, we require ADT to file the
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24 ⁴⁴*In Re Federal-State Joint Board on Universal Service; Western Wireless*
25 *Petition for Designation as an Eligible Telecommunications Carrier in the State of*
26 *Wyoming*, CC Docket No. 96-45, Memorandum Opinion and Order, 16 FCC Rcd 48, 53,
paras. 12-13 (CCB 2000).

1 same information required of MTA through our annual use-of-funds certification
2 process. ADT has agreed to do so.

3 *Service Area*

4 Under Section 214(e)(1), a carrier's ETC status is linked to a specific
5 "service area." In its comments, MTA states that the topographical map of ADT's
6 proposed service area, as marked by ADT in Exhibit A to its May 14, 2002, filing, does
7 not correspond to the serving area referenced in the MTA tariffs filed with this
8 Commission. As a result, MTA believes ADT planned to serve something less than
9 MTA's service area. MTA states that if ADT had no intention of serving MTA's entire
10 study area, then it must lodge a request to redefine the service area boundary.⁴⁵

11 We clarify that under federal law, ADT's ETC service area must be the
12 same as the MTA study area.⁴⁶ Consistent with the federal requirements, ADT
13 indicates it would serve the MTA study area and our approval of ADT's ETC status is for
14 this study area. Should there be a dispute over the extent of MTA's study area, we will
15 resolve such disputes when they occur.

16 *State USF*

17 ADT indicated it had no plan to apply for state universal service support.
18 We will not require that ADT file for such support. However, our regulations provide that
19 ADT, if granted federal ETC status, automatically becomes eligible for state universal
20 service funds. See 3 AAC 53.399(3). We anticipate that ADT will obtain only minimal
21 support from our state fund, as it will likely only qualify for support for Lifeline services.

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23 ⁴⁵MTA's Reply at 3, 8.

24 ⁴⁶See 47 U.S.C. § 214(e)(5). The service area cannot be changed from the
25 study area unless and until the FCC and the states, after taking into account
26 recommendations of a Federal-State Joint Board institute under section 410(c) of the
Act, a different definition of service area for such company.

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5. To the extent possible, Alaska DigiTel, LLC shall file as if it were a regulated carrier in response to our requests for information in our annual proceeding concerning annual certification of use of funds to the Federal Communications Commission.

DATED AND EFFECTIVE at Anchorage, Alaska, this 28th day of August, 2003.

BY DIRECTION OF THE COMMISSION
(Commissioners Dave Harbour
and Kate Giard, not participating.)

(S E A L)

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1 parts of Alaska, the telecommunications network is still rudimentary and economically
2 fragile. The commission should not ignore these facts when it comes to making ETC
3 decisions.

4 DATED at Anchorage, Alaska, this 28th day of August, 2003.

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7 Mark K. Johnson, Commissioner
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BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendraye
Marshall Johnson
Ken Nickolai
Phyllis A. Reha
Gregory Scott

Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of NPCR, Inc. d/b/a Nextel
Partners for Designation as an Eligible
Telecommunications Carrier Under 47 U.S.C.
§214(e)(2)

ISSUE DATE: December 1, 2003

DOCKET NO. PT-6200/M-03-647

ORDER DENYING WITHOUT PREJUDICE
NEXTEL'S APPLICATION FOR ETC
DESIGNATION

PROCEDURAL HISTORY

On April 25, 2003, NPCR, Inc. d/b/a Nextel Partners (Nextel) submitted its original filing asking the Commission to designate it as an eligible telecommunications carrier (ETC) for the purpose of receiving support from the federal universal service fund.

On May 5, 2003, Citizens Telecommunications Company of Minnesota, Inc. (Citizens) and the Minnesota Independent Coalition (MIC) filed challenges to the completeness of Nextel's petition. Nextel responded to the challenges on May 12, 2003.

By May 15, 2003, the Commission had received comments from Citizens and the Minnesota Department of Commerce (the Department). The parties argued that Nextel's filing is inadequate.

On July 17, 2003, the Commission met to act on Nextel's petition. Following discussions with the other parties, Nextel agreed at the Commission meeting to file supplemental information concerning its service offerings, facilities and advertising plan. Nextel also agreed that the 180-day timeline would begin upon its making a supplemental filing. The Commission agreed to defer consideration of Nextel's ETC petition until the record was more fully developed.

On July 28, 2003, Nextel submitted a supplemental filing to the pending petition.

On August 18, 2003, the Department and Citizens filed comments.

On August 20, 2003, the Commission issued its ORDER REQUIRING ADDITIONAL FILINGS AND VARYING TIME PERIOD.

On August 28, 2003, MIC and Nextel filed reply comments.

The Commission met on October 23, 2003 to consider this matter.

FINDINGS AND CONCLUSIONS

I. NEXTEL'S PETITION

Nextel asked the Commission to designate it an eligible telecommunications carrier (ETC) so that it can receive financial support from the federal universal service fund. Nextel stated that the requirements for ETC designation are set forth in 47 U.S.C. § 214(e)(1)-(2), 47 C.F.R. § 54.101, and Minn. Rules, Part 7811.0100, subp. 15. The Company argued that it met all the requirements for designation. Specifically, Nextel asserted that (1) it is a common carrier as required by 47 U.S.C. § 214(e)(1), (2) it provides each of the supported services identified by the Federal Communications Commission (FCC), and (3) it will meet all service and advertising obligations of an ETC.

On May 12, 2003, Nextel replied to Citizens' and MIC's objections that Nextel's petition was incomplete for failure to provide certain information. Nextel maintained that its petition was complete because it provided the items listed in the relevant rule, Minn. Rules, Part 7811.1400, subp. 4. While Nextel acknowledged that in two previous ETC cases the Commission had requested the additional items cited by MIC and Citizens it argued that this did not mean that these items were now filing requirements. Nextel stated that although it was not required to do so, it would voluntarily provide some of the information mentioned by MIC and Citizens: information regarding its service offerings, facilities, and advertising plan.

On July 28, 2003, Nextel supplemented its petition. The Company 1) clarified that Nextel Partners and Nextel Communications jointly market the "Nextel" brand name throughout their national service area; 2) argued that while it does not offer a service comparable to other ETCs' universal service offering, all of its conventional service plans qualify for universal service funding because they contain the nine supported services and are priced to rural customers at the same competitive price charged by Nextel Communications in the metro areas; 3) described its Minnesota facilities and service area; 4) submitted its advertising plan and discussed its commitment to advertise its service offerings throughout its Minnesota service area; 5) provided its standard custom service agreement; and 6) reaffirmed its arguments why designating it an ETC will benefit the public.

II. THE LEGAL STANDARD

Applications for ETC status are governed by federal and state law.¹ Section 214 of the Telecommunications Act of 1996 requires an ETC to offer certain designated services throughout

¹ 47 U.S.C. §§ 254, 214; 47 C.F.R. § 54.101; Minn. Rules parts 7811.1400 and 7812.1400. The fact that this Order analyzes and denies the petition based on provisions of the federal law does not negate the fact that there are also state standards and conditions to bring to bear on a petition for ETC status. For instance, while 47 U.S.C. § 214(e)(2) requires a public interest finding only when an applicant seeks ETC designation in an area served by a rural telephone company, Minn. Rules, Part 7812.1400, subp. 2 requires a public interest determination when a CLEC seeks ETC status in areas served by non-rural as well as rural telephone companies. See *In the Matter of the Petition of WETEC LLC dba Unitel Communications, Inc. for Designation as an Eligible Telecommunications Carrier*, Docket No. P-5614/M-03-1051, ORDER (November 26, 2003).

its ETC-designated service area, use its own facilities or a combination of its own facilities and resale of another carrier's service in providing these services, and advertise the availability and price of these services.² While the list of designated services may change over time,³ FCC rule § 54.101(a) currently designates the following services:

1. voice grade access to the public switched network
2. local usage
3. touch-tone service or its functional equivalent
4. single-party service
5. access to emergency services, including 911 and enhanced 911
6. access to operator services
7. access to interexchange services
8. access to directory assistance
9. toll limitation for qualifying low-income customers

This Commission has the responsibility for designating ETCs in Minnesota except where it lacks jurisdiction over an applicant.⁴

An applicant for ETC status must make several showings before it is deemed eligible for ETC status under the Act. These requirements are found in 47 U.S.C. § 214(e). First, the applicant must be a common carrier. Second, the applicant must offer the services that are supported by federal universal service support mechanisms under 47 U.S.C. § 254(e). Third, the applicant must do so either using its own facilities or a combination of its own facilities and resale of another carrier's services. Fourth, the applicant must offer the identified services throughout the service area for which the designation is received. Fifth, the applicant must advertise the supported services and charges therefor throughout the service area for which the designation is received using media of general distribution.⁵

Once a state commission determines that an applicant meets these five requirements, the applicant is entitled to receive ETC status unless the applicant is seeking to serve exchanges in which the incumbent local exchange carrier is a rural telephone company. If the applicant is seeking ETC status in an area served by a rural telephone company, the state commission must make an additional finding that the designation is in the public interest.

III. COMMISSION'S ANALYSIS AND ACTION

The Commission is required to confer ETC status on Nextel if it finds that the Company meets the requirements of 47 U.S.C. 214(e)(1)(A) and (B) and, since Nextel seeks designation in areas served by rural telephone companies, the public interest standard of 47 U.S.C. 214(e)(2).

² 47 U.S.C. § 214(c)(1).

³ 47 U.S.C. § 254(c)(1).

⁴ 47 U.S.C. § 214(e)(6).

⁵ These five requirements are established in 47 U.S.C. § 214(e)(1).

Having reviewed the record developed in this matter and heard the parties' oral arguments, the Commission finds that Nextel has failed to meet the service and advertising requirements of 47 U.S.C. § 214(e)(1), as explained more fully below.

A. Requirement to "Offer Services" Throughout the Service Area

An ETC must offer the services that are supported by federal universal support mechanisms under section 254(c)(1) throughout the service area for which the designation is received.⁶ The FCC has advised in a Declaratory Ruling that a carrier requesting ETC status is not required to provide ubiquitous service at the time of its application.⁷ In the same Ruling, however, the FCC clarified that applicants must support their assertions of ability and willingness to provide service throughout the service area with credible evidence:

We caution that a demonstration of the capability and commitment to provide service must encompass something more than a vague assertion of intent on the part of a carrier to provide service. The carrier must reasonably demonstrate to the state commission its ability and willingness to provide service upon designation.⁸

In this case, Nextel has not adequately supported the assertion in its verified petition that it will meet all service obligations of an ETC. Nextel has acknowledged that there were large areas of its service area that it cannot serve at present. The Company presented no plan for expanding its service capabilities and simply stated that receipt of the universal service funding would change (in unspecified ways) the economic model that might (no guarantee or analysis to show reasonable likelihood) make expansion (of unspecified extent) into some (unspecified) areas possible. The extent to which the economic model would change was not specified. No guarantee of expansion or analysis was provided to demonstrate the likelihood of expansion. No areas were identified for expansion. At the same time, the Company stated that the cost of installing one additional signal tower was approximately \$250,000 to \$300,000 and that the annual revenue initially anticipated from the universal service fund is approximately \$100,000.

In these circumstances and based on this record, therefore, the Commission finds that Nextel has failed to demonstrate that it is willing and able to serve "throughout the service area for which the designation is received . . ." as required of an ETC by 47 U.S.C. § 214(e)(1).⁹

⁶ 47 U.S.C. § 241(c)(1).

⁷ *In the Matter of Federal-State Joint Board on Universal Service Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission*. Declaratory Ruling, CC Docket 96-45, FCC 00-248, 15 FCC Rcd at 15175, Paragraph 17 (August 10, 2000) (Declaratory Ruling).

⁸ Declaratory Ruling, Paragraph 24.

⁹ In its July 31, 1998 Order in Docket No. P-5508/M-98-561, the Commission denied a petition for ETC status by Crystal Communications, a Minnesota competing local exchange company (CLEC), on the basis that the record in the case was insufficient to conclude that the applicant would offer the required services throughout the service area for which the designation

B. Requirement to Advertise the Supported Services Throughout the Service Area

An applicant must also be willing and able to advertise the availability of and the charges for the services that are supported by the federal universal service support mechanisms 1) throughout the service area for which ETC designation is sought and 2) using media of general distribution.¹⁰

In its petition filed April 24, 2003, Nextel stated that it would advertise the availability of the supported services and charges therefor using media of general distribution. Nextel stated that after being designated an ETC, it would continue to advertise its services in designated areas and work with the Department to develop an advertising plan consistent with what other ETCs implemented.

The Department objected that Nextel did not include an advertising plan nor had it provided detail regarding its plans specifically to advertise its universal service offering(s) and the availability of Lifeline and Link-Up for qualifying customers, either to advertise the availability of a basic universal service offering or to advertise the availability of the nine supported services throughout its proposed service area.

In its May 12, 2003 reply to MIC's and Citizens' challenge to the completeness of its petition, Nextel stated that it would file supplemental information, including an advertising plan. On July 28, 2003, it filed supplemental information, including a document entitled Advertising Plan of NPCR, Inc.

On August 18, 2003, the Department argued that the advertising information provided by Nextel was inadequate. The Department stated that Nextel had failed to provide a plan to advertise a basic universal service offering or to advertise the availability of the nine supported services throughout its proposed service area.

The Commission finds that Nextel fails to meet the advertising requirement of 47 U.S.C. § 214(e)(1)(B) because it has not submitted an advertising plan adequate to demonstrate its intent and ability to advertise the availability of the nine supported services throughout its proposed service area. In light of the Company's inability to serve throughout its requested area, as found above, Nextel's assertion that it will advertise throughout the area as required by law is not an adequate substitute for submitting an actual advertising plan whose scope and detail demonstrates the Company's intent and capability to advertise the availability of the nine supported services throughout its proposed service area.

Because the Nextel application fails the "advertise" requirement of 47 U.S.C. § 214(c)(1)(B) for reasons explained in the preceding paragraph, it is unnecessary to reach the further issue whether it

was requested. *In the Matter of Crystal Communications' Petition to Become an Eligible Telecommunications Carrier*, Docket No. P-5508/M-98-561, ORDER GRANTING IN PART, DENYING IN PART, STATUS AS ELIGIBLE TELECOMMUNICATIONS CARRIER (July 31, 1998), at page 5.

¹⁰ 47 U.S.C. § 214(e)(1).

also fails that requirement because it did not include an advertising plan for a basic affordable universal service offering.¹¹

C. Affordability: a Public Interest Consideration

To date, Nextel has refused to offer, let alone advertise, a particular universal service offering as distinguished from any of its other service offerings. Nextel has asserted that requiring an applicant to offer a lower cost "affordable" rate would be impermissible rate regulation. Nextel argued that although offering and advertising such a service (a separate and distinct lower cost universal service offering) was the way that past applicants¹² have chosen to meet the "offer and advertise" requirements of 47 U.S.C. § 214(e), the law does not require that an applicant make such an offering in order to qualify for ETC status. In addition, Nextel asserted that there are no standards on what can be considered affordable and nothing in the record to indicate that Nextel's offerings were not affordable.

Nextel stated that, even though it offered no particularized lower cost universal service offering, each of its regular, nationally offered and advertised offerings provide all the required functionalities, i. e., the nine supported services listed by the FCC in 47 C.F.R. § 54.101(a). As a consequence, Nextel argued, offering its nationally offered set of services meets the "offer" requirement of 241(c)(1)(A) and advertising those services meets the "advertise" requirement of 241(c)(1)(B).

The Department countered that in the context of ETC designation for receipt of public funds requiring an applicant to offer at least one "affordable" (in the sense of "lower cost") service that contains some level of local service does not constitute prohibited rate regulation. The Department cited 47 U.S.C. 254(i):

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

The Department noted that the FCC rules permit a state commission to designate additional qualifying ETCs for areas served by a rural telephone company only if the state commission finds that the designation of more than one carrier is in the public interest. The Department noted that the FCC has not defined the public interest factors that the state Commission may or should consider when designating an additional ETC in a rural service area. According to the Department,

¹¹ Not reaching the affordability issue at this time in the context of the advertising requirement is also appropriate because, as explained next in section C, affordability is a public interest consideration which is reached only if Nextel's next application for ETC status meets the threshold ETC requirements of 47 U.S.C. 214(e)(1)(A) and (B).

¹² Western Wireless Corporation (fka Minnesota Cellular Corporation) in Docket No. P-5695/M-98-1285; Tekstar Communications, Inc. in Docket No. P-5542/M-01-1865; Midwest Wireless Communications, L.L.C. in Docket No. P-573/AM-02-686; and RCC Minnesota, Inc. and Wireless Alliance, LLC (filing jointly as affiliates of Rural Cellular Corporation) in Docket No. PT-6182, 6181/M-02-1503.

however, there can be no doubt that affordability is a public interest factor. The Department noted that state Commissions have been given the primary role in evaluating the affordability factor. The Department cited the following FCC statement:

We agree with the [Federal-State] Joint Board [on Universal Service] that states should exercise initial responsibility, consistent with the standards set forth above, for determining the affordability of rates. . . . As the Joint Board determined, the unique characteristics of each jurisdiction render the states better suited than the Commission to make determinations regarding rate affordability.¹³ [Bracketed material added.]

Based on the parties' arguments and a review of the statutory and regulatory framework, the Commission finds that affordability is an appropriate public interest factor to consider during any public interest evaluation of an application from Nextel.

The public interest evaluation of an application such as Nextel's, however, is properly conducted after the applicant is found to have met the threshold statutory requirements of 47 U.S.C. § 214(e)(1).¹⁴

As noted previously in this Order, Nextel has not met all those requirements. Therefore, the public interest factors applicable to Nextel's application (which include affordability and service quality) are not ripe for consideration at this time. Accordingly, the Commission will make no findings at this time whether, for example, the public interest requires Nextel to provide, as the Department has argued, at least one affordable lower cost alternative service offering that includes some level of local calling.

IV. LOOKING AHEAD

The denial of Nextel's application will be without prejudice. In the event that Nextel refiles with new information that persuades the Commission that it meets the threshold requirements of

¹³ *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, FCC 97-157, "Report and Order," 12 F.C.C. Rcd 8776 (rel. May 8, 1997) ¶ 108 aff'd in part and reversed in part, *Texas Office of Pub Utility Counsel v. FCC* 183 F.3d 393 (5th Cir. 1999) ¶ 118.

¹⁴ Analysis under 47 U.S.C. § 214(e) of applications for ETC status in an area served by a rural telephone is a two step process. The first step is to determine whether the applicant meets the threshold statutory requirements of 47 U.S.C. § 214(e)(1)(A) and (B). If so, the second step is to determine whether the applicant satisfies the public interest standard of 47 U.S.C. § 214(e)(2). The two-step analysis followed by the Commission in this Order is consistent with the approach used by the Administrative Law Judge (ALJ) and by the Commission in the two most recent ETC applications: Midwest Wireless Communications, Docket No. PT-6182, 6181/M-02-1503 and RCC Minnesota, Inc./Wireless Alliance, Docket No. PT6153/AM-02-686.

47 U.S.C. § 214(e)(1)¹⁵, the Commission will undertake the public interest evaluation of that application.

An applicant for ETC designation bears the burden of proof on all the federal and state requirements and considerations applicable to its application. Information adequate to meet the filing requirements on Minn. Rules, Part 7811.1400, subp. 4 is not necessarily adequate to meet the applicant's burdens of proof and persuasion on all issues relevant to the application. An applicant, therefore, is advised to build a complete record containing much information beyond the Commission's filing requirements.

In previous proceedings involving applications for ETC designation in areas served by rural telephone companies, the Commission has directed applicants to provide several specific items beyond what was required to meet the initial filing requirements.¹⁶ With no attempt to be comprehensive, the Commission has listed in footnote 14 two informational items relevant to meeting the Phase 1 threshold requirements.¹⁷ The Commission believes that the following information would be relevant to the public interest evaluation:

1. a detailed description of a basic universal service offering or affordable alternative or an explanation of why it would be in the public interest to give an applicant access to universal service funding if that applicant does not offer an affordable lower cost service that specifically preserves and advances universal service;
2. a tariff or price list showing the list, prices and terms of offered services including local usage levels and calling areas for which the applicant seeks universal service support, including the terms and rates for the basic universal service package, along with references to Lifeline and Link-Up and other services which may be added to the basic universal service package;

¹⁵ Information relevant to those determinations would include 1) an advertising plan specific to a basic universal service offering, the nine-supported services, and the availability of Lifeline and Link-Up for qualifying customers and 2) a list of facilities used to provide services in the area in which Nextel seeks certification.

¹⁶ In addition, in its Order designating each of Minnesota's incumbent local exchange companies (ILECs) as ETCs, the Commission required each ETC to submit an advertising plan, including a description of available services and their rates; the geographic area where those services are available; the medium of publication of the advertising, including the names of, and geographic areas served by, the newspapers in the plan, and the size and the type of the advertising. *In the Matter of the Request by Members of MIC for Designation as an Eligible Telecommunications Carrier and Temporary Suspension of Certain Toll Restrictions* and *In the Matter of the Requests by Other Incumbent LECs for ETC Designations*, Docket No. P-999/M-97-1270, ORDER DESIGNATING PETITIONERS AS ELIGIBLE TELECOMMUNICATIONS CARRIERS (December 23, 1997).

¹⁷ The Phase 1 threshold requirements appear in 47 U.S.C. § 214(e)(1)(A) and (B).

3. a customer service agreement that defines a service quality plan consistent with the Company's claim to provide high quality services, including dispute resolution policies, network maintenance policies, procedure for resolving service interruptions, any customer remedies offered, and Nextel's billing, payment, and deposit policies;
4. a list of and Nextel's commitment to its federal obligations regarding its service area;
5. information typically gathered from ETCs in the annual certifications;
6. description of the process the Company will use to track and make available to the Commission and the Department, upon request, the following: (a) held orders for customer premises equipment and for either the basic universal service plan or any services the Company relies on to meet the "offer" requirement of 47 U.S.C. § 214(e)(1)(A) for more than 30 days and (b) customer complaints or disputes related to service quality, including reports of interrupted service for the basic universal service plan and for any service the Company relies on to meet the "offer" requirement of 47 U.S.C. § 214(e)(1)(A).

This Order will not contain a directive for Nextel to include any particular information with its next application because to do so would be premature. Moreover, the Department, any intervening party, and Commission Staff can submit Information Requests to the Company for any information they deem relevant. As in previous proceedings, however, it is unlikely that the Commission will begin the 180 day processing period prescribed in Minn. Rules, Part 7811.1400, subp. 12 until the information referenced has been filed.¹⁸

ORDER

1. Nextel's application for designation as an eligible telecommunications carrier (ETC) for the purposes of receiving universal service funding is denied without prejudice.

¹⁸ The Commission took this view in the two most recent ETC proceedings. See *In the Matter of the Petition by RCC Minnesota, Inc. and Wireless Alliance, L.L.C. for Designation as an Eligible Telecommunications Carrier Under 47 U.S.C. § 214(e)(2)*, Docket No. PT-6182/M-02-1503, ORDER REQUIRING ADDITIONAL FILING, VARYING TIME PERIOD AND NOTICE AND ORDER FOR HEARING (November 4, 2002) at pages 4 and 9; and *In the Matter of the Petition by Midwest Wireless Communications, L.L.C. for Designation as an Eligible Telecommunications Carrier Under 47 U.S.C. § 214(e)(2)*, Docket No. P-573/AM-02-686, ORDER REQUIRING ADDITIONAL FILINGS, VARYING TIME PERIOD AND NOTICE AND ORDER FOR HEARING (July 5, 2002) at pages 3-5 and 8.

2. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION



Burl W. Haar
Executive Secretary

(S E A L)

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In the Matter of NPCR, Inc., Petition
for Designation as an eligible
Telecommunications Carrier
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BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Application) Application No. C-2932
of Amended NPCR, Inc., d/b/a)
Nextel Partners, Eden Prairie,)
Minnesota seeking designation as) DENIED
an eligible telecommunications)
carrier that may receive)
universal service support.)
) Entered: February 10, 2004

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BY THE COMMISSION:

B A C K G R O U N D

By application filed April 24, 2003, NPCR, d/b/a Nextel Partners (NPCR or Applicant) of Eden Prairie, Minnesota, seeks a designation as an eligible telecommunications carrier (hereinafter, ETC) so that it may receive federal universal service fund support. The application was amended by NPCR on April 28, 2003. Notice of the application was published in The Daily Record, Omaha, Nebraska, on April 30, 2003. No protests or interventions were filed. A hearing on the application was held on July 17, 2003, in the Commission Hearing Room, with appearances as shown above.

The application provides that NPCR seeks designation in several of Qwest's wire centers and in the rural study areas of

Arlington Telephone Company, Blair Telephone Company, Clarks Telephone Company, Diller Telephone Company, Eastern Nebraska Telephone Company, Hamilton Telephone Company, Hartington Telephone Company, Henderson Cooperative, Hooper Telephone, Sodtown Telephone Company, Southeast Nebraska Telephone Company and Stanton Telecom, Inc. (See Attachment 1 to Exhibit 3, hereinafter "Attachment 1".)

In support of the application, NPCR presented one witness, Mr. Scott Peabody, director of engineering for NPCR. In addition to the application and amended application, which were offered and received into evidence as Exhibits 3 and 3(a), NPCR offered the pre-filed testimony of Mr. Peabody into the record. In summary of his written testimony, Mr. Peabody stated that NPCR meets all of the requisite criteria for a grant of ETC status.

NPCR is a Delaware corporation with a principal place of business located in Eden Prairie, Minnesota. NPCR was formed in 1998 to build out and operate a digital mobile network in mid-size, small and rural markets using the Nextel Communications brand name. NPCR launched service in Nebraska in 2000. NPCR has obtained licenses from the Federal Communications Commission (FCC) to operate in territories where 53 million people live and work. NPCR built a self-site network covering over 36 million people in 31 states. Nextel Communications and NPCR are separate companies, though they are working together through strategic agreements. The partnership arrangement has allowed NPCR to offer the same services to rural consumers as those offered to urban consumers by Nextel Communications at the same or similar rates.

The application and pre-filed testimony state generally that NPCR is a common carrier and provides the supported services including voice-grade access to the public switched network, local usage, dual tone, a functional equivalent to dual-tone, multi-frequency signaling, single-party service, access to emergency services, access to operator services, access to interexchange service, access to directory service, and will, upon designation, provide toll limitation for low-income consumers. NPCR's application also states that NPCR will offer and advertise the availability of supported services within the designated areas.

Mr. Peabody further testified that with an ETC designation, NPCR will be eligible to compete on a level playing field with its competitors. According to Mr. Peabody, in rural areas, public interest is served by bringing consumer choice, innovative services and new technologies to the designated

areas. Specifically, the application avers that the public interest test is or will be met because: 1) NPCR's request covers enough territory to prevent cherry-picking, 2) that NPCR will be able to provide universal service on a more competitively neutral basis, 3) that NPCR will provide supported services to Nebraska consumers with service offerings that will be different from landline offerings, 4) that deployment and wireless network expansion will continue with universal service support, 5) that incumbent local exchange carriers (LECs) will be given the incentive to improve their existing networks in order to remain competitive, 6) that NPCR will provide all of the supported services required by the Commission and will allow NPCR to compete on a level playing field, and 7) to promote the extensive role NPCR plays in the provision of communications services to Nebraska public schools, libraries and local, state and federal government agencies.

O P I N I O N A N D F I N D I N G S

In reviewing an application for eligible telecommunications carrier designation, the Commission looks to Sections 254(b) and 214(e) of the Telecommunications Act of 1996 (the Act), in conjunction with applicable FCC rules and regulations.

Section 254(b) of the Act defines universal service by outlining six principles:

1. Quality services should be available at just, reasonable and affordable rates.
2. Access to advanced services should be provided in all regions of the nation.
3. Consumers in all regions of the nation should have access to services (including advanced services) at rates that are reasonably comparable to those in urban areas.
4. All telecommunications providers should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service.
5. There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.
6. Schools and libraries should have access to advanced services.

In 1997, the FCC released its Universal Service Report and Order in CC Docket 96-45, FCC 97-157 (Universal Service Order), which implemented several sections of the Act. The FCC's Universal Service Order provides that only eligible

telecommunications carriers designated by a state commission shall receive federal universal service support. Section 214(e) of the Act delegates to the states the ability to designate a common carrier as an ETC for a service area designated by the state commission. A service area is the geographic area established for the purpose of determining the universal service obligation and support eligibility of the carrier. The FCC also provided that "competitive neutrality" should be an added universal service principle.

Section 214(e)(1) provides that an ETC Applicant shall:

- Throughout the service area** for which such designation is received-
- (A) offer the services that are supported by federal universal service support mechanisms under section 254 . . . ; and
 - (B) advertise the availability of such services and the charges therefore using media of general distribution.

The FCC's supported services are found in 47 C.F.R. § 54.101(a) and are as follows:

- a. voice grade access to the public switched 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 services;
- h. access to directory assistance; and
- i. toll limitation for qualifying low-income consumers.

Upon review of the application and testimony presented, the Commission finds that Applicant offered only generalized statements that it has the ability to provide the supported services listed in a-i, above.

Federal law further provides that:

In the 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), establish a different definition of service area for such company.

Section 214(e)(2) generally provides,

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). (Emphasis Added).

In an area served by rural carriers Section 214(e)(2) further requires ETC Applicants to demonstrate to the state Commission that the designation of **an additional** ETC is in the public interest. (Emphasis Added).

The Commission previously found in its Western Wireless Order that it was not necessary for an ETC to be offering the supported services and advertising the availability and charges of the services *prior to* ETC designation. However, in that ruling the Commission also found that Western Wireless had presented sufficient and credible evidence that it was willing and capable of meeting the requirements of Section 214(e)(2) and had every intention of carrying out its plan to provide the supported telecommunications services *throughout the designated area*. Western Wireless provided detailed evidence as to how its basic universal service offering (BUS) was to be provided over a wireless access unit and antenna combination that was capable of reaching even the most insular rural areas of the state.

Unlike the case in Western Wireless, the evidence presented in this case, does not convince the Commission that the Applicant is likewise capable of meeting the requirements of Section 214(e)(2). Nor does the evidence indicate to the Commission that the Applicant is willing to meet the basic requirements of Section 214 (e)(2).

The Commission further finds that the Applicant has not presented a clear plan and timetable for providing the supported services throughout the designated territory. Upon questioning, the Applicant stated that it would be difficult to follow any parameters set by the Commission in relation to the provisioning of service. (Transcript at 53:8-20). Applicant claims the Commission does not have the ability to set any reasonable parameters to ensure that the requirements of Section 214(e)(2) are fulfilled. This testimony creates concerns in relation to NPCR's willingness to serve the entirety of the study areas for which NPCR has requested designation.

In sum, the Commission finds that NPCR has not provided sufficient evidence that it is willing and capable of meeting the core eligibility requirements of section 214(e). NPCR failed to provide sufficient evidence that it can provide the supported services listed in 47 C.F.R. § 54.101 et seq. and failed to demonstrate to the Commission that it is willing to serve the entire designated area.

We also interpret the language in Section 214(e)(2) to mean that the Commission is only obligated to designate more than one ETC in a given territory served by non-rural carriers. Specifically, Section 214 (e)(2) reads that upon a finding that it is consistent with public interest and necessity, the Commission **shall** designate **more than one** ETC in an area served by a non-rural company. The plain construction of the phrase "**more than one**" in the Commission's opinion means the designation of a second ETC is required upon a finding that said ETC Applicant has satisfied the requirements of the Act and FCC regulations. However, the Commission finds that the literal reading of Section 214(e)(2) stops there. The Commission believes that the designation of a third or fourth ETC in a given territory served by a non-rural carrier is purely discretionary. In light of this interpretation, the Commission finds that it has already satisfied the requirement in Section 214(e)(2) by designating more than one ETC in all of the proposed non-rural territory described by NPCR in Attachment 1 to its application.

In addition, with respect to the request to be designated as an additional ETC in the rural areas outlined in Attachment 1, the Commission finds that the Applicant has not sufficiently proven that designation is in the public interest.

To demonstrate public interest, the Applicant's witness testified that the addition of it as a competitor and the introduction of new technologies in the rural market satisfy the public interest test. To further support its argument that a

designation is in the public interest, the Applicant states that the Commission should review its application against this Commission's Western Wireless Order. If we would do so, NPCR's application would fall short of the standards set by the Commission. First, as stated above, we do not believe Applicant has shown that it is willing to provide the supported services throughout the designated territory. We do not believe that Applicant's proposed service territory is large enough to properly address our concerns relating to "cherry picking." Moreover, there is no indication that a designation in the present case would lead to "increased" competition. Finally, while the Commission did provide an analysis of public interest in the Western Wireless case, the Commission believes that a public interest analysis requires a case-specific finding. A review of public interest requires the Commission to carefully balance the public benefits and public harms of approving an ETC application. This requires the Commission to look at the environment at the time designation is sought. In the present case, Applicant is already providing the wireless service throughout its licensed territory in Nebraska. Applicant offered no evidence that it will, in fact, extend its service or provide better service than presently being offered. Instead, Applicant has made generalized statements with respect to public interest, which even if true, would not distinguish itself from any other wireline or wireless provider.

Nonetheless, we will address NPCR's claims individually. First, NPCR claims that its proposed territory is large enough to prevent cherry-picking. We do not believe that it is. NPCR does not give any other information to back this claim with the exception of a map, which outlines its licensed territory and signal strength. (See Exhibit 8). Exhibit 8 demonstrates that large regions of territory served by Eastern Nebraska Telephone and Stanton will go unserved while the higher populated areas will continue to receive NPCR's service. In response to Commission questions, Applicant could not give the Commission a time frame in which to expect all proposed designated areas to be served. Further, unlike Western Wireless, NPCR's application covers only a part of the eastern portion of the state, leaving the western half of the state unserved. We do not think the proposed territory is large enough to prevent cherry-picking.

Next, NPCR states that with federal support, it will be able to provide universal service on a more competitively neutral basis. Competitive neutrality was added by the FCC to the Section 254 list of universal service principles. Contrary to the position of NPCR, we find that the goal of competitive neutrality is not automatically met with the designation of an additional ETC in the areas served by rural companies. As NPCR

is already successfully providing a wireless service in that area, there is no reason to believe that NPCR needs a subsidy to level the competitive playing field. Federal subsidies flowing to NPCR may result in just the opposite, a windfall to Applicant, particularly when this Applicant is unwilling to submit to some basic state-imposed requirements such as equal access, the filing of tariffs and service quality benchmarks.

Third, NPCR states that it will provide supported services to Nebraska consumers with service offerings that will be different from landline offerings. NPCR is providing service in the proposed territory now. There was no evidence produced which would indicate that this ETC designation would produce better or more valuable services than those currently available to rural consumers. Although NPCR claims that it will expand deployment of its wireless network as it receives universal service support, it brought forth no specific evidence of where and when it plans to do so. In fact, the NPCR witness stated in the hearing that NPCR could not give any timetable for any such expansion.

Further, NPCR claims that incumbent local exchange carriers (ILECs) will be given the incentive to improve their existing networks in order to remain competitive. We do not believe this to be true. Because NPCR does not directly compete with the service of the rural incumbent carrier, there would be no incentive for the incumbent LECs to make any improvements. Moreover, we note that current state universal service mechanisms already give incumbent LECs incentives to improve their existing networks.

Finally, NPCR states that public interest is met because designation will promote the extensive role NPCR plays in the provision of communications services to Nebraska public schools, libraries and local, state and federal government agencies. NPCR offered no specific evidence of how this would come about or where universal service support would be invested.

In today's marketplace, we find that the question to be answered is whether subsidizing NPCR's service offering in the proposed Nebraska rural territories is good public policy. Looking back to its 2000 Western Wireless decision, the Commission finds that perhaps its public interest analysis wasn't rigorous enough and tailored enough to the goals of universal service. To be sure, the Commission was more concerned at that time with bringing competition to the rural areas of Nebraska. Since then, the environment and the Commission's focus has changed. The Commission believes that universal service is not a vehicle by which competition should

be artificially created. The purpose of universal service is not to promote competition. Rather, the purpose of universal service is found in section 254 of the Act. To this end, the Commission's role is to ensure that the universal service principles continue to be served in a competitive environment.

As we noted in our Western Wireless Order,

The mere provision of additional competition by the entry of another ETC into a rural area is not sufficient in and of itself as a demonstration of the public interest. We accept the argument made by the Intervenors that, "Competition is not tantamount to public interest." If that were the case, no public interest test review would be necessary since any and all new competitors would represent additional benefit to the public.

In light of the current environment, we find that the real issue to consider is whether Applicant's competitive efforts in the proposed territory should be subsidized by payments from the federal USF. We find they should not. As the Applicant's case demonstrates, no federal subsidy is necessary to bring Applicant's service to the rural areas. Applicant is already serving the rural areas and bringing new technologies to these areas without the assistance of a federal subsidy. We further believe an ETC designation would not place Applicant on a level playing field with the incumbent carriers. Rather, a grant of the application would grant to the Applicant distinct advantages over the incumbent carriers, jeopardizing their ability to serve all of their subscribers adequately and jeopardizing the principles set forth in section 254. In addition, Applicant is virtually unregulated in terms of service quality, and Applicant has no equal access obligations that the incumbent carriers have. Unlike Western Wireless, Applicant was unwilling to submit its service to some service quality benchmarks, file tariffs, or consent to the Commission's general jurisdiction over consumer complaints. Consumers in the proposed territory are already receiving telecommunications services from the Applicant without additional costs. If this application is granted, consumers would be required to bear the additional costs necessary to subsidize the service provided by the Applicant. Accordingly, we find that the public costs in granting an ETC designation in the territory served by the rural carriers outweighs any supposed benefits offered by Applicant.

In sum, we find NPCR's application for ETC designation in the proposed territories described in Attachment 1 to the

application served by non-rural carriers and by rural carriers should be denied.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that the application of NPCR d/b/a Nextel Partners should be and it is denied.

MADE AND ENTERED at Lincoln, Nebraska, this 10th day of February, 2004.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Chairman

ATTEST:

Executive Director

Commissioners Anne Boyle and Lowell Johnson dissenting:

We respectfully dissent. NPCR, d/b/a Nextel Partners (NPCR) filed this application seeking eligible telecommunications carrier (ETC) designation in areas served by Qwest and a number of rural independent companies. The Commission duly published notice of the application and placed all carriers on notice of NPCR's intentions. Even though there has been great controversy at the state and national level regarding designation of ETC status, no party opposed or intervened. It is well established that the "failure to timely file a protest shall be construed as a waiver of opposition and participation in the proceeding." See Neb. Admin. Code Title 291, Chapter 1, Section 014.01.

Nevertheless, in order to ensure that NPCR's offering satisfied all criteria outlined in the federal Telecommunications Act of 1996 (the Act), the Nebraska Public Service Commission (NPSC) chose to hold a hearing. NPCR, through its witness, offered into the record evidence on each element of proof necessary. The Commission accepted the evidence and did not dispute NPCR's claim that they had met all criteria required by the Act.

We are very concerned about the Federal Universal Service Fund (USF) from which ETCs draw funding. As the FCC has recognized, designation of additional ETCs draws more from the USF, which is suffering from ever-increasing demands and diminishing sources of revenue. Some rural associations have criticized states for cursorily granting ETC designation. However, we do not believe that the states should be to blame as the term "public interest" has been an ill-defined and ever changing test. At the time of the hearing on this application, the FCC hadn't offered clear guidelines to states to determine public interest. It was only recently, that the FCC, by Memorandum Opinion and Order involving Virginia Cellular, Inc., gave states a specific framework for making their public interest judgments.¹ However, the FCC explained that its public interest analysis may again be altered due to the Joint Board's deliberations and any other public interest framework that the FCC may adopt.

In reviewing this application, we question whether designation of ETC status in rural areas where competition may harm existing carriers of last resort. At the same time we consider whether customers are well served without the benefit of choice. A competitive ETC does not draw until it begins to provide service. Therefore, the only tests states can consider

are the objective criteria set by the Act and the public interest.

We are hopeful that the FCC will give states more authority to look to a number of relevant factors prior to designation. If states are to consider the size of the fund, the FCC should compute a formula to determine the amount each state should receive. A federal/state partnership would allow each state to administer their portion of the fund. Currently carriers simply certify they are properly using provided funds. State administration would allow closer scrutiny to ensure proper use of funds. Currently, states have no control over the size or disbursements from the federal USF.

Based on the record in this case, it is our opinion that the NPSC is legally unable to make a decision to deny an ETC application simply because of the aforementioned concerns. With no protests, no dispute that necessary criteria had not been met and no provision in the Act for state discretion to deny an application other than those previously mentioned, the application should be granted.

Anne C. Boyle

Lowell C. Johnson

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF ALLTEL)
COMMUNICATIONS, INC.'S PETITION)
FOR DESIGNATION AS AN ELIGIBLE)
TELECOMMUNICATIONS CARRIER)
PURSUANT TO SECTION 214(e)(2) OF)
THE COMMUNICATIONS ACT OF 1934.)
_____)

Case No. 03-00283-UT

**ORDER VACATING BRIEFING SCHEDULE
AND SETTING STATUS CONFERENCE**

THIS MATTER comes before the undersigned Hearing Examiner in this case *sua sponte*, in part, because of the Federal Communications Commission's Memorandum Opinion and Order released on January 22, 2004, in *Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, CC Docket No. 96-45. The Hearing Examiner being otherwise fully advised in the premises, hereby orders as follows:

1. The briefing schedule set at the conclusion of the hearing held on November 19, 2003, and continuing on November 20, 2003, requiring briefs to be filed on March 1, 2004, is hereby vacated.
2. A status conference is hereby set for March 16, 2004, at 2:00 P.M. at the offices of the Commission, Marian Hall, 224 East Palace Avenue, Santa Fe, New Mexico.

ISSUED at Santa Fe, New Mexico, this 27th day of February, 2004.

NEW MEXICO PUBLIC REGULATION COMMISSION

MARILYN S. HEBERT, Hearing Examiner

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

In the Matter of)	
)	
Federal-State Joint Board on)	CC Docket No. 96-45
Universal Service)	
)	
Multi-Association Group (MAG) Plan for)	CC Docket No. 00-256
Regulation of Interstate Services of)	
Non-Price Cap Incumbent Local Exchange)	
Carriers and Interexchange Carriers)	

**FOURTEENTH REPORT AND ORDER, TWENTY-SECOND ORDER ON
RECONSIDERATION, AND FURTHER NOTICE OF PROPOSED RULEMAKING
IN CC DOCKET NO. 96-45, AND REPORT AND ORDER IN CC DOCKET NO. 00-256**

Adopted: May 10, 2001

Released: May 23, 2001

Comment Date: 30 days from publication in the Federal Register

Reply Comment Date: 60 days from publication in the Federal Register

By the Commission: Chairman Powell and Commissioner Ness issuing separate statements; Commissioner Furchtgott-Roth concurring in the result.

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which support is targeted to high-cost wire centers.⁴³⁴ The Personal Communications Industry Association (PCIA) requests that the Commission clarify how to determine which wire center should be used to determine the amount of support for any particular wireless customer.⁴³⁵ PCIA contends that a customer's address is the most accurate surrogate for the incumbent's wire center and therefore support for mobile wireless customers should be based on the wire center associated with the customer's address.⁴³⁶ We grant PCIA's request for clarification of the Commission's decision in the *Ninth Report and Order* to the extent it seeks clarification on the limited issue of assigning mobile wireless customers to the incumbent local exchange carrier's wire center.⁴³⁷ We clarify that a mobile wireless customer's billing address is a reasonable surrogate for the customer's address for assigning the customer's location to a wire-center in a non-rural carrier's study area to target universal service support.⁴³⁸

G. State Certification Under Section 254(e)

1. Background

185. Under section 254(e) of the Act, carriers must use universal service support "only for the provision, maintenance and upgrading of facilities and services for which the support is intended."⁴³⁹ In the *Ninth Report and Order*, the Commission concluded that because the support provided to non-rural carriers is intended to enable the reasonable comparability of intrastate rates, and states have primary jurisdiction over intrastate rates, it is most appropriate for states to determine whether support is used consistent with section 254(e).⁴⁴⁰ Accordingly, the Commission adopted, as a regulatory safeguard, rules requiring states seeking federal universal service high-cost support for non-rural carriers within their territory to file annually a certification with the Commission and USAC. The certification must state that all federal high-cost funds flowing to non-rural carriers in that state and/or competitive eligible telecommunications carriers seeking high-cost support in the service area of a non-rural carrier in that state, will be used in a manner consistent with section 254(e).⁴⁴¹ Absent such certification, a carrier cannot

⁴³⁴ See *id.* at 20470-73 paras. 70-76.

⁴³⁵ See Petition for Reconsideration and/or Clarification of the Personal Communications Industry Association (PCIA Petition), CC Docket No. 96-45 at 4-5.

⁴³⁶ We note that PCIA's petition, in requesting that support for mobile wireless carriers be based on "the wire center associated with the *customer's address*," does not provide additional guidance on the issue of what the customer's address is for mobile wireless carriers. PCIA Petition at 4 (emphasis added).

⁴³⁷ We note that on reply PCIA states no party opposed its recommended approach. See Reply Comments of the Personal Communications Industry Association, CC Docket No. 96-45 at 2.

⁴³⁸ PCIA states that a wireless carrier does not necessarily know the address of a prepay customer, and therefore, it may not be possible to determine support for these customers based on address. See PCIA Petition at 4 n.6. In this Order we do not resolve the issue of how to assign prepaid mobile wireless customers when the carrier does not have customer billing address information. We will review this issue on a case-by-case basis.

⁴³⁹ 47 U.S.C. § 254(e).

⁴⁴⁰ *Ninth Report and Order*, 14 FCC Rcd at 20482 para. 95. The Commission noted that as long as the uses prescribed by the state are consistent with section 254(e), the states should have the flexibility to decide how carriers use the support provided by the federal mechanism. *Id.* at 20483 para. 96.

⁴⁴¹ *Id.* at 20483 para. 97. To ensure that carriers receiving *interstate* access universal service support will use that support in a manner consistent with section 254(e), the Commission adopted a certification scheme requiring carriers seeking such support to file a certification with the Commission stating that the carrier will use its support only for the provision, maintenance, and upgrading of facilities and service for which the support is intended. See *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers*, CC Docket Nos. 96-262 and 94-1, Sixth Report and Order, *Low-Volume Long-Distance Users*, CC Docket No. 99-249, (continued....)

receive support.⁴⁴²

186. In its recommendation, the Rural Task Force recognized the need for accountability in the administration of the high-cost support mechanism for rural carriers.⁴⁴³ The Rural Task Force found that existing procedures used by NECA, USAC, the Commission, and state commissions reasonably promote such accountability. The Rural Task Force recommended that the Commission delegate to the states responsibility for oversight of section 254(e) in a manner similar to that used for non-rural carriers.⁴⁴⁴

2. Discussion

187. We conclude that states should be required to file annual certifications with the Commission to ensure that carriers use universal service support "only for the provision, maintenance and upgrading of facilities and services for which the support is intended" consistent with section 254(e). We conclude that the mandate in section 254(e) applies to *all* carriers, rural and non-rural, that are designated as eligible to receive support under section 214(e) of the Act.⁴⁴⁵ As we concluded with regard to non-rural carriers, the federal high-cost support that is provided to rural carriers is intended to enable the reasonable comparability of intrastate rates, and states have jurisdiction over intrastate rates. Given that states generally have primary authority over carriers' intrastate activities, we believe that the state certification process provides the most reliable means of determining whether carriers are using support in a manner consistent with section 254(e). Accordingly, we will require states that wish to receive federal universal service high-cost support for rural carriers within their boundaries to file a certification with the Commission and USAC stating that all federal high-cost funds flowing to rural carriers in that state will be used in a manner consistent with section 254(e).⁴⁴⁶ Absent such certification, carriers will not receive such support.

188. We recognize that some state commissions may have only limited regulatory oversight to ensure that federal support is reflected in intrastate rates. In the case of non-rural carriers, we concluded that states nonetheless may certify to the Commission that a non-rural carrier in the state had accounted to the state commission for its receipt of federal support, and that such support will be used "only for the provision, maintenance and upgrading of facilities and services for which the support is intended."⁴⁴⁷ We

(Continued from previous page)

Report and Order, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Eleventh Report and Order, 15 FCC Rcd 12962, 13062 para. 232 (*Interstate Access Support Order*), *pets. for review pending*, *Texas Office of Public Util. Counsel et al. v. FCC*, 5th Cir. No. 00-60434 (and consolidated cases) (2000). See 47 C.F.R. § 54.809.

⁴⁴² *Ninth Report and Order*, 14 FCC Rcd at 20484 para. 98. See 47 C.F.R. § 54.313(a).

⁴⁴³ Rural Task Force Recommendation at 33.

⁴⁴⁴ *Id.*

⁴⁴⁵ See 47 U.S.C. § 254(e).

⁴⁴⁶ As explained above, three federal universal service mechanisms provide high-cost support for rural carriers. These include high-cost loop support, LSS and LTS. See *supra* para. 13. High-cost loop support provides support for a portion of a carrier's total cost allocated to the intrastate jurisdiction. Similarly, LSS is available to support the intrastate switching costs of carriers with 50,000 or fewer lines. By contrast, LTS supports interstate allocated loop costs of non-price cap carriers (typically small, rural carriers) that participate in the NECA common line pool. Because the Commission has primary jurisdiction over interstate rates, oversight of the use of LTS lies with the Commission. See *Interstate Access Support Order*, 15 FCC Rcd at 13062 para. 232. We anticipate addressing certification of LTS when we address interstate access reform in the MAG proceeding. See *infra* n.1.

⁴⁴⁷ *Ninth Report and Order*, 14 FCC Rcd at 20483 para. 97.

determined that, in states in which the state commission has limited jurisdiction over such carriers, the state need not initiate the certification process itself.⁴⁴⁸ Instead, non-rural local exchange carriers, and competitive eligible telecommunications carriers serving lines in the service area of the non-rural local exchange carriers, may formulate plans to ensure compliance with section 254(e), and present those plans to the state, so that the state may make the appropriate certification to the Commission.⁴⁴⁹ We conclude that this approach is equally appropriate here with regard to rural carriers and competitive eligible telecommunications carriers serving lines in the service area of a rural local exchange carrier. Absent the filing of such certification, carriers will not receive federal universal service support.

189. We also recognize that, in limited instances, certain carriers may not be subject to the jurisdiction of a state (*e.g.*, certain tribally-owned carriers). In such instances, there is no state regulatory authority to ensure compliance with section 254(e). We conclude that, in these limited instances, a carrier shall certify directly to the Commission that federal high-cost support will be used in a manner consistent with section 254(e). The certification must be filed in the form of a sworn affidavit executed by a corporate officer attesting to the use of the support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended pursuant to section 254(e) of the 1996 Act. A copy of this letter must also be submitted to USAC. Absent such a certification, carriers will not receive federal universal service support.

190. The certification requirement we adopt is applicable to all rural carriers and competitive eligible telecommunications carriers seeking high-cost support in the service area of a rural local exchange carrier. States, or carriers not subject to the jurisdiction of a state, shall file this certification annually. If filed by the state, the certification shall be applicable to all rural carriers and competitive eligible telecommunications carriers seeking high-cost support in the service area of a rural local exchange carrier that the state certifies as eligible to receive federal high-cost during that annual period.⁴⁵⁰ The certification may be filed in the form of a letter from the appropriate state regulatory authority, or authorized corporate officer where the state lacks jurisdiction, and shall be filed with the Commission and USAC. A state may file a supplemental certification for carriers that were not eligible for support at the time the state filed its initial certification. In the event that a state determines that a carrier has not complied with section 254(e), the state shall have the authority to revoke certification. In addition, because states are responsible for filing section 254(e) certifications with the Commission, challenges to the propriety of the certifications, or revocation of the certifications, should be brought at the state level.

191. Under our existing rules, USAC submits to the Commission estimated universal service support requirements, including high-cost support, two months prior to the beginning of each quarter.⁴⁵¹ Thus, for the first quarter of 2002, USAC will submit estimated universal service support requirements on or before November 1, 2001. In order for USAC to submit an accurate estimate of the level of high-cost and local switching support, it will need to know which carriers have been certified pursuant to the section 254(e)-certification process. To allow USAC sufficient time to process section 254(e) certifications and estimate the level of high-cost support, we conclude that certifications should be filed one month before USAC's quarterly filing is due, that is on October 1. In the event that a certification is filed untimely, the carriers subject to that certification will not be eligible for support until the quarter for which USAC's

⁴⁴⁸ *Id.*

⁴⁴⁹ *Id.*

⁴⁵⁰ The timing and effectiveness of these annual certifications are discussed *infra* in para. 191.

⁴⁵¹ 47 C.F.R. § 54.709(a)(3). The Commission uses those support requirements to establish a contribution factor for the upcoming quarter. *See* 47 C.F.R. § 54.709(a). USAC then uses the contribution factor to bill carriers and collect the appropriate amount of support to fund the universal service programs. *Id.*

subsequent filing is due. For example, if a state files a section 254(e) certification after October 1, 2001, but on or before January 1, 2002, the carrier would not be eligible for support until the second quarter of 2002.⁴⁵² In the event that a state revokes a certification, the state must notify USAC and the Commission within 30 days of the revocation.

192. In adopting this certification scheme, we recognize that rural carriers are receiving federal high-cost support under our existing rules and may be entitled to additional levels of federal high-cost support under our revisions to these rules, which will be effective July 1, 2001. We will not, however, require certifications for the last two quarters of 2001. Rather, we will require certifications to be submitted initially on October 1, 2001 for the first full year of implementation, January 1, 2002 – December 31, 2002. We acknowledge that, as a result, we will not have certifications for support distributed for the last two quarters of 2001. We believe that permitting the continued delivery of support during these two quarters without certification will ease the transition to the revised mechanism for states, carriers, and USAC, and ensure that the benefits accruing from its adoption are realized as quickly as possible. We note that we have the authority to take enforcement action against a carrier if we should determine that support is being used in a manner inconsistent with section 254(e).⁴⁵³ We believe that this enforcement power will afford sufficient protection against abuse during this limited period of transition.

193. Finally, we reconsider, on our own motion, the existing rule requiring state certification of the use of universal service support by non-rural incumbent local exchange carriers and eligible telecommunications carriers serving lines in the service area of a non-rural incumbent local exchange carrier adopted in the *Ninth Report and Order*.⁴⁵⁴ In its current form, the rule does not recognize that in limited instances, certain carriers may not be subject to the jurisdiction of a state. As a result, the rule does not provide a mechanism by which such a carrier's use of support can be certified as consistent with section 254(e). Consistent with our determination with regard to rural carriers and eligible telecommunications carriers serving lines in the service area of a rural incumbent local exchange carrier, we conclude that in these limited instances, a carrier shall certify directly to the Commission that federal high-cost support will be used in a manner consistent with section 254(e). The certification must be filed in the form of a sworn affidavit executed by a corporate officer attesting to the use of the support only for the provision, maintenance and upgrading of facilities and services for which the support is intended pursuant to section 254(e) of the Act. A copy of this letter must also be submitted to USAC. Absent such a certification, carriers will not receive support.⁴⁵⁵

H. Advanced Services

1. Background

194. Section 254(c) of the Act defines universal service as an "evolving level of

⁴⁵² See Appendix A for the relevant rules.

⁴⁵³ See *Seventh Report and Order*, 14 FCC Rcd at 8115-16 para. 78. States or other parties may petition the Commission, under section 208 of the Act, if they believe a carrier has misapplied its high-cost support, and may also fully avail themselves of the Commission's formal complaint procedures to bring any alleged misapplication of federal high-cost support before the Commission. See also *Ninth Report and Order*, 14 FCC Rcd at 20488 para. 110.

⁴⁵⁴ See *id.* at 20482-88 paras. 93-110. See also 47 C.F.R. § 54.313. This reconsideration on the Commission's own motion is appropriate given the pendency of petitions for reconsideration of the Commission's *Ninth Report and Order*. See *Central Florida Enterprises v. FCC*, 598 F.2d 37, 48 n.51 (D.C. Cir. 1978), *cert. dismissed*, 441 U.S. 957 (1979).

⁴⁵⁵ See Appendix A for the relevant rule.

telecommunications services that the Commission shall establish periodically[.]”⁴⁵⁶ In 1997, based on consideration of the definitional criteria set forth in section 254(c) and the Joint Board’s recommendations, the Commission designated nine “core” services that are eligible for universal service support: single-party service; voice grade access to the public switched telephone network; Dual Tone Multifrequency signaling or its functional equivalent; access to emergency services; access to operator services; access to interexchange service; access to directory assistance; and toll limitation services for qualifying low-income consumers.⁴⁵⁷

195. The 1996 Act addresses advanced telecommunications and information services in sections 254(b) and 706. Section 254(b) establishes the universal service principles that access to such services should be provided in all regions of the Nation, and should be reasonably comparable in rural, insular, and high-cost areas to the access in urban areas.⁴⁵⁸ Section 706 directs the Commission and the states to utilize various regulatory methods to “encourage deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans[.]”⁴⁵⁹

196. The Rural Task Force recommended that the Joint Board review the definition of services that are supported by the federal universal service mechanisms.⁴⁶⁰ It also recommended that the list of supported services “should evolve to include access to information services at a rate that is reasonably comparable to that provided in urban areas.”⁴⁶¹

⁴⁵⁶ 47 U.S.C. § 254(c)(1).

⁴⁵⁷ *First Report and Order*, 12 FCC Rcd at 8807-25 paras. 56-87; see 47 U.S.C. § 254(c)(1).

⁴⁵⁸ 47 U.S.C. §§ 254(b)(2), (3).

⁴⁵⁹ Section 706(c) of the 1996 Act, reproduced in the notes under 47 U.S.C. § 157; see *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to all Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Second Report, 15 FCC Rcd 20913 (2000) (*Second 706 Report*). Section 706 generally defines advanced telecommunications capability as “high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology. In the *Second 706 Report*, the Commission defined as “advanced” for section 706 purposes services with a transmission speed of at least 200 kilobits per second (kbps) in two directions (provider-to-customer and customer-to-provider), and as “high-speed” services with a speed of at least 200 kbps in one direction. *Section 706 Report*, 15 FCC Rcd at 20921 para. 11.

⁴⁶⁰ Rural Task Force Recommendation at 22. The Rural Task Force stated that “[t]he provision of access to advanced services . . . is separate and distinct from the actual provision of advanced services when and if they have been added to the supported services defined periodically by the FCC under Section 254(c).” *Id.* We note that, contrary to the Rural Task Force’s suggestion, inclusion of a service on the list of supported services under section 254(c) generally means that universal service mechanisms support access to the service, rather than “the actual provision” of the service.” *Id.*; see, e.g., *First Report and Order*, 12 FCC Rcd at 8817 para. 74 (“we support the telecommunications network components necessary for access . . . , but not the underlying services themselves”).

⁴⁶¹ Rural Task Force Recommendation at 23. In 1997, the Commission determined that dial-up Internet access should not be supported separately from voice grade access “because the record does not indicate that a substantial majority of residential customers currently subscribe to Internet access by using access links that provide higher quality than voice grade access.” *First Report and Order*, 12 FCC Rcd at 8823 para. 83. In 1999, the Commission’s Common Carrier Bureau sought comment on requests by the Rural Utilities Service (RUS) and three state commissions to redefine voice grade access by increasing the minimum frequency range from 300-3,000 Hertz (Hz) to approximately 200-3,500 Hz. RUS and these states expressed concerns that the current definition does not ensure that consumers in rural areas using 28.8 kbps modems for Internet access can achieve data transmission speeds reasonably comparable to those achieved by consumers in urban areas using the same (continued....)

197. In addition, the Rural Task Force stated that its recommendation to continue distributing support to rural carriers based on their embedded costs “inherently provides incentives for the infrastructure investments necessary for providing access to advanced services.”⁴⁶² It recommended the adoption of a “no barriers to advanced services” policy for rural carriers, which it indicated would be comparable to that applied in connection with the forward-looking high-cost mechanism for non-rural carriers.⁴⁶³ The Rural Task Force recommended that the “no barriers” policy incorporate the following general principles: (1) support should be provided for plant “that can, either as built or with the addition of plant elements, when available, provide access to advanced services[;]” (2) “carriers should be encouraged by regulatory measures to remove infrastructure barriers relating to access to advanced services[;]” and (3) “[t]he federal universal service support fund should be sized so that it presents no barriers to investment in plant needed to provide access to advanced services.”⁴⁶⁴

2. Discussion

198. The definition of universal service under section 254(c) of the Act is a matter currently pending before the Joint Board. The Commission asked the Joint Board to review the list of supported services and, if warranted, recommend modifications.⁴⁶⁵ Among other things, the Commission asked the Joint Board to consider the record on requests to redefine voice grade access to ensure reasonable comparability of dial-up Internet access in urban and rural areas.⁴⁶⁶ In accordance with section 254(c), the Commission will consider whether any modifications to the list of supported services are warranted after the Joint Board completes its review.⁴⁶⁷

199. We agree with the Rural Task Force that our universal service policies should not inadvertently create barriers to the provision of access to advanced services, and believe that our current universal service system does not create such barriers.⁴⁶⁸ Initially, we emphasize that section 254(b) states that access to advanced services “should” be provided, and the Fifth Circuit has held that section 254(b) establishes “principles that the FCC should consider in developing its policies” rather than specific statutory commands.⁴⁶⁹ As the Rural Task Force recognized, the Commission’s existing high-cost loop support mechanism for rural carriers “inherently provides incentives for the infrastructure investments

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modems. *Common Carrier Bureau Seeks Comment on Requests to Redefine “Voice Grade Access” for Purposes of Federal Universal Service Support*, CC Docket No. 96-45, Public Notice, DA 99-2985 (rel. Dec. 22, 1999).

⁴⁶² Rural Task Force Recommendation at 22.

⁴⁶³ *Id.* The forward-looking high-cost support mechanism for non-rural carriers provides support for plant that does not impede the provision of access to advanced services. See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Forward-Looking Mechanism for High Cost Support for Non-Rural LECs*, CC Docket No. 97-160, Fifth Report and Order, 13 FCC Rcd 21323, 21351-52 paras. 68-70 (1998).

⁴⁶⁴ Rural Task Force Recommendation at 22-23.

⁴⁶⁵ *Referral Order*, 15 FCC Rcd 25257.

⁴⁶⁶ *Id.* at 25256 para. 3; see *supra* n.461.

⁴⁶⁷ See 47 U.S.C. § 254(c)(2) (“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”); NYDPS Comments at 6; Sprint Comments at 3; Texas Commission Comments at 8.

⁴⁶⁸ See Rural Task Force Recommendation at 22; *supra* n.463.

⁴⁶⁹ *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d at 421; 47 U.S.C. § 254(b); cf. Rural Task Force Recommendation at 22-23 (“The provision of access to advanced services is required under Section 254(b) . . . Sections 254(b)(2) and (3) require access to information services that is reasonably comparable to that provided in urban areas.”).

necessary for providing access to advanced services.”⁴⁷⁰

200. Contrary to the arguments of some commenters, use of support to invest in infrastructure capable of providing access to advanced services does not violate section 254(e), which mandates that support be used “only for the provision, maintenance, and upgrading of facilities and services for which the support is intended.”⁴⁷¹ The public switched telephone network is not a single-use network. Modern network infrastructure can provide access not only to voice services, but also to data, graphics, video, and other services. High-cost loop support is available to rural carriers “to maintain existing facilities and make prudent facility upgrades[.]”⁴⁷² Thus, although the high-cost loop support mechanism does not support the provision of advanced services, our policies do not impede the deployment of modern plant capable of providing access to advanced services. Rural carriers may consider both their present and future needs in determining what plant to deploy, knowing that prudent investment will be eligible for support.⁴⁷³ The measures that we adopt in this Order will increase incentives for carriers to modernize their plant by increasing the total amount of high-cost loop support available under the cap.

201. As we move forward in the future, we will consider ways to ensure that we do not create regulatory barriers to the deployment of advanced services. The principal thrust of the “no barriers” proposal appears to be that the Commission should require carriers to deploy plant capable of providing access to advanced services, and encourage them to replace plant that cannot provide such access.⁴⁷⁴ Moreover, we believe any specific policies we adopt in this area should apply uniformly to all local exchange carriers, rather than as part of a transitional high-cost support mechanism for rural carriers.⁴⁷⁵ Therefore, we believe that the “no barriers” policy as specifically proposed by the Rural Task Force should be considered further in connection with our comprehensive review of the high-cost loop support mechanisms for rural and non-rural carriers. In accordance with our mandate under section 706, we will continue to examine whether deployment of advanced telecommunications capability to all Americans is progressing in a reasonable and timely manner, and to consider means by which we can stimulate the further deployment of access to advanced services.⁴⁷⁶

⁴⁷⁰ Rural Task Force Recommendation at 22.

⁴⁷¹ 47 U.S.C. § 254(e); *see, e.g.*, NYDPS Comments at 5-7.

⁴⁷² *First Report and Order*, 12 FCC Rcd at 8939 para. 300.

⁴⁷³ *Id.* Of course, carriers who make such investments using universal service support also must comply with the mandate that support be used “only for the provision, maintenance, and upgrading of facilities and services for which the support is intended.” 47 U.S.C. § 254(e).

⁴⁷⁴ *See* Rural Task Force Recommendation at 22-23. *See also Second 706 Report*, 15 FCC Rcd at 21004 para. 247 (“Because the development of the advanced services market remains in a very early stage, . . . we believe that there is time for us to examine further the factors that affect infrastructure investment and develop policies that will ensure access to needed services, but that are not inappropriately linked to universal service mechanisms for voice telephony”). We note that the Rural Utilities Service makes funding for rural carriers contingent on their use of the funds to deploy plant capable of providing access to advanced services. *See* 7 C.F.R. §§ 1751.100-1751.106. No commenter addressed the Rural Utilities Service’s standards or whether they would comport with federal high-cost universal service mechanisms.

⁴⁷⁵ *See* Maine and Vermont Commissions Comments at 4 (“According to the Rural Policy Research Institute, for every rural customer served by a ‘rural telephone company,’ there are four rural customers served by a non-[rural company]”).

⁴⁷⁶ *See Second 706 Report*, 15 FCC Rcd at 21003-14 paras. 244-268.

I. Interstate Access Universal Service Support for Rate-of-Return Carriers

1. Background

202. The Rural Task Force recommended a number of principles for the Commission to apply in addressing the issue of implicit support for high loop costs within the interstate access rates of rate-of-return carriers (typically rural carriers).⁴⁷⁷ The Commission has taken various measures to reform the access rate structure of price cap carriers.⁴⁷⁸ According to the Rural Task Force, rate disparity between price cap and rate-of-return carriers results from both access rate structure differences and cost differences, and may create significant pressures on interexchange carriers to geographically deaverage toll rates, contrary to the requirements of section 254(g) of the Act.⁴⁷⁹ To reform the access rate structure of rate-of-return carriers, the Rural Task Force recommended that the Commission determine the amount of implicit support within their access rates by calculating the difference between their current access rates and "the appropriate unit prices of interstate access[.]" and then replacing this amount with a new, uncapped support mechanism.⁴⁸⁰ The purpose of the new interstate access support mechanism would be similar to that of the mechanism adopted in the *Interstate Access Support Order* for price cap carriers.⁴⁸¹

203. The Rural Task Force did not recommend a specific method for determining the "appropriate unit prices of interstate access." The Rural Task Force further recommended, among other things, that the new support mechanism be funded by collections from all providers of interstate telecommunications services, that support be subject to geographic deaveraging and targeted to high-cost areas, and that support be portable and available to all eligible telecommunications carriers on an equitable, non-discriminatory, and competitively neutral basis.

204. The Joint Board concurred with the Rural Task Force that the Commission should consider creating an explicit universal service support mechanism to replace support that may be implicit within the access rates of rate-of-return carriers, but acknowledged that access charge issues "are interstate in nature and, therefore, are properly before the Commission."⁴⁸² The Joint Board stated, however, that the MAG plan now before the Commission "raises issues beyond interstate access reform, and proposes universal service policy and procedural changes, including rate comparability under section 254(b)(3) and the overall size of the universal service mechanisms."⁴⁸³ It therefore encouraged the Commission "to ensure the Joint Board remains actively involved in review of those aspects of the MAG plan that relate to universal service."⁴⁸⁴

⁴⁷⁷ Rural Task Force Recommendation at 31-32. Although most rate-of-return carriers are rural carriers, whether a carrier is subject to price cap regulation does not turn on whether it meets the definition of rural telephone company. See generally *Access Charge Reform for Incumbent Local Exchange Carriers Subject to Rate-of-Return Regulation*, CC Docket No. 98-77, Notice of Proposed Rulemaking, 13 FCC Rcd 14238 (1998); see also *supra* n.3.

⁴⁷⁸ See *Interstate Access Support Order*, 15 FCC Rcd at 12962.

⁴⁷⁹ 47 U.S.C. § 254(g).

⁴⁸⁰ Rural Task Force Recommendation at 31.

⁴⁸¹ See *Interstate Access Support Order*, 15 FCC Rcd at 13043-44 paras. 195-97.

⁴⁸² *Recommended Decision* at 10 para. 20.

⁴⁸³ *Id.* As stated above, the MAG plan is an interstate access reform and universal service support proposal for rate-of-return carriers. See *supra* n.1.

⁴⁸⁴ *Id.* The Joint Board further stated that "[a] significant number of Joint Board members urge that this involvement include a referral to the Joint Board of the universal service issues raised by the MAG plan." *Id.*; (continued....)

2. Discussion

205. We find the Rural Task Force's recommended principles for access reform to be reasonable and generally consistent with prior Commission actions to reform the access rate structure of price cap carriers. More specifically, these principles are generally consistent with our prior actions to identify implicit support in interstate access charges and to replace such implicit support with explicit universal service support available to all eligible telecommunications carriers on an equitable, non-discriminatory, and competitively neutral basis.⁴⁸⁵ As the Joint Board recognized, the Commission currently is considering access reform issues in a separate proceeding concerning the MAG plan.⁴⁸⁶ We recognize the importance of completing access reform for rate-of-return carriers, and intend to act expeditiously to resolve issues raised in the MAG proceeding.⁴⁸⁷ Our consideration of these issues in the MAG proceeding will be informed by the Rural Task Force's recommended principles, which we will incorporate into that docket, as well as by the comments filed in this proceeding and the MAG proceeding concerning those principles.⁴⁸⁸ As we stated previously in the *MAG NPRM*, we intend to keep the Joint Board actively involved in review of those aspects of the MAG plan that relate to universal service.⁴⁸⁹

206. We reject AT&T's argument that "[t]he Commission must immediately address access reform for rural carriers as part of the [Rural Task Force] plan."⁴⁹⁰ In contrast to the Rural Task Force's specific recommendations regarding reform of high-cost loop support under Part 36 of the Commission's rules, its recommendations regarding access reform consisted of general principles, which it recognized do not resolve fundamental questions that remain controversial.⁴⁹¹ We agree with NRTA, OPASTCO, USTA, and others that "[a]ccess charge reform issues would be more appropriately addressed in the MAG Plan proceeding[.]"⁴⁹² Likewise, we reject suggestions that we defer action on the Rural Task Force plan.⁴⁹³ As

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see id. at Concurring Statement of Commissioner Laska Schoenfelder and Statement of Public Counsel Martha Hogery Concurring in Part and Dissenting in Part.

⁴⁸⁵ *See supra* n.478.

⁴⁸⁶ The MAG plan includes a proposal similar in some respects to the Rural Task Force recommendation to replace support that may be implicit within the access rate structure of rate-of-return carriers with a new, explicit support mechanism. *See MAG NPRM*, 16 FCC Rcd at 463 para. 8, 466 para. 18.

⁴⁸⁷ We recognize that the Fifth Circuit recently held that, pursuant to section 254(e) of the Act, the Commission cannot permit carriers to recover their universal service contributions through access charges imposed on interexchange carriers. We intend to address this matter expeditiously. *See Comsat Corp., et al. v. FCC*, No. 00-60044 (5th Cir. May 3, 2001); *see also* AT&T comments at 10-11.

⁴⁸⁸ *See* Ad Hoc Telecommunications User Committee Comments at 26-27; Arizona LEC Assn. Comments at 3; AT&T Comments at 4-11; California Commission Comments at 3, 7; CUSC Comments at App. A 25-26; Evans Tel. Co., et.al. Comments at 8; General Communications, Inc. Comments at 2-3; John Staurulaukis, Inc. Comments at 17-18; Texas Commission Comments at 8; WorldCom Comments at 4.

⁴⁸⁹ *See MAG NPRM*, 16 FCC Rcd at 466 para. 18 ("we intend to work closely with the Joint Board on those aspects of the MAG proposal related to interstate access universal service support"); *see also id.* at 462 para. 4.

⁴⁹⁰ AT&T Comments at 8; *see* General Communications, Inc. Comments at 2-3; AT&T Reply Comments at 2-6; WorldCom Reply Comments at 13-14.

⁴⁹¹ Rural Task Force Recommendation at 31 ("there is no agreement on how much or how to determine the amount of implicit support"); *compare* AT&T Comments at 8-10 ("AT&T suggests that the Commission follow the CALLS model for rural carriers") *with* CUSC Comments at App. A 25-26 (Rural Task Force's recommended approach, "like the CALLS plan, makes the unfounded assumption that all residual access revenues not recovered through the rebalanced access charges constitute appropriate universal service subsidies.").

⁴⁹² NRTA, OPASTCO, & USTA Comments at 3; *see* NTCA Comments at 20.

discussed above, the Rural Task Force plan represents a consensus of competing views developed over the course of several years and endorsed by a Joint Board Recommended Decision. The MAG plan was first submitted to the Commission on October 20, 2000, and requires further consideration to resolve issues raised by commenters.⁴⁹⁴ Accordingly, although we are considering the issues raised in both proceedings simultaneously, we conclude that the MAG plan's pendency before the Commission does not warrant delay in implementation of the Rural Task Force plan.⁴⁹⁵

V. FURTHER NOTICE OF PROPOSED RULEMAKING

A. Background

207. As discussed in greater detail in the attached Order,⁴⁹⁶ we decline at this time to adopt the Rural Task Force's proposal to freeze high-cost loop support on a per-line basis in rural carrier study areas where a competitive eligible telecommunications carrier initiates service. The purpose of the proposal was to prevent excessive growth in the universal service fund as a result of the entrance of competitive eligible telecommunications carriers in rural carrier study areas over the life of the five-year plan we adopt here. As discussed above in section IV.C.3, support provided to competitive eligible telecommunications carriers is not subject to the overall cap on the high-cost loop fund. During the five-year period, excessive growth in the fund is thus possible if incumbent carriers lose many lines to competitive eligible telecommunications carriers, or if competitive eligible telecommunications carriers add a significant number of lines. The first scenario raises particular fund growth concerns because as an incumbent "loses" lines to a competitive eligible telecommunications carrier, the incumbent must recover its fixed costs from fewer lines, thus increasing its per-line costs. With higher per-line costs, the incumbent would receive greater per-line support, which would also be available to the competitive eligible telecommunications carrier for each of the lines that it serves. Thus, a substantial loss of an incumbent's lines to a competitive eligible telecommunications carrier could result in excessive fund growth.

208. We base our decision not to adopt the Rural Task Force's proposal at this time on several concerns. First, the proposal may be of limited benefit in serving its intended purpose and may, in some instances, contribute to fund growth by freezing support at higher levels than would be warranted in the future. Second, the likelihood of a competitive eligible telecommunications carrier capturing a substantial percentage of lines from the incumbent during the five-year period is speculative. Third, the indexed cap on the high-cost loop fund will operate as a check on excessive fund growth to a certain extent. Fourth, we are concerned that the proposal may have the unintended consequence of discouraging efficient investment in rural infrastructure. Fifth, the proposal may hinder the competitive entry in rural study areas by creating an additional incentive for incumbents to oppose the designation of eligible telecommunications carriers in rural study areas. Finally, we are concerned that the proposal would require complex and administratively

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⁴⁹³ See NRTA, OPASTCO, & USTA Comments at 2-3; Fred Williamson & Assoc. Comments at 2; see also TDS Comments in CC Docket No. 00-256.

⁴⁹⁴ See, e.g., Alaska Commission Comments in CC Docket No. 00-256 at 2 ("Unlike the CALLS plan, the MAG's access charge reform proposals have not been tempered by industry consensus. Development of an industry consensus would likely result in changes that we believe are needed before the plan is approved."); WorldCom Comments at 2 ("the MAG plan's strengths are outweighed by obvious weaknesses. The Commission should not adopt the MAG plan in its current form").

⁴⁹⁵ Wyoming Commission Comments at 1 (urging the Commission not to allow "any unresolved access reform issues to stand in the way of timely and necessary federal universal service reform."); see Alaska Commission Comments in CC Docket No. 00-256 at 2 ("we would not like to see approval of the RTF delayed while the considerable additional issues in the MAG Plan are debated.").

⁴⁹⁶ See *supra* discussion at section IV.B.3.

Federal Communications Commission

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

In the Matter of)
)
Federal-State Joint Board on) CC Docket No. 96-45
Universal Service)
)
Multi-Association Group (MAG) Plan for) CC Docket No. 00-256
Regulation of Interstate Services of)
Non-Price Cap Incumbent Local Exchange)
Carriers and Interexchange Carriers)

ERRATA

Released: June 1, 2001

By the Deputy Chief, Accounting Policy Division:

On May 23, 2001, the Commission released the Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking in CC Docket No. 96-45, and Report and Order in CC Docket No. 00-256 (FCC 01-157) (the *Order*).¹ These errata amend the *Order*, as follows:

Appendix A, first sentence, replace "Part 36 of Title 47" with "Part 36 and Part 54 of Title 47";

Appendix A, first sentence, replace "is" with "are";

Appendix A, Section 36.605(c)(3), replace "meets the above stated criterion," with "meets the stated criterion in paragraphs (a), (b), (c) of this section,;"

Appendix A, Section 36.605(c)(3), replace "(A)" with "(i)";

Appendix A, Section 36.605(c)(3), replace "(B)" with "(ii)";

Appendix A, Section 36.605(c)(3)(B), replace "(i)" with "(A)";

Appendix A, Section 36.605(c)(3)(B), replace "(ii)" with "(B)";

Appendix A, Section 36.605(c)(3)(ii)(B), replace "subsection (a)" with "paragraph (b)";

Appendix A, Section 36.621(a)(4), replace "beginning July 31, 2001" with "beginning July 1,

¹ *Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking in CC Docket No. 96-45, and Report and Order in CC Docket No. 00-256, FCC 01-157 (rel. May 23, 2001).*

Federal Communications Commission

2001”;

Appendix A, instructions for amending Section 54.305, replace "paragraphs (b), (c), (d), and (f)" with "paragraphs (b), (c), (d), (e), and (f)";

Appendix A, Section 54.315(a), replace “or (d)(iii)” with “or (d)(1)(iii)”;

Appendix A, Section 54.315(b)(5), replace “in subsections (1)-(4) above.” with “in paragraphs (b)(1) through (4) of this section.”;

Appendix A, Section 54.315(c)(6), replace “in subsections (1)-(5) above.” with “in paragraphs (c)(1) through (5) of this section.”;

Appendix A, Section 54.315(d)(6), replace “in subsections (1)-(5) above.” with “in paragraphs (d)(1) through (5) of this section.”;

Appendix A, Section 54.315(e), delete “(1)” in the first line;

Appendix A, Section 54.315(e), replace “(i)” with “(1)”;

Appendix A, Section 54.315(e), replace “(ii)” with “(2)”;

Appendix A, Section 54.315(e), replace “(iii)” with “(3)”;

Appendix A, Section 54.315(e), replace “(iv)” with “(4)”;

Appendix A, Section 54.315(e), replace “(v)” with “(5)”;

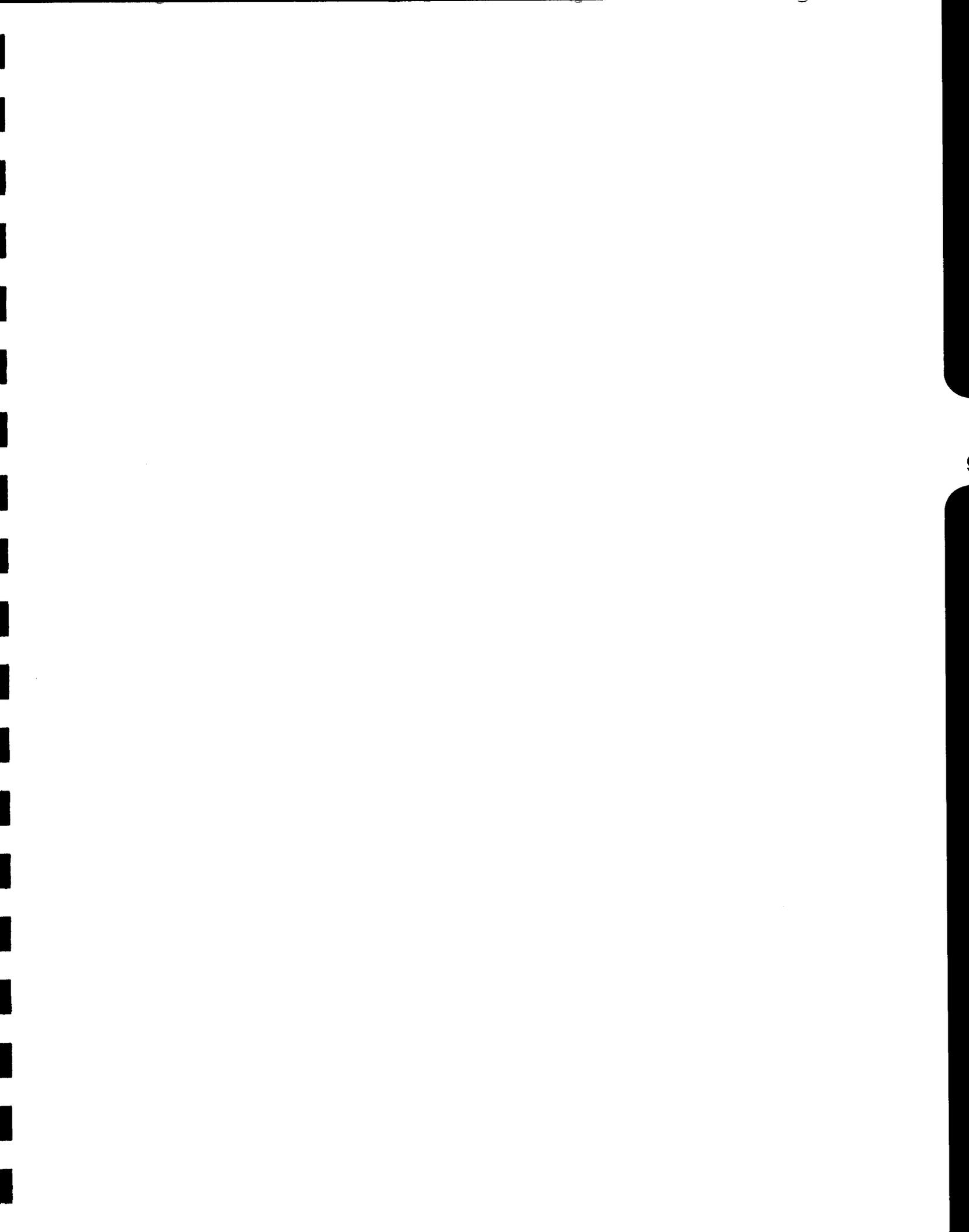
Appendix A, Section 54.315(e), replace “(vi)” with “(6)”;

Appendix A, Section 54.315(e), replace “(vii)” with “(7)”;

Appendix A, Section 54.315(f)(3), replace “pursuant to (d)(2)(A) and (d)(2)(C)” with “pursuant to (d)(2)(i) and (d)(2)(iv).”

FEDERAL COMMUNICATIONS COMMISSION

Mark G. Seifert
Deputy Chief, Accounting Policy Division



TEXAS OFFICE OF PUBLIC UTILITY COUNSEL; CELPAGE, INC.; SOUTHWESTERN BELL TELEPHONE COMPANY; GTE MIDWEST, INC.; LOUISIANA PUBLIC SERVICE COMMISSION, an Executive Branch Department of the State of Louisiana; COMSAT CORPORATION; PEOPLE OF THE STATE OF CALIFORNIA; PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA; IOWA UTILITIES BOARD; SOUTH DAKOTA PUBLIC UTILITIES COMMISSION; PENNSYLVANIA PUBLIC UTILITY COMMISSION; BELL ATLANTIC TELEPHONE COMPANIES; VERMONT DEPARTMENT OF PUBLIC SERVICE; GTE SERVICE CORPORATION; GTE ALASKA INCORPORATED; GTE ARKANSAS INCORPORATED; GTE CALIFORNIA INCORPORATED; GTE FLORIDA INCORPORATED; GTE SOUTH INCORPORATED; GTE SOUTHWEST INCORPORATED; GTE NORTH INCORPORATED; GTE NORTHWEST INCORPORATED; GTE HAWAIIAN TELEPHONE COMPANY INCORPORATED; GTE WEST COAST INCORPORATED; CONTEL OF CALIFORNIA, INC.; CONTEL OF MINNESOTA, INC.; CONTEL OF THE SOUTH, INC.; PUBLIC SERVICE COMMISSION OF NEVADA; CINCINNATI BELL TELEPHONE COMPANY; FLORIDA PUBLIC SERVICE COMMISSION; PEOPLE OF THE STATE OF NEW YORK; PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK; and THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, Petitioners, VERSUS FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, Respondents.

No. 97-60421

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

183 F.3d 393; 1999 U.S. App. LEXIS 17941; 16 Comm. Reg. (P & F) 871

July 30, 1999, Decided

SUBSEQUENT HISTORY: [**1]

Certiorari Granted June 5, 2000, Reported at: 2000 U.S. LEXIS 3778. Certiorari Denied May 30, 2000, Reported at: 2000 U.S. LEXIS 3756.

PRIOR HISTORY: Petitions for Review of a Final Order of the Federal Communications Commission. 97-157.

DISPOSITION: Petitions for review GRANTED IN PART and DENIED IN PART. The May 8, 1997, Universal Service Order AFFIRMED in part, REMANDED in part, and REVERSED in part, in accordance with this opinion.

LexisNexis (TM) HEADNOTES - Core Concepts:

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JUDGES: Before SMITH, DUHE, and EMILIO M. GARZA, Circuit Judges.

OPINIONBY: JERRY E. SMITH

OPINION: [*405] JERRY E. SMITH, Circuit Judge:

This is a consolidated challenge to the most recent attempt of the Federal Communications Commission ("FCC") to implement provisions of the landmark 1996 Telecommunications Act (the "Act"). n1 Petitioners, joined by numerous intervenors, challenge several aspects of the FCC's Universal Service Order (the "Order") implementing the provisions of the Act codified at 47 U.S.C. § 254. We grant the petition for review in part, deny it in part, affirm in part, reverse in part, and remand in part.

n1 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (to be codified as amended in scattered sections of title 47, United States Code).

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I. BACKGROUND.

A. THE 1996 ACT AND THE UNIVERSAL SERVICE ORDER.

Beginning with the passage of the Communications Act of 1934 (the "1934 Act"), Congress has made universal service a basic goal of telecommunications regulation. As Section 1 of the 1934 Act stated, the FCC was created

for the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate [*406] facilities at reasonable charges . . .

47 U.S.C. § 151 (as amended).

Armed with this statutory mandate, the FCC historically has focused on increasing the availability of reasonably priced, basic telephone service via the landline telecommunications network. n2 Rather than relying on market forces alone, the agency has used a combination of implicit and explicit subsidies to achieve

its goal of greater telephone subscribership. Explicit subsidies provide carriers or individuals with specific grants [**3] that can be used to pay for or reduce the charges for telephone service. This form of subsidy includes using revenues from line charges on end-users to subsidize high-cost service directly and to support the Lifeline Assistance program for low-income subscribers.

n2 In economic terms, universal service programs are justified as a way to address a "market failure." While the carriers have little incentive to expand the telecommunications infrastructure into areas of low population density or geographic isolation, each individual user of the network benefits from the greatest possible number of users. See Eli M. Noam, *Will Universal Service and Common Carriage Survive the Telecommunications Act of 1996?*, 97 *COLUM. L. REV.* 955, 958-59 (1997).

Implicit subsidies are more complicated and involve the manipulation of rates for some customers to subsidize more affordable rates for others. For example, the regulators may require the carrier to charge "above-cost" rates to low-cost, profitable urban [**4] customers to offer the "below-cost" rates to expensive, unprofitable rural customers.

For obvious reasons, this system of implicit subsidies can work well only under regulated conditions. In a competitive environment, a carrier that tries to subsidize below-cost rates to rural customers with above-cost rates to urban customers is vulnerable to a competitor that offers at-cost rates to urban customers. Because opening local telephone markets to competition is a principal objective of the Act, Congress recognized that the universal service system of implicit subsidies would have to be re-examined.

To attain the goal of local competition while preserving universal service, Congress directed the FCC to replace the patchwork of explicit and implicit subsidies with "specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service." 47 U.S.C. § 254(b)(5). Congress also specified new universal service support for schools, libraries, and rural health care providers. See 47 U.S.C. § 254(h). It then directed the FCC to define such a system and to establish a timetable for implementation within fifteen [**5] months of the passage of the Act.

The Federal-State Joint Board (the "Joint Board"), created by the Act to coordinate federal and state regulatory interests, issued two recommendations on how to implement the universal service provisions. n3 The

FCC met the statutory deadline when it issued the Order on May 8, 1997. n4 Since that time, the agency has issued seven reconsideration orders (the last one on May 28, 1999) and has made [*407] two reports to Congress regarding the Order.

n3 The first Recommended Decision was issued on *November 8, 1996 (12 FCC Rcd 87 (1996))*, the second *Recommended Decision on November 25, 1998 (13 FCC Rcd 24744 (1998))*.

n4 Congress also directed that the FCC establish rules to achieve the local competition goals of the Act within six months of the Act's enactment. The agency met this deadline when it issued the Local Competition Order on August 8, 1996. Almost all parts of this order were affirmed by the Supreme Court. *See AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 142 L. Ed. 2d 834, 119 S. Ct. 721 (1999).

On the same day it issued the Order, the FCC released the Access Charge Order. Access charges are the charges assessed between local exchange companies (LEC's) and interexchange companies (IXC's) for the use of one network by callers from the other network. Challenges to this order were also consolidated before the Eighth Circuit. *See Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998).

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The FCC designated a set of core services eligible for universal service support, proposed a mechanism for supporting those services, and established a timetable for implementation. *See Order PP 21-42*. Pursuant to the Act, the agency developed rules for modifying the existing system of support for high-cost service areas and created new support programs for schools, libraries, and health care facilities.

1. HIGH-COST SUPPORT.

The FCC's plans for changing the high-cost support system required it to resolve a number of complicated issues, including (1) what methodology to use for calculating high-cost support; (2) how to allocate costs between the states and the federal government; (3) which carriers should be required to contribute to the support system; and (4) when to implement the high-cost support program. The agency resolved the question of how to calculate the proper amount of high-cost support by accepting the Joint Board's second recommendation to identify areas where the forward-looking cost of service exceeds a cost-based benchmark and to provide extra support to any state that cannot maintain reasonable

comparability. n5 *See Second Recommended Decision P 19*; [**7] *Seventh Report and Order P 61 n.157*.

n5 This methodology is a departure from the revenue-based national benchmark proposed in the Order. The revenue-based benchmark was challenged for including discretionary revenues in its calculation and for its nationwide scope. Because of the revisions proposed by the Joint Board's Second Recommended Decision, we now consider those challenges to the prior revenue-based methodology moot. *See infra* part III.A.1.b.

Most importantly, the FCC decided to use the "forward-looking" costs to calculate the relevant costs of a carrier serving a given geographical area. In other words, to encourage carriers to act efficiently, the agency would base its calculation on the costs an efficient carrier would incur (rather than the costs the incumbent carriers historically have incurred). n6

n6 The agency made a decision to provide only 25% of the funds for high-cost support, leaving the state commissions ("the states") to provide the rest of the funds. According to the FCC, the states traditionally have provided a majority of universal service support, and if the agency were to fund all the high-cost support, it would overcompensate carriers. Moreover, the FCC claims that the 25% figure approximates the costs that historically have been assigned to the interstate jurisdiction. *See Order P 201*.

The Joint Board, however, recommended that the FCC scrap the 25%/75% division of responsibility in favor of a more flexible plan of allocation. *See Second Recommended Decision PP 4-5, 41-46*. The FCC accepted the Joint Board's recommendation and eliminated the 25/75 rule on May 27, 1999, thereby mooting the issue for this court. *See infra* part III.A.1.c. *See also Seventh Report and Order P 3* ("We explicitly reconsider and repudiate any suggestion in the *First Report and Order* that federal support should be limited to 25 percent of the difference between the benchmark and forward-looking cost estimates . . .").

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The FCC developed rules for determining which carriers should be required to contribute to the interstate universal service support system and how their contributions should be calculated. It decided to require

all telecommunications carriers and certain non-telecommunications carriers to contribute in proportion to their share of end-user telecommunications revenues. See Order PP 39-42. The agency determined that to reduce the burden on individual carriers' prices, the carriers' contribution base should be as broad as possible. See Order P 783. Therefore, the agency required contributing carriers to include their international telecommunications revenues in their contribution base and rejected claims by certain carriers, n7 which do not receive direct subsidies from [*408] the support program, seeking an exemption from making any contributions. See Order P 805.

n7 These carriers include wireless service providers of paging and commercial mobile radio service ("CMRS"). The FCC also rejected a claim by CMRS providers seeking an exemption from making contributions to state support funds.

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Finally, the FCC adopted a timetable for implementing its high-cost support plan. Because it has not yet developed an accurate assessment of forward-looking costs, it delayed implementation of its support program for non-rural carriers until January 1, 2000. n8 Additionally, because the agency believes it will take even longer to develop accurate forward-looking cost models for rural carriers, it delayed the implementation of its new support plan for rural carriers to "no sooner than January 1, 2001." See Order P 204.

n8 In the original order, the FCC had planned implementation by January 1, 1999. This date was delayed until July 1, 1999, and again to January 1, 2000. See *Seventh Report and Order* P 5.

During this delay in implementation, the FCC decided that carriers will continue to receive support at the levels generated by existing universal support programs. According to the agency, this gradual, phased-in plan for implementing its new high-cost support system meets the Act's requirement of a "specific [*10] timetable for completion." See *47 U.S.C. § 254(a)(2)*.

2. SCHOOLS AND LIBRARIES.

Pursuant to § 254(h), the FCC adopted rules implementing new programs for schools, libraries, and health care facilities, in particular by providing universal service support for internet access and internal connections in schools and libraries. See Order P 436.

The agency decided that any entity, including non-telecommunications carriers, that provides internet access or internal connections to schools and libraries will receive universal service support. See Order P 594.

To fund the new § 254(h) programs, the FCC accepted the Joint Board's recommendation to assess the interstate and intrastate revenues of providers of interstate telecommunications service. See Order P 808. Because many states do not already have similar support programs for schools and libraries, the agency justified its inclusion of intrastate revenues as necessary to ensure adequate funding for § 254(h) programs.

B. CHALLENGES TO THE ORDER.

On September 5, 1997, petitioner Celpage Inc. filed a motion in this court to stay the Order. We denied that motion on October 16, 1997, and rejected [*11] a similar motion by various rural telephone companies on December 31, 1997. Their petitions, along with challenges to the Order by other petitioners, were consolidated in this court.

There are two sets of challenges to the Order. The first regards the FCC's plan for replacing the current mixture of explicit and implicit subsidies with an explicit universal service support system for high-cost areas. On both statutory and constitutional grounds, petitioners attack (1) the methodology for calculating support under the plan; (2) the allocation of funding responsibilities between the FCC and the states; and (3) the agency's restrictions on how carriers can recover universal service costs.

Other petitioners attack the FCC's high-cost support plan as an encroachment on state authority over intrastate telecommunications regulation because it restricts state eligibility requirements and imposes a "no disconnect" rule for low-income telephone subscribers. Petitioners also challenge, for lack of specificity and for failing to delay implementation of the plan for some rural carriers, the FCC's timetable for implementing the new universal service plan. Additionally, petitioners challenge the [*12] FCC's system for assessing contributions, arguing that it improperly includes CMRS providers and unfairly assesses carriers on the basis of their international and interstate revenues.

The second set of challenges regards the FCC's proposal for implementing § 254(h) [*409] programs supporting schools, libraries, and health care providers. Petitioners claim that the FCC impermissibly expanded the scope of § 254(h) support to include the provision of internet access and internal connections. Moreover, they attack the FCC's statutory authority to provide such support to non-telecommunications providers.

Additionally, petitioners charge that the agency encroached on state authority to implement state support programs for schools and libraries and failed to designate which telecommunications services will receive § 254(h) support. They also argue that the FCC exceeded its statutory authority by requiring subsidies for toll-free telephone calls to internet service providers by non-rural health care providers. Finally, they attack the FCC's § 254(h) contribution system because it assesses both the intrastate and interstate revenues of carriers. n9

n9 The FCC also determined that it could require carriers to contribute, based on both interstate and intrastate revenues, to high-cost support as well as § 254(h) support. But for policy reasons, it decided to assess contributions on both interstate and intrastate revenues for support of § 254(h) programs only. It maintains, however, that it may impose similar assessments for high-cost support as well. See *Seventh Report and Order* PP 87-90.

We review the states' challenge to the FCC's claim of jurisdictional authority over intrastate rates in the context of its actions regarding support of the § 254(h) programs, but we also discuss its implications for FCC jurisdictional authority for support of high-cost programs. See *infra*, part III.B.5.

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We affirm most of the FCC's decisions regarding its implementation of the high-cost support system, concluding, for the most part, that the Order violates neither the statutory requirements nor the Constitution. We remand for further consideration, however, as to the FCC's decision to assess contributions from carriers based on both international and interstate revenues. We also reverse (1) the requirement that ILEC's recover their contributions from access charges and (2) the blanket prohibition on additional state eligibility requirements for carriers receiving high-cost support.

On jurisdictional grounds, we reverse the rule prohibiting local telephone service providers from disconnecting low-income subscribers. We also conclude that the agency exceeded its jurisdictional authority when it assessed contributions for § 254(h) "schools and libraries" programs based on the combined intrastate and interstate revenues of interstate telecommunications providers and when it asserted its jurisdictional authority to do the same on behalf of high-cost support.

II. STANDARD OF REVIEW.

When deciding whether the FCC has the statutory authority to adopt the rules included in the Order, [**14] we review the agency's interpretation under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984), by first deciding whether "Congress has directly spoken to the precise question at issue," *id.* at 842. If so, we "give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. In this situation, we reverse an agency's interpretation if it does not conform to the plain meaning of the statute. This level of review is often called "Chevron step-one" review.

Where the statute is silent or ambiguous, however, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. We may reverse the agency's construction of an ambiguous or silent provision only if we find it "arbitrary, capricious or manifestly contrary to the statute." *Id.* at 844. That is to say, we will sustain an agency interpretation of an ambiguous statute if the interpretation "is based on a permissible construction of the statute." [**410] *Id.* at 843. We refer to this more deferential [**15] level of review as "Chevron step-two" review.

The Administrative Procedure Act ("APA") also authorizes us to reverse an agency's action if it acted arbitrarily or capriciously in adopting its interpretation by failing to give a reasonable explanation for how it reached its decision. See 5 U.S.C. § 706 (2)(A) (1994); see also *Harris v. United States*, 19 F.3d 1090 (5th Cir. 1994). "Arbitrary and capricious" review under the APA differs from *Chevron* step-two review, because it focuses on the reasonability of the agency's decision-making processes rather than on the reasonability of its interpretation. n10

n10 See *Arent v. Shalala*, 315 U.S. App. D.C. 49, 70 F.3d 610, 614-16 (D.C. Cir. 1995); see also Gary Lawson, *Outcome, Procedure and Process: Agency Duties of Explanation for Legal Conclusions*, 48 RUTGERS L. REV. 313 (1996). We recognize the difference between *Chevron* step-two review and the APA's arbitrary and capricious review is not always obvious. Indeed, the different standards of review overlap, because both require a reviewing court to decide whether the agency action is "manifestly contrary to the statute" (*Chevron*) or "otherwise not in accordance with law." (APA). See *Arent*, 70 F.3d at 615 & n.6.

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Finally, we do not give the FCC's actions the usual deference when reviewing a potential violation of a constitutional right. "The intent of Congress in 5 U.S.C. § 706(2)(B) was that courts should make an independent assessment of a citizen's claim of constitutional right when reviewing agency decision-making." *Porter v. Califano*, 592 F.2d 770, 780 (5th Cir. 1979).

III. ANALYSIS.

A. HIGH-COST SUPPORT.

1. METHODOLOGY FOR CALCULATING SUPPORT FOR HIGH-COST AREAS.

a. FORWARD-LOOKING COST-OF-SERVICE METHODOLOGY.

GTE and Southwestern Bell (collectively "GTE") and the FCC engage in a fairly complex economic debate over the merits of calculating costs using the forward-looking cost models based on the "least cost, most efficient" carrier. n11 Because [*411] incumbent local exchange carriers ("ILECs") such as GTE will receive their subsidies, under the new system, based on the difference between the costs of providing service to a high-cost region and the revenue that could be derived from that service, GTE fears that using the costs of a hypothetical most-efficient carrier will significantly reduce the amount of universal service support it receives. [**17]

n11 As an initial matter, the FCC asks us to dismiss all challenges to its methodology for calculating high-cost support, claiming that such challenges are not ripe in light of the Joint Board's Second Recommended Decision. The Joint Board advised the agency to make substantial revisions in the high-cost support methodology, including the elimination of the 25%/75% division between federal and state contributions and the modification of the revenue benchmark used to calculate high-cost support. The FCC accepted these recommendations, and we dismiss challenges to those issues as moot. See *infra* parts III.A.1.b and c.

But the FCC did not modify other portions of the Order, including its use of forward-looking cost models. See *Seventh Report and Order* P 48. We agree with GTE that the mere existence of a Joint Board recommendation does not permit the FCC to block all judicial review of its high-cost methodology, especially after the agency has issued its order implementing these recommendations.

The Supreme Court has consistently endorsed judicial review of final agency actions. "Although . . . the FCC regulation could properly be characterized as a statement only of intentions, the Court held that 'such regulations have the force of law before their sanctions are invoked as well as after. When, as here, they are promulgated by order of the Commission and the expected conformity to them causes injury cognizable by a court of equity, they are appropriately the subject of attack . . .'" *Abbott Lab. v. Gardner*, 387 U.S. 136, 150, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967) (quoting *Columbia Broadcasting Sys. v. United States*, 316 U.S. 407, 418-19, 86 L. Ed. 1563, 62 S. Ct. 1194 (1942)).

Additionally, we consider four factors when evaluating a claim of lack of ripeness in the administrative context: (1) whether the issues are purely legal; (2) whether the issues are based on a final agency action; (3) whether the controversy has a direct and immediate impact on the plaintiff; and (4) whether the litigation will expedite, rather than delay or impede, effective enforcement by the agency. See *Dresser Indus. v. United States*, 596 F.2d 1231, 1235 (5th Cir. 1979). To find a case ripe, we require the party bringing the challenge (here, GTE) to establish all four factors in seeking judicial review. See *Merchants Fast Motor Lines, Inc. v. Interstate Commerce Comm'n*, 5 F.3d 911, 920 (5th Cir. 1993).

The FCC does not claim that the issues presented are not purely legal, and we have already explained why, under *Abbott Laboratories*, the Order remains a final agency action. There is no indication that the petitioners are currently unaffected by the legal force of the Order. Finally, we agree with GTE that because the FCC has had ample time (three years) and opportunity to implement the Order, judicial guidance on the legality of the Order will not delay or impede the agency's ability to carry out its statutory duties.

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i. STATUTORY INTERPRETATION.

The question, of course, is not whether it is good policy for the FCC to use such cost models, n12 but whether the decision to adopt this methodology conforms to the plain language of the statute. If the language is ambiguous, we must then ask whether the use of forward-looking cost models is reasonable given the terms of the statute and the deference the FCC must be

afforded under *Chevron*. Additionally, we must consider whether the agency's actions in reaching its decision are "arbitrary and capricious" under the APA. See 5 U.S.C. § 706(2)(A).

n12 GTE refers us to Justice Brandeis's dissent (joined by Justice Holmes) in *Missouri ex rel. Southwestern Bell Tel. Co. v. Public Serv. Comm'n*, 262 U.S. 276, 67 L. Ed. 981, 43 S. Ct. 544 (1922), criticizing use of "fair value" (another version of forward-looking cost models) in ratemaking. GTE notes that Justice Breyer has endorsed Justice Brandeis's criticisms. Even in his separate opinion in *Iowa Utilities*, however, Justice Breyer did not advocate that the Court prohibit the FCC from adopting forward-looking cost models. See *Iowa Utilities*, 119 S. Ct. at 752 (Breyer, J., concurring in part and dissenting in part) ("These examples do not show that the FCC's rules are themselves unreasonable").

Most importantly, the Brandeis criticism of "fair value" has never reflected the view of a majority of the Court, which on several occasions has declined to adopt Justice Brandeis's views on this question. See *Federal Power Comm'n v. Texaco Inc.*, 417 U.S. 380, 41 L. Ed. 2d 141, 94 S. Ct. 2315 (1974); *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 88 L. Ed. 333, 64 S. Ct. 281 (1944). Instead, the Court consistently has refused to "designate [] a single theory of ratemaking [that] would unnecessarily foreclose alternatives which could benefit both consumers and investors." *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 316, 102 L. Ed. 2d 646, 109 S. Ct. 609 (1989).

In fact, the Court has explicitly sustained similar cost models not based on historical costs. See *Mobil Oil Exploration & Producing Southeast Inc. v. United Distrib. Cos.*, 498 U.S. 211, 224-25 n.5, 112 L. Ed. 2d 636, 111 S. Ct. 615 (1991) (indicating that similar non-historical based cost model was not arbitrary, capricious, or manifestly contrary to the statute at issue.).

[**19]

We conclude that the plain language is ambiguous as to whether the FCC's cost models are permitted. We then decide that under *Chevron* step-two, the FCC's forward-looking cost models are authorized under their reasonable interpretations of the statutory language. Finally, we do not conclude that the FCC acted in a "arbitrary and capricious" manner in reaching its decision to adopt forward-looking cost models.

GTE argues that the methodology violates the "equitable and nondiscriminatory" language in § 254(b)(4). We disagree with GTE's claim that the plain language of § 254(b)(4) prohibits the FCC from adopting its methodology.

The section of the statute that GTE relies on represents one of seven principles identified by the statute as the basis for the agency's universal service policies. Rather than setting up specific conditions or requirements, § 254(b) reflects a Congressional intent to delegate these difficult policy choices to agency discretion: "The Joint Board and the Commission shall base policies for the preservation and advancement of universal service on the following principles" (Emphasis added.) 47 U.S.C. § 254(b).

[*412] Moreover, [**20] the FCC has offered reasonable explanations for how its use of the forward-looking cost models cannot be characterized as inequitable and discriminatory. For instance, the FCC points out that all carriers, including interexchange carriers ("IXC's") such as AT&T and MCI, are subject to the same cost methodology and must move toward the same efficient cost level to maximize the benefits of universal service support.

The term "sufficient" appears in § 254(e), and the plain language of § 254(e) makes sufficiency of universal service support a direct statutory command rather than a statement of one of several principles. Still, we do not find that the use of the single word "sufficient," even in the language of command, demonstrates Congress's unambiguous intent regarding the forward-looking cost models. We therefore review under *Chevron* step-two and conclude that the agency has offered reasonable justifications for its adoption of the "most efficient" methodology.

The FCC points to cases in which agencies have adopted similar methodologies to encourage competition. n13 It also argues that nothing in the statute defines "sufficient" to mean that universal service support must [**21] equal the actual costs incurred by ILEC's. These reasons suffice to survive the reasonableness requirement of *Chevron* step-two.

n13 See, e.g., *West Tex. Util. Co. v. Burlington N.R.R.*, Docket No. 41191 (Surface Transp. Bd. May 3, 1996), *aff'd sub nom. Burlington N.R.R. v. Surface Transp. Bd.*, 324 U.S. App. D.C. 352, 114 F.3d 206, 213 (D.C. Cir. 1997) (sustaining, as reasonable, agency application of "stand alone cost constraints" based on rates that a hypothetical carrier would have to charge to earn a reasonable return).

To be sure, the FCC's reason for adopting this methodology is not just to preserve universal service. Rather, it is also trying to encourage local competition by setting the cost models at the "most efficient" level so that carriers will have the incentive to improve operations. As long as it can reasonably argue that the methodology will provide sufficient support for universal service, however, it is free, under the deference we afford it under *Chevron* [**22] step-two, to adopt a methodology that serves its other goal of encouraging local competition.

ii. "ARBITRARY AND CAPRICIOUS."

Arguing that the FCC has departed from its own stated methodology, GTE charges the agency with "arbitrary and capricious" actions under the APA. *See* 5 U.S.C. § 706(2)(A). The APA's "arbitrary and capricious" standard of review is narrow and requires only a finding that the agency "articulated a rational relationship between the facts found and the choice made." *Harris v. United States*, 19 F.3d 1090, 1096 (5th Cir. 1994).

GTE points out that while the agency has wedded itself to the "most efficient" carrier cost methodology, it used current depreciation schedules to develop its models for projecting forward-looking costs. These schedules are not based on the actual costs of the current regulated system, but, GTE contends, have been artificially deflated by state regulators so that local carriers recover less than they would in a real, competitive market. Using these artificially-deflated schedules in the cost models disadvantages the ILEC's, because they will not be able to recover their capital costs as they would [**23] if free from regulation.

Actually, the FCC has departed from its general "most efficient" methodology by making a number of adjustments to its cost model. For instance, instead of assuming the "most efficient" wire center locations in its cost models, the agency simply made calculations based on whatever wire centers already exist. *See* Order P 251(1). This allowance actually benefits the ILEC's.

While GTE argues that the FCC's failure to adhere tightly to its "most efficient" [**413] methodology fails the "arbitrary and capricious" test, that test, properly understood, is far less onerous. If the FCC's departures from its methodology "articulate a rational relationship," we will not apply the "arbitrary and capricious" remedy.

The FCC seeks to mitigate the effect of the "most efficient" methodology by accounting for wire centers that already exist. Additionally, and contrary to GTE's assertions, the agency is prescribing a range within which the depreciation schedules must fall, rather than

simply adopting the schedules that already exist. For the time being, the FCC will rely on the actual depreciation schedules, because it does not see a prospect of significant competition in the [**24] near future in the high-cost markets. *See* Order P 250(5). Moreover, the agency has committed itself to re-prescribe the range for these schedules every three years. *See id.* P 250(5) n.662. These reasons establish enough of a "rational relationship" with facts presented for the forward-looking cost methodology to pass the APA's arbitrary and capricious test. n14

n14 GTE claims that implementing the forward-looking cost methodology will force ILEC's to operate at a loss, and this constitutes an unconstitutional taking under *Brooks-Scanlon*. GTE's claim has no merit; it has not shown that a taking has occurred or that any taking will be permanent or would be so serious as to be considered "confiscatory." *See Duquesne*, 488 U.S. at 314. ("An otherwise reasonable rate is not subject to constitutional attack by questioning the theoretical consistency of the method that produced it.").

Unlike the situation in *Brooks-Scanlon*, the circumstance here is that the regulatory entity setting the rules, the FCC, is not requiring the ILEC's to remain open or to charge low rates, thereby forcing them to operate at a permanent loss. *See Continental Airlines v. Dole*, 784 F.2d 1245, 1251 (5th Cir. 1986) (distinguishing *Brooks-Scanlon* where agency required loss-making operation for a limited time only).

[**25]

b. METHODOLOGY FOR CALCULATING THE REVENUE BENCHMARK.

GTE challenged the inclusion of revenues from "discretionary" services in the revenue benchmark used to compare costs and revenues for the purposes of universal service support. The Joint Board, however, recently proposed eliminating the entire revenue benchmark in favor of a single national cost benchmark. *See* Second Recommended Decision PP 41-50. The FCC accepted this recommendation. *See Seventh Report and Order* P 61 ("We reconsider and reject the determination in the *First Report and Order* that federal support for rate comparability should be determined using a revenue-based benchmark."). n15 This decision moots GTE's challenge to the inclusion of discretionary revenues, because no revenues will be used in the calculation of the benchmark. n16

n15 Vermont has filed a petition for review of the *Seventh Report and Order* in the District of Columbia Circuit. See No. 99-1243 (D.C. Cir.). Pursuant to 28 U.S.C. § 2349(a), it thereby has vested that court with exclusive jurisdiction to review the *Seventh Report and Order*. Unless the District of Columbia Circuit transfers the petition to this court pursuant to 28 U.S.C. § 2112(a), we lack jurisdiction to consider the order on its merits.

We still retain jurisdiction to the extent that the new order changes or affects the Order that is the subject of this consolidated proceeding. As we explain below, the FCC's repudiation of its revenue benchmarks and the 25% allocation moot the petitioners' challenges for purposes of this appeal. Petitioners, however, are not precluded, by our dismissal in this proceeding, from filing appeals of the new cost-based benchmark and the new allocation methodology in another proceeding. [**26]

n16 Mootness goes to the heart of our jurisdiction under Article III of the Constitution. Therefore, we must consider mootness even if the parties do not raise it, because "resolution of this question is essential if federal courts are to function within their constitutional spheres of authority." *North Carolina v. Rice*, 404 U.S. 244, 245, 30 L. Ed. 2d 413, 92 S. Ct. 402 (1971).

A case becomes moot if (1) there is no reasonable expectation that the alleged violation will recur and (2) interim relief or events have completely and irrevocably [*414] eradicated the effects of the alleged violation. *County of Los Angeles v. Davis*, 440 U.S. 625, 631, 59 L. Ed. 2d 642, 99 S. Ct. 1379 (1979). n17 The FCC's new approach eradicates any possible effect of discretionary revenues on the levels of the petitioners' universal service support. n18 We therefore dismiss, as moot, GTE's challenge to the use of discretionary revenues in the high-cost support benchmark.

n17 Even if these conditions are met, there are at least three exceptions to the mootness doctrine. First, courts may assert jurisdiction if the official action being challenged is capable of "repetition, yet evading review." See *Nader v. Volpe*, 154 U.S. App. D.C. 332, 475 F.2d 916, 917 (D.C. Cir. 1973). Second, courts also have

adjudicated otherwise moot issues if the defendant has voluntarily ceased the challenged activity to avoid judicial resolution and there is a reasonable possibility that the challenged conduct will resume. See *Gluth v. Kangas*, 951 F.2d 1504, 1507-08 (9th Cir. 1991) (refusing to hold voluntary cessation of prison library restrictions moot in light of long history of policy). Finally, courts have avoided mootness where the mooted issue still has collateral or future consequences. See *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 122, 94 S. Ct. 1694, 40 L. Ed. 2d 1 (1974) (refusing to moot employer's challenge to state benefits for strikers even though strike had ended, because issue would affect employer's future relations with union).

Only the first and second exceptions are arguably applicable to the FCC's new order, and we do not think either exception applies. The "repetition" exception will not apply unless there is a reasonable expectation that the same litigant will again be subjected to the same action. See *DeFunis v. Odegaard*, 416 U.S. 312, 315-17, 94 S. Ct. 1704, 40 L. Ed. 2d 164 (1974) (mooting student's lawsuit because he will graduate regardless of outcome of litigation). The second exception requires a showing that the challenged conduct will resume. There is little basis for suggesting that the FCC, after a long and torturous process involving a recommendation from the Joint Board and months of deliberation, will reverse itself on the question of revenue benchmarks. [**27]

n18 Reconsideration of agency actions by the implementing agency can moot issues otherwise subject to judicial review because the reviewing court can no longer grant effective relief. See, e.g., *Center for Science in the Pub. Interest v. Regan*, 234 U.S. App. D.C. 62, 727 F.2d 1161, 1164 (D.C. Cir. 1984) (holding that a change in position of Department of Treasury regarding labeling of alcoholic beverages mooted federal appeal); see also 15 JAMES W. MOORE, MOORE'S FEDERAL PRACTICE § 101.96, at 101-179 (3d ed. 1998) ("[A] parallel proceeding in another forum and [] resolution of that controversy in that forum will moot the issues presented in the federal action. . . . regardless of whether or not that parallel forum is an administrative proceeding.").

GTE also challenged the FCC's use of a national benchmark for purposes of revenue calculations. Because GTE's challenge focused on the problems of a national revenue benchmark, the FCC's elimination of the revenue benchmark also moots its challenge to the national benchmark.

GTE's basic attack on the national [**28] revenue benchmark is that ILEC's operating in states with below-average revenues will be systematically undercompensated by a universal service support system based on a national revenue benchmark. But none of these arguments necessarily applies to a cost-based national benchmark. n19 Indeed, the FCC adopted the cost-based national benchmark because it agreed that "revenues may not accurately reflect the level of need for support to enable reasonably comparable rates because states have varying rate-setting methods and goals." *Seventh Report and Order* P 62.

n19 *Accord Center for Science in the Pub. Interest, 727 F.2d at 1164* ("Most of the issues presented in these appeals are not necessarily pertinent to examination of the second [administrative action] and may well prove irrelevant in that context.").

Because the subject matter of GTE's appeal--a national revenue benchmark--no longer has any legal force, "any further judicial pronouncements . . . would be purely advisory." See *Center [**29] for Science in the Public Interest, 727 F.2d at 1164*. "We cannot assume jurisdiction to decide a case on the ground that it is the same case as one presented to us, when it is admitted that it is not and when it presents different issues." *Id.* at 1166 n.6 (emphasis added). Therefore, we also dismiss, as moot, the [*415] challenges to the FCC's national revenue benchmark. n20

n20 Our conclusion regarding mootness does not conflict with *Natural Resources Defense Council v. EPA, 489 F.2d 390 (5th Cir. 1974)*, in which we refused to moot a challenge to the EPA's approval of Georgia's Clean Air Act implementation plan despite the EPA's later decision to withdraw its approval. Because the EPA's reasons for withdrawing approval showed that it still fundamentally disagreed with the petitioners' interpretation of the Clean Air Act's requirements, we asserted jurisdiction.

In this case, the FCC's new order not only alters, but explicitly repudiates, the reasoning behind its use of revenues in calculating the

benchmark. All of the petitioners' challenges to the benchmark calculations focused on the unreliability or unfairness of such revenue-based calculations. By eliminating the use of revenues, the petitioners and the FCC no longer fundamentally disagree on the problems that revenues cause in calculating the benchmark for high-cost support.

Thus, *Natural Resources Defense Council* does not conflict with the reasoning of *Center for Science in the Public Interest, 727 F.2d at 1166*, in which the court mooted a challenge after the Treasury had implemented a new, superseding regulation containing different reasoning and substantive provisions different from the challenged regulation. In both cases, the courts analyzed whether the intervening agency action represented a substantive shift in an agency's interpretation of its statutory duties.

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c. LIMITING THE FEDERAL MECHANISM TO TWENTY-FIVE PERCENT OF UNIVERSAL SERVICE COSTS.

The third step in the FCC's methodology for calculating support to high-cost, non-rural areas allocates 25% of the funding responsibility to the agency, leaving 75% to be provided by the states. In other words, only 25% of the overall funds for the explicit universal support program for high-cost areas will be provided from the funds collected from interstate telephone calls; the rest must be provided by the states, usually through charges on intrastate service. Certain states, n21 GTE, and Kansas and Vermont n22 challenged this allocation on statutory grounds. Specifically, they question the 25% rule for failing to provide "sufficient" support under § 254(e). Kansas and Vermont also challenged the FCC's 25% allocation decision for lack of notice and for failing to ensure reasonable comparability between rural and urban rates.

n21 Nine state commissions--from Texas, California, Florida, Iowa, Louisiana, New York, Nevada, Pennsylvania, and South Dakota--have presented a joint appeal, and we refer to them as "the states." [**31]

n22 The state commissions of Kansas and Vermont filed a separate appeal. Although both Kansas and Vermont challenge the 25% allocation, only Vermont maintains its challenge

to the FCC's transitional support rules for rural carriers. *See infra* part III.A.6.c.i.

As in the case of arguments against the revenue benchmark, we do not consider these challenges, because the FCC has accepted the Joint Board's recommendation to scrap the 25%/75% rule. n23 The *Seventh Report and Order* proposes a new methodology that places "no artificial limits on the amount of federal support that is available" when a state cannot by itself maintain reasonable comparability. *Seventh Report and Order* P 34. This new framework is "a different regulation, containing on its face reasoning not previously articulated by the agency as its policy." *Center for Science in the Pub. Interest*, 727 F.2d at 1166. Therefore, we dismiss the challenges by all of the petitioners as moot. n24

n23 *See Seventh Report and Order* § 3 ("We explicitly reconsider and repudiate any suggestion in the *First Report and Order* that federal support should be limited to 25 percent of the difference between the benchmark and the forward-looking cost estimates. . . ."). [**32]

n24 Vermont invites us to review the *Seventh Report and Order's* interpretation of reasonable comparability in the context of that recent order's revised approach to allocating costs between the different states and between the state and federal funds. To the extent that Vermont's "reasonable comparability" arguments were based on a challenge to the 25% allocation, we dismiss its arguments as moot. To the extent its arguments focused on the alleged failure of the FCC to articulate a definition of "reasonable comparability," we would have to examine the merits of the *Seventh Report and Order*. As we explained, *supra* n. 16, we cannot review the merits of that order, because we lack jurisdiction over the merits of the new allocation methodology until it is transferred to this court by the District of Columbia Circuit.

[*416] d. PROPERLY CONSULTING WITH THE JOINT BOARD BEFORE AMENDING JURISDICTIONAL SEPARATIONS RULES.

GTE raises an administrative procedural objection to the FCC's adoption of new jurisdictional separations rules n25 that propose to end existing high-cost fund support for non-rural [**33] carriers on January 1, 1999.

n26 Instead of arguing that the new rule is arbitrary and capricious, GTE claims that the agency failed properly to refer the matter to the Joint Board, in violation of 47 U.S.C. § 410(c), which states that "the Commission shall refer any proceeding regarding the jurisdictional separation of common carrier property and expenses between interstate and intrastate operations . . . to a Federal-State Joint Board."

n25 "Beginning January 1, 1999, non-rural carriers shall no longer receive support pursuant to this [program]." 47 C.F.R. § 36.601(c).

n26 This implementation date has now been delayed until January 1, 2000. *See Seventh Report and Order* P 5.

The FCC responds that it did make a general referral to the Joint Board in March 1996 and that the Joint Board subsequently recommended that the agency replace the existing support mechanisms for non-rural carriers with a new universal service system. The plan to replace the existing support mechanism, [**34] the FCC argues, requires a change in the method of jurisdictional separation, and by recommending the plan, the Joint Board had already considered the jurisdictional effects. n27

n27 Jurisdictional separations rules are part of a process whereby it "may be determined what portion of an asset is employed to produce or deliver interstate as opposed to intrastate service." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 356, 90 L. Ed. 2d 369, 106 S. Ct. 1890 (1986). Section 410(c) requires the FCC to consult the Joint Board, but it does not "dictate how costs must be recovered" *See National Ass'n of Regulatory Util. Comm'rs v. FCC*, 237 U.S. App. D.C. 390, 737 F.2d 1095, 1112 n.19 (D.C. Cir. 1984).

GTE and the FCC disagree on the level of specificity needed to fulfill the Joint Board consultation requirement of § 410(c). GTE argues that simply identifying the broad subject of universal service reform did not raise the issue of altering the system that is used to shift [**35] costs in many high-cost areas to the interstate jurisdiction. In particular, GTE contends that the Joint Board failed to consider the *amounts* of the fund allocation between the interstate and intrastate jurisdictions when it considered the plan to implement a new support mechanism.

Although the FCC does not have to raise every possible detail in its referral to the Joint Board, it must show that the Joint Board was aware of the effects on the jurisdictional separations rules of replacing the existing high-cost support system. The plain language of the statute shows that any shift in the allocation of jurisdictional responsibility lies at the heart of § 410(c)'s consultation requirement.

The Joint Board was aware that replacing the existing high-cost support system will affect the jurisdictional separations rules. This is shown by the fact, for instance, that the Joint Board made a detailed discussion of the current jurisdictional separations rules, acknowledging that they "currently assign 25 percent of each LEC's loop costs to the interstate jurisdiction." See First Recommended Decision P 188.

In discussing the comments submitted by affected parties, the Joint Board [**36] recognized that the jurisdictional separations rules are part of the old regime of "embedded" or "historical" costs. See *id.* P 207. Thus, the Joint Board does seem to recognize that the jurisdictional separations rules are part of the old "embedded cost" [*417] system and were developed in the context of allocating the actual costs of developing the local and long-distance networks. By recommending replacing the historical cost system with a forward-looking "most efficient" cost model, the Joint Board must have considered that the jurisdictional separations rules no longer would apply in the same way. Although no detailed discussion appears in the First Recommended Decision, the Joint Board's recognition that the jurisdictional separations rules would be affected by adopting a new cost model fulfills § 410(c)'s consultation requirement. n28

n28 The FCC did not arbitrarily and capriciously fail to explain the reason for its amendment of rule 36.601(c). It stated that the new universal service mechanism will replace the old high-cost fund subsidies and that the change will occur on January 1, 1999 (later extended to July 1, 1999 and then to January 1, 2000). The agency's general explanations of the effect of the new support mechanism provide enough of a reason to survive GTE's attack.

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2. ELIGIBILITY REQUIREMENTS FOR CARRIERS SEEKING UNIVERSAL SERVICE SUPPORT.

The states and intervenor Southwestern Bell ("SBC") challenge the FCC's reading of the Act's provisions governing eligibility requirements for carriers

seeking universal service support. In general, they question the agency's interpretation of § 214(e) as too narrow and restrictive of the ability of state commissions to set their own criteria and exercise their own discretion over a carrier's eligibility.

a. LIMITING THE CRITERIA THAT STATE COMMISSIONS MAY CONSIDER WHEN ASSESSING A CARRIER'S ELIGIBILITY.

Section 214(e) governs the designation of carriers eligible to receive federal universal service support. Section 214(e)(1)(A) and (B) set out the eligibility requirements, and § 214(e)(2) n29 governs the designation of eligible carriers by state commissions.

n29 The subsection reads:

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 a 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.

[**38]

In the Order, the FCC interpreted § 214(e)(2) in this way. With limited exceptions for rural areas, a state commission has no discretion when assessing a carrier's eligibility for federal support. If a carrier satisfies the terms of § 214(e)(1), a state commission *must* designate it as eligible. Thus, the FCC ruled that a state commission may not impose additional eligibility

requirements on a carrier seeking universal service support in non-rural service areas. See Order P 135. The agency does permit the states to impose service quality obligations on local carriers if those obligations are unrelated to a carrier's eligibility to receive federal universal service support. According to the FCC, this interpretation "gives effect to the unambiguously expressed intent of Congress." See *Chevron*, 467 U.S. at 842-43.

The states and SBC offer two lines of attack. First, they argue that the plain language of § 214(e)(2) does not support the FCC's blanket prohibition on additional state eligibility requirements. Second, they say that the FCC exceeded its jurisdictional authority, in violation of 47 U.S.C. § 152(b), by purporting to interfere [**39] with the states' regulation of intrastate service. Because we conclude that the agency [*418] erred in prohibiting the states from imposing additional eligibility requirements, we do not reach the states' jurisdictional challenges.

On the plain language front, the states argue that § 214(e)(2) does not unambiguously prohibit them from regulating carriers receiving federal universal support. Specifically, they contend that Congress did not mean to prohibit the states from imposing service quality standards on eligible carriers. According to the states, the language on which the FCC relies--"[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"--does not expressly circumscribe state authority to add additional eligibility requirements.

The agency's best hope for express authority for its action rests on the statute's use of the word "shall" in § 214(e)(2). Generally speaking, courts have read "shall" as a more direct statutory command than words such as "should" and "may." n30 Though we agree that the use of the word "shall" indicates a congressional command, nothing [**40] in the statute indicates that this command prohibits states from imposing their own eligibility requirements. Instead, we read § 214(e)(2) as addressing *how many* carriers a state may designate for a given service area, and not how much discretion a state commission retains to impose eligibility standards.

n30 See *MCI Telecomm. Corp. v. FCC*, 247 U.S. App. D.C. 32, 765 F.2d 1186, 1191 (D.C. Cir. 1985) (holding that "shall" is "the language of command").

The first sentence requires state commissions to designate at least one common carrier as eligible, but that

carrier must still meet the eligibility requirements in § 214(e)(1). The second sentence then confers discretion on the states to designate more than one carrier in rural areas, while requiring them to designate eligible carriers in non-rural areas consistent with the "public interest" requirement. Nothing in the statute, under this reading of the plain language, speaks at all to whether the FCC may prevent state commissions from imposing [**41] additional criteria on eligible carriers. n31

n31 To be sure, if a state commission imposed such onerous eligibility requirements that no otherwise eligible carrier could receive designation, that state commission would probably run afoul of § 214(e)(2)'s mandate to "designate" a carrier or "designate more than one carrier."

Thus, the FCC erred in prohibiting the states from imposing additional eligibility requirements on carriers otherwise eligible to receive federal universal service support. The plain language of the statute speaks to the question of *how many* carriers a state commission may designate, but nothing in the subsection prohibits the states from imposing their own eligibility requirements. n32 This reading makes sense in light of the states' historical role in ensuring service quality standards for local service. Therefore, we reverse that portion of the Order prohibiting the states from imposing any additional requirements when designating carriers as eligible for federal universal service [**42] support.

n32 Additionally, § 152(b) of Act instructs us to construe the Act to avoid giving the FCC jurisdiction over "charges, classifications, practices, services, facilities, or regulations for and in connection with intrastate communications services. . . ." 47 U.S.C. § 152(b). See *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 376 n.5, 90 L. Ed. 2d 369, 106 S. Ct. 1890 (1988) ("[Section] 152(b) not only imposes jurisdictional limits on the power of a federal agency, but also, by stating that nothing in the Act shall be construed to extend FCC jurisdiction to intrastate service, provides its own rule of statutory construction."); see also discussion of "no disconnect" rule, *infra* part III.A.3.

b. THE TERMS OF SECTION 214(e)(5)
GOVERNING THE DEFINITION OF SERVICE
AREAS.

In their initial brief, the states argued that the FCC had impermissibly encroached on their exclusive authority to [*419] designate service areas for universal service support. The FCC, however, [**43] pointed out that P 185 of the Order had only *encouraged* the states to make certain decisions n33 when designating service areas. The agency explicitly denies that the paragraph requires the states to follow its "encouragements." Thus, it appears that the states misinterpreted the FCC's intentions in P 185 and that there is no issue left for us to address.

n33 In order to promote competition, the FCC encourages states to

adopt the existing study areas of ILECs as service areas for non-rural areas because it would create a significant barrier to entry. The FCC further encourages states to consider designating service areas that the ILECs have not traditionally served, this limiting the ILEC advantage over new entrants.

Order P 185.

The states, however, continue to contest one aspect of the Order regarding the definition of service areas. The FCC maintains that it may establish a different definition of service areas for rural carriers, with the agreement of the states, without having to submit [**44] such a new definition first to the Joint Board. The states argue that the plain language of § 214(e)(5) allows the agency to act only "after taking into account recommendations of [the Joint Board] . . ."

The FCC has two procedural responses and one substantive defense. Because we agree with the FCC that the states have no standing, we do not reach the FCC's other defenses.

The agency argues that the states have no standing to challenge its ruling, because the states have failed to show any harm. n34 After all, as the FCC points out, it must still garner the approval of each respective state before a rural service area can be re defined. The states argue that they are harmed because the state members of the Joint Board are denied a chance to participate in the decisionmaking process, so the states are less able to coordinate with each other. They further contend that bypassing the Joint Board denied the states any meaningful participation in revising service area definitions for rural territories.

n34 We review the FCC's standing defense, like all constitutional questions, under a *de novo* standard of review. See 5 U.S.C. § 706 (stating that "a reviewing court shall decide all relevant questions of law [and] interpret constitutional and statutory provisions").

[**45]

This claim is weak, because the states' independent ability to veto particular service areas seems to provide them with a substantial amount of "meaningful participation." This is unlike the situation in the cases the states rely on, in that the states here are not challenging a federal preemption order that threatens their sovereign authority. See *California v. FCC*, 75 F.3d 1350, 1361 (9th Cir. 1996). Therefore, the states lack standing to challenge this portion of the Order.

c. DECLINING TO REQUIRE ELIGIBLE CARRIERS TO OFFER SUPPORTED SERVICES ON AN UNBUNDLED BASIS.

GTE argues that the FCC's failure to require carriers to "unbundle" their offerings when receiving universal service support violates the congressional intent expressed in § 214(e)(1) under *Chevron* step-one. "Bundling" refers to a carrier's practice of offering different services together as one package. For instance, a carrier might offer basic phone service as part of a package that includes call-waiting and voicemail.

GTE fears that a new carrier could "cherry pick" high-profit customers by offering only bundled local telephone service packages. Because the intended beneficiaries of universal [**46] service are, by definition, less able to afford even basic service, offering expensive bundled packages will allow new carriers to steal wealthier, low-cost customers while leaving ILEC's such as GTE to provide service to everyone else. GTE reasons that Congress, by requiring carriers receiving federal universal service support to advertise the availability of its [*420] supported services, intended to require new carriers to participate in universal service--an intent that would be thwarted by allowing the new carriers to offer bundled services.

The FCC responds that the plain language of the statute is satisfied as long as a carrier offers "services that are supported by Federal universal service mechanisms." 47 U.S.C. 214(e)(1)(A). Except for the advertising requirement, the statute makes no mention of "bundling" or other eligibility criteria. In fact, the FCC argues that because of the exclusive grant of eligibility authority conferred on the states by § 214(e)(2), it *cannot* impose additional eligibility criteria. Because the

statute is silent on the question of bundling, and because the statute seems to prohibit further eligibility criteria, the agency asks [**47] us to give deference to its interpretation of § 214(e) under *Chevron* step-two.

We agree that the statute's plain language does not reveal Congress's unambiguous intent. It is not evident, however, that the FCC's interpretation of the statute meets even the minimum level of reasonability required in step-two review.

Section 214(e)(1) plainly requires carriers receiving universal service support to offer such supported services to as many customers as possible. Thus, an eligible carrier must offer such services "throughout the service area" and "advertise the availability of such services." This requirement makes sense in light of the new universal service program's goal of maintaining affordable service in a competitive local market. Allowing bundling, however, would completely undermine the goal of the first two requirements, because a carrier could qualify for universal service support by simply offering and then advertising expensive, bundled services to low-income customers who cannot afford it.

The FCC suggests that GTE's problems stem not from bundling but from state-imposed "carrier of last resort" ("COLR") requirements, which prohibit ILEC's such as GTE from disconnecting [**48] low-profit consumers and leave ILEC's vulnerable to outside competition. But the elimination of COLR requirements would only further undermine the goal of making basic services available to low income consumers and those in "rural, insular, and high cost areas." See 47 U.S.C. § 254(b)(3). This again would violate the express intent of the universal service program. Without a better explanation for its unreasonable interpretation, we would be inclined to find the FCC's implementation "arbitrary and capricious and manifestly contrary to the statute." See *Chevron*, 467 U.S. at 844.

Fortunately, the agency also has explained that "only an eligible carrier that succeeds in attracting and/or maintaining a customer base to whom it provides universal service will receive universal service support." Order P 138. Therefore, it reasons that if offering only bundled services would price low-income customers out of the market, the carrier offering bundled services would eventually lose universal service support. Thus, the FCC can avoid the problem of providing universal service support to carriers that do not serve high-cost customers for which the support [**49] is intended. This explanation supports the FCC's claim that its decision to allow bundling is reasonable under *Chevron* step-two review.

Though the decision is a close one, we conclude that the FCC's refusal to require eligible carriers to provide

unbundled services is neither "arbitrary, capricious," nor "manifestly contrary to the statute." See *Chevron*, 467 U.S. at 844. Because the agency will prevent companies from using bundling to receive federal support while avoiding high-cost customers, we do not find its interpretation "so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs.' Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, [**421] 43, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983).

3. AUTHORITY TO PROHIBIT CARRIERS FROM DISCONNECTING LOCAL SERVICE TO LOW-INCOME CONSUMERS WHO FAIL TO PAY TOLL CHARGES.

Bell Atlantic and the states challenge the FCC's adoption of a regulation n35 prohibiting carriers receiving universal service support from disconnecting Lifeline services n36 from low-income consumers who have failed to pay toll charges. See Order P 390. The petitioners [**50] charge that the "no disconnect" rule exceeds the agency's jurisdictional authority under § 2(b) of the 1934 Act, n37 which prohibits FCC regulation of intrastate telecommunications service. Because the plain language of the statute expresses Congress's unambiguous intent, we review the agency's interpretation under *Chevron* step-one.

n35 47 C.F.R. § 54.401(b).

n36 The Lifeline program refers to the FCC's efforts to expand telephone services to qualifying low-income subscribers. The agency defines Lifeline services to include single-party service, voice-grade access to the public switched telephone network, BTMF or its functional digital equivalent, access to directory assistance, and toll-limitation services. See Order P 390.

n37 "Nothing in this subchapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier" 47 U.S.C. § 152(b) (as amended).

[**51]

The agency has three responses. First, it argues that § 2(b) does not apply where Congress has given the FCC an "unambiguous or straightforward" grant of authority. See *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 377. The agency argues that Congress granted such express authority in § 254(b)(3), which directs the FCC

to base its policies on the principle that "low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services"

As we have discussed, § 254(b) identifies seven principles the FCC should consider in developing its policies; it hardly constitutes a series of specific statutory commands. Indeed, we have avoided relying on the aspirational language in § 254(b) to bind the FCC to adopt certain cost methodologies for calculating universal service support. n38

n38 See *supra* part III.A.1.a.i.

Just as we declined to read § 254(b) as an inexorable statutory command against the FCC, we decline to read it [**52] as a grant of plenary power overriding other portions of the Act. The agency has no "unambiguous or straightforward" grant of authority to override the limits set by § 2(b), and, accordingly, it has no jurisdiction to adopt the "no disconnect" rule on the basis of the vague, general language of § 254(b)(3). n39

n39 The SBC intervenors challenge a related FCC rule prohibiting the practice of requiring deposits from customers initiating service with toll-blocking for interstate service. Unfortunately for SBC, none of the petitioners on this issue (the states and Bell Atlantic) raised a challenge to this similar but separate rule in the FCC proceeding. Therefore, we cannot consider it on appeal. See *United Gas Pipe Line Co. v. FERC*, 824 F.2d 417, 437 (5th Cir. 1987).

Second, the FCC contends that the petitioners' jurisdictional challenge is inapposite because the "no disconnect" rule does not purport to regulate intrastate service, but merely prevents the disconnection of interstate service (and, [**53] as a consequence, of intrastate service) for failure to pay toll charges. n40 As Bell Atlantic [*422] rightly responds, however, the "no disconnect" rule is a "regulation," because it dictates the circumstances under which local service must be maintained. Therefore, the FCC, by issuing the rule, has acted "with respect to" and "in connection with" interstate service within the meaning of § 2(b).

n40 Bell Atlantic argues that the FCC has waived this argument on appeal. We do not agree. The FCC's brief states that the "no disconnect" rule "does not purport to regulate

intrastate service . . . but merely to prevent the disconnection of service (including interstate access service) to customers who have failed to pay toll charges." Though weak, this statement preserves the FCC's attempt to exceed its jurisdictional boundaries on the ground that it cannot regulate an interstate matter without also regulating an intrastate matter.

The FCC points out that even if the "no disconnect" rule is a "regulation" within the meaning [**54] of § 2(b), courts have sustained agency jurisdiction over similar rules under the "impossibility" exception. In *North Carolina Utils. Comm'n v. FCC*, 552 F.2d 1036 (4th Cir. 1977), the court upheld FCC regulations permitting local subscribers to connect their telephones to the local loop to make interstate calls. North Carolina previously had required subscribers to use leased telephones and argued that § 2(b) prevented FCC intervention because the vast majority of these calls were intrastate. The court rejected this argument, holding that "the FCC has jurisdiction to prescribe the conditions under which terminal equipment may be interconnected with the interstate telephone line network." *Id.* at 1048.

Essentially, the FCC asks us to find that the "no disconnect" rule, aimed at regulating interstate service, is impossible to separate from intrastate service. In similar cases, the District of Columbia Circuit has permitted the FCC to intervene in relatively localized service issues n41 and has developed a useful framework for analyzing what the petitioners refer to as the "impossibility" exception to § 2(b). See *Public Serv. Comm'n v. FCC* ("*Maryland PSC*"), 285 U.S. App. D.C. 329, 909 F.2d 1510, 1515 (D.C. Cir. 1990). [**55]

n41 See, e.g., *Public Util. Comm'n v. FCC*, 281 U.S. App. D.C. 25, 886 F.2d 1325 (D.C. Cir. 1989); *Illinois Bell Tel. Co. v. FCC*, 280 U.S. App. D.C. 32, 883 F.2d 104 (D.C. Cir. 1989); *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 279 U.S. App. D.C. 99, 880 F.2d 422 (D.C. Cir. 1989).

To permit the FCC to preempt state regulation of whether to cut off low-income subscribers, that circuit requires the agency to show that "(1) the matter to be regulated has both interstate and intrastate aspects; (2) FCC preemption is necessary to protect a valid federal regulatory objective; and (3) state regulation would negate the exercise by the FCC of its own lawful authority because regulation of the interstate aspects of the matter cannot be unbundled from regulation of intrastate aspects." *Maryland PSC*, 909 F.2d at 1515

(internal quotations and citations omitted). This framework creates a properly narrow exception to § 2(b) that allows the FCC [**56] to preempt state regulation only when it has shown it cannot carry out its authorized federal objectives without encroaching on state autonomy.

Applying this framework to the "no disconnect" rule, we agree with Bell Atlantic that the FCC has failed to show why allowing the states to control disconnections from local service would "negate the exercise of the FCC's lawful authority" As Bell Atlantic points out, the agency offered only a brief explanation of what lawfully authorized federal objectives are being served by the "no disconnect" rule and why it is necessary to preempt local authority to achieve these objectives.

In the Order, the FCC simply states that the "no disconnect" rule advances its goal of increasing subscribership and that it will improve the competitiveness of the market for billing and collection of toll charges. See Order PP 390-391. But the agency has not adequately explained, in either its brief or its Order, why these goals would be "negated" by allowing the states to control disconnection of local subscribers. In contrast to what occurred in *Maryland PSC*, where the court allowed the FCC to assert jurisdiction to prevent ILEC's from shifting [**57] local costs to interstate consumers, the FCC has offered no similar explanation of how protecting interstate service requires imposition of a "no disconnect" rule. Therefore, we decline [**423] to allow the agency to assert jurisdiction over the disconnection of local service based on the impossibility exception.

Finally, the FCC argues that in the wake of *Iowa Utilities*, it has jurisdiction over all areas, including intrastate matters, to which the Act applies. In *Iowa Utilities*, the Court rejected jurisdictional challenges to the portions of the FCC's *Local Competition Order* implementing § 251 and 252 of the Act, which govern the interconnection of new local service carriers with the ILEC's and establish procedures for negotiating, arbitrating, and approving any interconnection agreements. As in the instant case, petitioners challenged the FCC's jurisdiction to implement the Act, arguing that much of the authority to enforce the provisions (§ 251 and 252) remain with the state commissions by virtue of § 2(b). Specifically, they contended that the Act gives the FCC jurisdiction over intrastate matters only when the statute explicitly applies to intrastate services and [**58] specifically confers agency jurisdiction over intrastate services.

The Court brushed aside these attempts to raise the § 2(b) jurisdictional fence and squarely held that " §

201(b) n42 explicitly gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies." *Iowa Utilities*, 119 S. Ct. at 730. Though § 2(b)'s language stating that "nothing in this Act shall be construed to apply or to give the Commission jurisdiction" implies that FCC jurisdiction does not always follow where the Act applies, the Court held that "the term 'apply' limits the substantive reach of the statute . . . and the phrase 'or Commission jurisdiction' limits . . . the FCC's ancillary jurisdiction." *Id.* at 731. Relying on this holding, the FCC argues that because § 254 applies to intrastate as well as interstate matters, § 201(b) confers the necessary jurisdiction to implement the "no disconnect" rule.

n42 "The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." 47 U.S.C. § 201(b).

[**59]

Though the Court's broad language seems to support the FCC's position, Bell Atlantic finds comfort in the Court's preservation of *Louisiana PSC*. In reconciling its holding with *Louisiana PSC*, the Court held that the FCC must show that the meaning of a statutory provision applies to intrastate matters in an "unambiguous and straightforward" manner as "to override the command of § 2(b)." *Iowa Utilities*, 119 S. Ct. at 731 (quoting *Louisiana PSC*, 476 U.S. at 377). If the agency fails in this initial task, it cannot use its normally broad regulatory authority to assert what is now only ancillary jurisdiction because of the still-intact jurisdictional fence created by § 2(b). See *id.* Therefore, after *Iowa Utilities*, § 2(b) still serves as (1) a rule of statutory construction n43 requiring the FCC to find unambiguous statutory authority applying to intrastate matters and (2) a jurisdictional barrier restricting the agency from using its plenary authority to assert ancillary jurisdiction by "taking intrastate action solely because it furthers an interstate goal." See *Iowa Utilities*, 119 S. Ct. at 731 (citing [**60] *Louisiana PSC*, 476 U.S. at 374).

n43 Accord *Louisiana PSC*, 476 U.S. at 376 n.5 ("[Section] 152(b) not only imposes jurisdictional limits on the power of a federal agency, but also, by stating that nothing in the Act shall be construed to extend FCC jurisdiction to intrastate service, provides its own rule of statutory construction.")

The question is whether § 254 does indeed "apply" to intrastate matters in a sufficiently "unambiguous" manner. Without such a finding, *Iowa Utilities* flatly holds that the FCC cannot use its plenary authority to assert ancillary jurisdiction.

Unfortunately, *Iowa Utilities* provides little guidance for resolving the question whether § 254 applies to intrastate services. For the Supreme Court, "the question . . . is not whether the Federal Government [*424] has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has." *Iowa Utilities*, 119 S. Ct. at 730 n.6. [**61] The Court did not further explain why it felt § 251 and 252 "unquestionably" applied to intrastate matters.

The FCC bases its contention that § 254 plainly applies to intrastate as well as interstate matters on § 254(b)(3),(c), and (j). According to the agency, § 254(b)(3) applies to intrastate service by stating that "low income consumers . . . should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services."

The use of the word "including," the FCC argues, indicates that the object of § 254 is to provide access to more than just interexchange services. Furthermore, § 254(c) instructs the agency to consider, in the process of establishing what constitutes universal service, whether such services "have . . . been subscribed to by a substantial majority of residential customers." Finally, § 254(j) specifically preserves the Lifeline Assistance program, which has always provided subsidies for both intrastate and interstate services.

We have already discussed our reluctance to rely on the aspirational language of § 254(b). n44 Moreover, the phrase "including interexchange carriers" [**62] cannot be said unambiguously to mean that § 254 applies to local services, and § 254(c)'s mention of a "majority of residential customers" is far from straightforward. Neither is there much guidance from § 254(j), which specifically protects the Lifeline Assistance program from being affected by any other part of § 254 but does not in any way clarify to what degree § 254 applies to intrastate universal service.

n44 See *supra* part III.A.3.

Instead, there is substantial support in the statute for a dual regulatory structure in the administration of the universal service program. Section 254(d) specifically instructs interstate carriers to contribute to the FCC's universal service mechanisms, while § 254(f) instructs

intrastate carriers to contribute to the states' individual universal service mechanisms. This section contains the only discussion of intrastate universal service mechanisms and directs intrastate carriers to report to the states rather than to the FCC.

In light of *Iowa Utilities* and [**63] *Louisiana PSC*, therefore, we conclude that, "while it is, no doubt, possible to find some support in the broad language of the section for [the FCC's] position, we do not find the meaning of the section so unambiguous or straightforward as to override the command of § 152(b)." *Louisiana PSC*, 476 U.S. at 377. Unlike § 251 and 252, which were solely concerned with intrastate issues (i.e., interconnection of new entrants into the local telephone market), § 254 applies to both interstate and intrastate services. It does so, however, only to the extent that it gives exclusive authority over intrastate contributions to the state commissions. We find it incongruous to use this explicit limitation on FCC authority as the hook to provide it with jurisdiction.

Therefore, the FCC exceeded its jurisdiction when it imposed the "no disconnect" rule. Because there is no express grant of statutory authority, a proper showing of "impossibility," or a persuasive explanation of how § 254 applies to intrastate service, we reverse, for want of agency jurisdiction, those portions of the Order implementing the "no disconnect" rule.

4. RECOVERY OF UNIVERSAL SERVICE CONTRIBUTIONS. [**64]

a. REQUIRING INCUMBENTS TO RECOVER CONTRIBUTIONS THROUGH ACCESS CHARGES.

GTE and the FCC again wrangle over the meaning of "explicit" in their [*425] dispute regarding the rule requiring most ILEC's to recover their universal service contributions through access charges. GTE contends that the rule violates § 254(e)'s command that any support for universal service be "explicit," because recovering contributions through increased access charges is a form of implicit subsidy.

GTE argues that the rule unfairly disadvantages ILEC's because, unlike their potential new competitors, they cannot recover their universal service contributions through explicit charges on their end-users, but, instead, are required by the FCC to increase their access charges on long-distance service providers. Though they do not necessarily lose out in terms of amounts recovered, GTE fears that this recovery method will put them at a competitive disadvantage because, instead of than seeing the costs of universal service on his bill as an explicit surcharge, an ILEC consumer will pay for the costs of universal service through higher rates.

The FCC advances a different understanding of "explicit." "Regardless of how [**65] carriers recover their contributions, the FCC's universal service system 'satisfies the statutory requirement that support be explicit' by requiring each carrier to contribute a specific percentage of its end user revenues" (quoting Order P 854). As long as carriers know exactly how much they are contributing to the support mechanisms, the subsidies are explicit. The statute provides little guidance on whether "explicit" means "explicit to the consumer" (as urged by GTE) or "explicit to the carrier" (as urged by the FCC). The statute does state, however, that all universal service support should be "explicit." We read "explicit" to mean the opposite of "implicit." See § 254(e). By forcing GTE to recover its universal service contributions from its access charges, the FCC's interpretation maintains an implicit subsidy for ILEC's such as GTE. In fact, requiring carriers to recover their contributions from access charges on interstate calls shifts the costs of intrastate universal service to the interstate jurisdiction. These are precisely the sorts of implicit subsidies currently used by the FCC in its DAM weighting program. See Order P 212 (discussing rules that permit [**66] small LEC's to recover costs for intrastate services from interstate access charges).

We are convinced that the plain language of § 254(e) does not permit the FCC to maintain any implicit subsidies for universal service support. Therefore, we will not afford the FCC any *Chevron* step-two deference in light of this unambiguous Congressional intent. Because the agency continues to require implicit subsidies for ILEC's in violation of a plain, direct statutory command, we reverse its decision to require ILEC's to recover universal service contributions from their interstate access charges.

b. REQUIRING INTERSTATE CARRIERS TO REDUCE INTERSTATE ACCESS CHARGES BY THE AMOUNT OF FEDERAL HIGH-COST SUPPORT THEY RECEIVE UNDER THE NEW UNIVERSAL SERVICE SYSTEM.

The states contest an aspect of the Order's effect on interstate access charges, arguing that the requirement that carriers reduce their interstate access charges by the amount of direct federal high-cost support they receive will leave insufficient funds for intrastate universal service. The states make two unconvincing plain-language arguments. First, they point to § 254(b)(5)'s language about "specific, predictable and [**67] sufficient" mechanisms to "preserve and advance universal service." As we have observed, § 254(b) identifies a set of principles and does not lay out any specific commands for the FCC. Even § 254(e), which is framed as a direct, statutory command, is ambiguous as

to what constitutes "sufficient" support. Therefore, we do not consider the language an expression of Congress's "unambiguous intent" allowing *Chevron* step-one [**426] review, and we review its interpretation for reasonability under *Chevron* step-two.

The states argue that § 254(e) does not permit the application of federal universal service funds for the interstate jurisdiction. In essence, they seek to preserve state universal service support by reading the statute to require all high-cost support to remain intrastate. Though this might make compelling policy, nothing in the plain language of § 254(e) unequivocally establishes the states' right to all of the federal universal support funds. The statutory language is at best ambiguous as to Congress's intent, which, under *Chevron* step-two, leaves it to the FCC's reasonable interpretation.

n45 "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."

[**68]

The FCC has offered good reason to believe that its new explicit support through direct subsidies will replace the amounts lost through the reduction of access charges. See Report to Congress P 230. To be sure, the states and intervenor NASUCA n46 make a plausible argument that ILEC's will receive less under the new plan than they did through implicit subsidies. As we have determined, however, because the FCC has offered reasonable explanations of why it thinks the funds will still be "sufficient" to support high-cost areas, we defer to the agency's judgment of what is "sufficient."

n46 National Association of State Utility Consumer Advocates.

Under the agency's new universal service plan, it is possible that the states will receive less support for intrastate universal service costs than they did under the old plan. While this may seem unfair as a matter of policy, the states have failed to show that the FCC's interpretation, which may possibly result in a reduction of their level of support, is "arbitrary, [**69] capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844.

5. CONTRIBUTIONS.

a. REQUIRING CMRS CARRIERS TO CONTRIBUTE TO THE FEDERAL UNIVERSAL SERVICE FUND. n47

n47 Intervenor American Cable Television Association challenges the FCC for failing to meet the requirements of the Regulatory Flexibility Act before promulgating the Order. None of the petitioners raises this argument, nor does the FCC respond to it, and therefore we do not consider it. *See* discussion of MCI's intervenor argument, *infra* part III.A.6.b.

Celpage Inc., a paging carrier, and intervenors representing a number of wireless telecommunications companies (referred to in general as commercial mobile radio service or "CMRS" providers), challenge the FCC's decision to subject them to the universal service support scheme. Celpage raises a number of constitutional and statutory challenges to the decision to require their contributions to the universal service fund. Specifically, Celpage attacks the agency's [**70] universal service contribution requirement as an unconstitutional tax, a violation of equal protection, and an uncompensated taking. Additionally, Celpage charges that the FCC's action violates § 254's plain language, is arbitrary and capricious, and does not meet the agency's own principle of competitive neutrality.

i. CONSTITUTIONAL CHALLENGES.

(a). UNCONSTITUTIONAL TAX.

There are two ways in which the universal service contribution requirement for paging carriers could constitute an unconstitutional tax. First, the FCC's application of the universal service requirement to paging carriers such as Celpage might be an unconstitutional delegation of Congress's exclusive taxing power under the Taxing Clause. n48 Alternatively, because [*427] the Act originated in the Senate, n49 its requirement of universal service contributions from paging carriers might violate the Origination Clause's requirement that all "bills for raising revenue" originate in the House of Representatives" n50

n48 U.S. CONST., art. I, § 8, cl. 1 ("The Congress shall have Power to lay and collect Taxes. . .").

n49 *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (enacting S. 652). [**71]

n50 U.S. CONST., art. I, § 7, cl. 1 ("All Bills for Raising Revenue shall originate in the House of Representatives.")

Despite their similarities, the Taxing Clause and Origination Clause challenges to the universal service contribution system represent separate lines of analysis. n51 In its initial brief, however, Celpage raises only the Origination Clause challenge and does not raise a Taxing Clause claim until its reply brief. Therefore, we will not consider it, n52 and we focus our efforts on Celpage's claim that the universal service contribution requirement, as applied to paging carriers, is a violation of the Origination Clause. n53

n51 The Taxing Clause analysis focuses on whether the assessment is a tax or a fee. This question is usually resolved based on whether the revenues are used to primarily defray the expenses of regulating the act. *See National Cable Television Ass'n v. United States*, 415 U.S. 336, 340, 39 L. Ed. 2d 370, 94 S. Ct. 1146 (1974). If it is a tax, then courts will ask whether it has been properly delegated. *Id.* On the other hand, the Origination Clause analysis asks whether (1) the revenues generated from the assessment are for general revenues or for a particular program and (2) there is a connection between the payors and the beneficiaries of the program. *See Munoz-Flores*, 495 U.S. 385, 397, 110 S. Ct. 1964, 109 L. Ed. 2d 384. *See infra* part III.B.1.c. n.83. [**72]

n52 Generally, we do not consider arguments raised for the first time in a reply brief. *See FED. R. APP. P. 28(c)*. Even if Celpage's Taxing Clause argument were properly before us, we find no basis for reversal. As applied to paging carriers, the universal service contribution qualifies as a fee because it is a payment in support of a service (managing and regulating the public telecommunications network) that confers special benefits on the payees. *See National Cable*, 415 U.S. at 340. *Cf. Rural Tele. Coalition v. FCC*, 267 U.S. App. D.C. 357, 838 F.2d 1307, 1314 (D.C. Cir. 1988) (upholding universal service contributions as a fee supporting allocations between interstate and intrastate jurisdictions).

n53 The Supreme Court has squarely held that Origination Clause challenges are subject to

judicial review and do not fall under the political question doctrine. "A law passed in violation of the Origination Clause would thus be no more immune from judicial scrutiny because it was passed by both Houses and signed by the President than would a law passed in violation of the First Amendment." *Munoz-Flores*, 495 U.S. at 397.

[**73]

Unfortunately for Celpage, its Origination Clause claim cannot survive *United States v. Munoz-Flores*, 495 U.S. 385, 398, 109 L. Ed. 2d 384, 110 S. Ct. 1964 (1990). There, the Court refused to find that a special assessment on certain federal criminals for a "crime victim's" fund is a tax, because "a statute that creates a particular governmental program and that raises revenue to support that program . . . is not a 'Bill for raising Revenue' within the meaning of the Origination Clause." *Id.*

Celpage points out that the Congressional Budget Office has treated universal service fund contributions as federal revenues. But how the government classifies a program for accounting purposes does not resolve whether the funds are used for a specific program or for general revenues. Indeed, the Court in *Munoz-Flores* upheld the special assessment even though the excess money collected was deposited in the Treasury. Instead of looking at accounting designations, *Munoz-Flores* teaches us (1) to determine whether the funds are "part of a particular program to provide money for that program . . ." and (2) to establish a connection between the payors and the beneficiaries. [**74] *Munoz-Flores*, 495 U.S. at 399, 400 n. 7.

With one exception, n54 universal service contributions are part of a particular program [*428] supporting the expansion of, and increased access to, the public institutional telecommunications network. See Order P 8. Each paging carrier directly benefits from a larger and larger network and, with that in mind, Congress designed the universal service scheme to exact payments from those companies benefiting from the provision of universal service. n55 This design prevents the sums being used to support the universal service program from being classified as "revenue" within the meaning of the Origination Clause.

n54 See discussion of § 254(h) support for internet services, *infra* part III.B.1. Unlike the circumstance in that case, the situation here is that of a telecommunications service provider's (a paging carrier's) being required to support the maintenance of a large telecommunications network.

n55 See § 254(d) ("Every telecommunications carrier that provides interstate telecommunications services shall contribute . . . to the . . . mechanisms established by the Commission to preserve and advance universal service."); § 254(f) ("Every telecommunications carrier that provides intrastate telecommunications services shall contribute . . .").

[**75]

Paging carriers are uniquely dependent on a widespread telecommunications network for the maintenance and expansion of their business. See Order P 82. As in *Munoz-Flores*, the challenged assessment targets a group "to which some part of the expenses" of sustaining the universal service program "can fairly be attributed." See *Munoz-Flores*, 495 U.S. at 400 n.7. Therefore, the application of the universal service contribution requirement to paging carriers does not transform the Act into a "bill for raising revenue" in violation of the Origination Clause. n56

n56 The *Munoz-Flores* Court does not discuss in great detail the importance, in Origination Clause analysis, of some kind of relationship between the payors and the beneficiaries. Still, it makes sense that the Court would insist on some link, because an assessment on one group for the benefit of a completely unrelated group is how courts have distinguished taxes raised for general federal outlays from fees raised for specific programs. Otherwise, Congress could *always* avoid the Origination Clause requirement because, in theory, all revenue is raised to fund some "particular program." Thus, courts must establish *some relationship* between the payors and the beneficiaries to avoid the strictures of the Origination Clause.

[**76]

(b). EQUAL PROTECTION.

To invalidate the FCC's actions on equal protection grounds, we must find that there is no "basis for the action that bears a debatably rational relationship to a conceivable legitimate govern mental end." See *Reid v. Rolling Fork Pub. Util. Dist.*, 979 F.2d 1084, 1087 (5th Cir. 1992). This is a tough burden, and Celpage does not come close. Celpage argues there can be no rational reason to include paging carriers in the universal service contribution system, because its contributions will support services that do not benefit Celpage. But the FCC has offered a reasonable proposition: Paging

carriers such as Celpage benefit from a larger and more universal public network system, because it increases the number of potential locations for paging use. Even if this proposition is wrong, as Celpage suggests, it certainly meets the very low "debatably rational" test. n57

n57 See *Reid*, 979 F.2d at 1087 (5th Cir. 1992) (stating that a "decision of a governmental body does not violate equal protection guarantees if there is any basis for the action that bears a debatably rational relationship to a conceivable legitimate governmental end").

[**77]

(c). TAKING.

Celpage advances an unconvincing takings claim. As an initial matter, a takings claim is not ripe until a claimant has unsuccessfully sought compensation from the state. n58 Celpage does not allege that it has used any of the FCC's administrative procedures to petition for compensation or that such procedures are so inadequate as to make resort to these procedures futile. "To violate the [takings] clause, the state must not only take someone's property but also deny him [*429] compensation." *Samaad v. City of Dallas*, 940 F.2d 925, 934 (5th Cir. 1991).

n58 See *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 193, 87 L. Ed. 2d 126, 105 S. Ct. 3108 (1985).

As we did in the case of GTE's challenge to the forward-looking cost methodology, we reject Celpage's takings claim as not ripe for judicial review. n59

n59 Even if we considered Celpage's takings claim, it would fail to demonstrate how its claim comports with the three factors the Supreme Court has established to analyze a regulatory takings claim: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action. See *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 225, 89 L. Ed. 2d 166, 106 S. Ct. 1018 (1986). In particular, Celpage has failed to offer reasonably specific predictions of the size and scale of this taking, thereby failing to show the

extent to which the regulation has interfered with its distinct investment-backed expectations.

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ii. OTHER CHALLENGES.

Celpage attacks the FCC's interpretation of the "equitable and nondiscriminatory" language in § 254(b)(4). To be truly equitable, Celpage asserts, the agency should not treat all carriers in the same way for purposes of the universal service contribution system. Additionally, Celpage accuses the agency of failing to consider evidence of congressional intent, the record evidence, and other evidence of why paging carriers should not be included in the universal service contribution system.

The FCC has successfully dispensed with the plain language challenge. First, as we have explained, the "equitable and nondiscriminatory" language in § 254(b) acts as only one of seven guiding principles for FCC rulemaking. See *supra* part III.A.1.a.i. That subsection also instructs the agency that "all providers of telecommunications services should make an equitable and nondiscriminatory contribution" to universal service. (Emphasis added.) The language of § 254(b) directs us to give the FCC, in addition to the usual *Chevron* deference, discretion here to fashion a policy that is guided by both of these principles.

Celpage also challenges the FCC's interpretation [**79] as arbitrary and capricious under the APA because it is not supported by the record, and the agency has provided no reason why its decision should be made in the face of contrary record evidence. Specifically, Celpage says that the FCC failed to consider *ex parte* statements by legislators during the rulemaking proceedings urging it to exclude CMRS carriers from the universal service contribution system. Additionally, Celpage points to evidence in the record supporting its position and claims the FCC failed to consider it.

To achieve reversal under the APA's arbitrary and capricious standard, Celpage must show that the FCC failed to "articulate[] a rational relationship between the facts found and the choice made . . ." *Harris*, 19 F.3d at 1096. A reviewing court tries "to determine whether the decision was based on a consideration of relevant factors . . ." *Louisiana v. Verity*, 853 F.2d 322, 327 (5th Cir. 1988).

The record does not show that the FCC failed to consider the counter-arguments proffered by the CMRS providers and their allies. The agency did take note of letters from Congress on behalf of CMRS providers and from other legislators [**80] taking the opposite position. See Report to Congress P 129 & n.301.

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Moreover, the letters on both sides have limited persuasiveness, because they are simply "post-passage remarks" that "represent only the personal views of these legislators" and "cannot serve to the change the legislative intent of Congress expressed before the Act's passage." *Regional Reorganization Act Cases*, 419 U.S. 102, 132, 42 L. Ed. 2d 320, 95 S. Ct. 335 (1974) (quoting *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 639 n.34, 18 L. Ed. 2d 357, 87 S. Ct. 1250 (1967)).

The FCC offered a reasonable justification for including CMRS providers-- [*430] this time relying on statutory language, the Joint Board recommendation, and the reasonable view that paging carriers do receive benefits from the universal service system. Accordingly, the agency's interpretation may not fairly be described as "arbitrary and capricious" under the APA. n60

n60 Celpage also challenges the FCC's ruling for violating its own principle of "competitive neutrality." Because this term has been developed by the FCC through regulation rather than through interpretation of the statute, we should give the agency broad deference in applying this principle, and we can reverse only if we find the FCC's actions "arbitrary, capricious or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844. The FCC's decision to require paging operators to contribute to the support of a network through which their business operates is not so irrational or arbitrary as to merit reversal.

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iii. IMPLEMENTING UNIVERSAL SERVICE ASSESSMENT REQUIREMENTS.

Celpage and the CMRS Providers challenge the FCC's rules and procedures for assessing contributions in the form of the Universal Service Worksheet. Specifically, Celpage attacks the worksheet for failing to distinguish between billed revenues and collected revenues for purposes of calculating universal service contributions. The CMRS Providers complain that the FCC's failure to provide guidance on how to adjust for the different nature of CMRS revenues makes the assessment system unconstitutionally vague.

We do not reach the vagueness argument, because the FCC persuasively responds that these challenges are not yet ripe for judicial review, for the reason that the agency has made a "tentative decision." n61 Similar attacks on the Worksheet are currently pending before the agency as petitions for reconsideration. n62 Moreover, recognizing the difficulties that the Worksheet raises, the FCC has already granted CMRS providers

interim relief by allowing them to provide good-faith estimates of the figures required by the Worksheet.

n61 See *Pub. Citizen Health Research v. Commissioner, Food & Drug Admin.*, 238 U.S. App. D.C. 271, 740 F.2d 21 (D.C. Cir. 1984) (refusing to exercise judicial review over tentative agency actions absent excessive delay or extraordinary recalcitrance). [**82]

n62 On October 26, 1998, the FCC released an order and a further notice of proposed rulemaking on the question of how to assess wireless carriers' revenues. The agency made a tentative decision to provide wireless carriers with interim guidelines for how to approximate their percentage of interstate wireless revenues. Additionally, the agency sought comment on various proposals for a final guideline on such calculations and comment on the relationship of wireless communications providers to universal service. This order further supports the FCC's position that it has not yet made a final decision on how to handle these issues.

Thus, the agency properly asks us to defer judicial review of its tentative decision until all administrative remedies are exhausted. In analogous situations, courts have postponed review "until relevant agency proceedings have been concluded [to] permit[] an administrative agency to develop a factual record, to apply its expertise to the record, and to avoid piecemeal appeals." See *Telecommunications Research & Action Ctr. v. FCC*, 242 U.S. App. D.C. 222, 750 F.2d 70, 79 (D.C. Cir. 1984) [**83] (internal citations omitted).

iv. STATES' COLLECTION OF UNIVERSAL SERVICE ASSESSMENT FROM CMRS CARRIERS.

Celpage and the CMRS Providers make a convincing challenge in contesting the FCC's decision to permit states to impose universal service contribution requirements on CMRS providers. They argue that the plain language of 47 U.S.C. § 332(c)(3)(A) specifically preempts states from doing so. Additionally, the CMRS Providers contend that § 254(f)'s language, relied on by the FCC, does not reach CMRS providers, because they are interstate carriers.

[*431] (a) Plain Language of § 332(c)(3)(A).

Celpage and the CMRS Providers argue that in § 332(c)(3)(A), "Congress has spoken to the precise

question at issue," the ability of states to assess CMRS providers for universal service contributions. See *Chevron*, 467 U.S. at 842. Therefore, they argue that the FCC's interpretation deserves no deference. The plain language of § 332(c)(3)(A) does seem to apply to the issue at hand:

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 [**84] 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.

Before we discuss the differing interpretations of the statute, we must decide on the proper standard of review. The Tenth Circuit recently reviewed the FCC's interpretation of this section under the second step of *Chevron*, because the statute does not expressly state how we should read § 332(c)(3)(A) in relation to § 254(f). See *Sprint*, 149 F.3d 1058, 1061. This standard of review is inappropriate, however, because it would allow the FCC to receive *Chevron* deference in almost every situation in which two sections of a statute must be read together. Indeed, the Act [**85] does contain a specific rule of statutory construction in § 601(c)(1), reprinted in 47 U.S.C. § 152 (Addendum A-1): "This Act and the amendments made by this Act shall not be construed to modify, impair or supersede Federal, State or local law unless expressly provided in such Act or Amendments."

Thus, we disagree with the *Sprint* court that the lack of a specific provision discussing the relation between § 332(c)(3)(A) and 254(f) automatically triggers *Chevron* deference. To the contrary, § 601(c)(1) gives us explicit instruction to read § 254(f) ("federal law") as not conflicting with § 332(c)(3)(A). Therefore, we conduct a *Chevron* step-one review and try to search out the statute's plain meaning.

Celpage and the CMRS Providers offer this "plain common sense" reading: Assessments for universal service by state commissions constitute regulation of

rates or entry for purposes of the statute. The first sentence of this subsection prohibits the states from regulating rates or entry, and therefore prohibits universal service assessments, relating to CMRS providers. The second sentence explains that states may impose universal service requirements [**86] "where such services are a substitute for land line telephone exchange service . . ." This plain language, Celpage and the CMRS Providers argue, expressly prohibits states from requiring universal service contributions from CMRS providers without first making a finding that the CMRS services in question are a substitute for landline telephone service.

The FCC points to plain language that requires it to make "every . . . carrier that provides intrastate telecommunications service" contribute to the universal service programs as determined by the states. See 47 U.S.C. § 254(f). It then contends that the provisions of § 332(c)(3)(A) should not be read to trump the express commands of § 254(f).

The FCC finds support for its reading in the second clause of the first sentence of § 332(c)(3)(A). First, it concludes that requiring universal service contributions is neither rate nor entry regulation. See [**432] *Fourth Reconsideration Order* P 301. It then notes that this clause says that a state is not prohibited from regulating "other terms and conditions of commercial mobile services." Based on this clause alone, the FCC argues, the states retain the ability [**87] to compel universal service contributions as long as it does not constitute regulation of rates or entry. The second sentence simply clarifies that states can also regulate "rates and entry" if they make a finding that CMRS providers are substituting for landline service.

The *Sprint* court adopted this reading of § 332(c)(3)(A) and added another argument for the FCC's position. See *Sprint*, 149 F.3d at 1061. The second sentence's introductory language, "nothing in this subparagraph . . .," limits the reach of the landline substitution requirement to § 332(c)(3)(A). Therefore, the landline substitution requirement "simply is not relevant to § 254(f)." *Id.*

The petitioners argue that the FCC's reading violates the maxim of statutory construction that all language of a statute must be given effect. n63 According to the petitioners, if we read the clause "other terms and conditions" to enable states to impose universal service requirements, then the entire second sentence would be redundant. There would be no reason to create a statutory requirement for when states may impose conditions for universal service if the "other terms and conditions" clause already [**88] allows states to impose universal service requirements on CMRS providers.

n63 See *Mississippi Poultry Ass'n v. Madigan*, 31 F.3d 293, 304 (5th Cir. 1994) (en banc) ("[A] statute should be interpreted so as not to render one part inoperative.").

But the FCC persuasively responds that, under its reading, the second sentence clarifies the ability of states to regulate rates and entry in the name of universal service, while the "other terms and conditions" clause opens the door to all other universal service regulation. Thus, we do not conclude, as the petitioners imply we should, that requiring universal service contributions necessarily constitutes the regulation of rates and entry. n64 Thus, under the FCC's reading, the states may generally regulate CMRS providers as they please, but they may regulate the rates and entry of CMRS providers only when they make a finding of substitutability.

n64 A state commission could require a universal service contribution based on end-user revenues but leave the carrier free to set its rates as it pleases while not blocking new carriers from entering the market. On the other hand, a state commission would be regulating "rates and entry" if it required the carriers to lower rates for one group of customers as part of an implicit subsidy.

[**89]

We disagree with the CMRS Providers' further argument that even this reading, adopted in *Cellular Telecomms. Indus. Ass'n v. FCC*, 335 U.S. App. D.C. 32, 168 F.3d 1332 (D.C. Cir. 1999), n65 would render the second sentence redundant because the third sentence of the subsection specifically lays out the procedures under which a state can petition for the right to regulate CMRS rates. The FCC's reading would still permit the following understanding of the statute: States (1) in general can never regulate rates and entry requirements for CMRS providers; (2) are free to regulate all other terms and conditions of CMRS service; (3) may regulate CMRS rates and entry requirements when they have made a substitutability finding in connection with universal service programs; and (4) may also regulate CMRS rates if they petition the FCC and meet certain statutory requirements, including either substitutability or unjust market rates. None of the provisions would have to be read as inoperative or redundant.

n65 See also *Mountain Solutions v. State Corp. Comm'n*, 966 F. Supp. 1043 (D. Kan. 1997).

[**90]

Additionally, this reading would avoid conflict with § 254(f), which requires that "every telecommunications carrier" contribute to the universal service fund. This [*433] rendition of § 332(c)(3)(A) allows the FCC to give effect to the plain language of § 254(f) while not violating § 601(c)'s directive to construe the Act in ways that do not "modify, impair, or supersede" federal law.

Therefore, the reading offered by Celpage and the CMRS Providers does not represent the unambiguous intent of Congress. The FCC's reading reflects Congress's unambiguous intent as expressed in the plain language of the statute and takes into account Congress's instruction that § 254 be construed in ways that do not conflict with other federal laws. n66 Therefore, we reject Celpage and the CMRS providers' challenges to this section of the Order.

n66 Even if the CMRS providers are right that the plain language does not unambiguously support the FCC's reading, we would defer to the FCC's reasonable interpretation under *Chevron* step-two. *Accord Cellular Telecommunications*, 168 F.3d at 1336 ("The bottom line is that Cellular has not demonstrated that its interpretation of § 332(c)(3)(A) is the only permissible one . . .").

[**91]

(b) CMRS PROVIDERS AS INTERSTATE CARRIERS.

Celpage and the CMRS Providers raise a weak challenge to state contribution requirements, contending that CMRS providers are "jurisdictionally interstate" and therefore exempt from state assessments. We agree with the FCC that the plain language of § 254(f) simply requires that "every telecommunications carrier that provides intrastate telecommunications services" contribute to state mechanisms. As the agency found, a significant portion of the CMRS providers' services arise from providing *intrastate* telecommunications services. n67 This undeniably significant involvement of CMRS providers in the provision of intrastate service is more than sufficient to place them within the ambit of § 254(f).

n67 According to one study, interstate revenues accounted for only 5.6% of total revenues for cellular and personal communications service carriers and 24% of total

revenues for paging and other mobile service carriers. See Fourth Reconsideration Order P 303.

b. **[**92]** DETERMINING THAT INTERSTATE CARRIERS MUST CONTRIBUTE ON THE BASIS OF THEIR INTERNATIONAL REVENUES.

COMSAT, a small interstate carrier specializing in providing international telephone service, challenges the FCC's decision to define the universal service base to include the international revenues of interstate carriers. COMSAT derives such a small portion of its revenues from interstate service that it would end up with universal payment obligations exceeding its interstate revenues. It argues that this bizarre outcome violates § 254(d)'s requirement that all universal service contributions be "equitable and nondiscriminatory" and the FCC's own principle of competitive neutrality. At the very least, COMSAT argues, this result shows that the FCC's action is arbitrary and capricious.

As a threshold matter, the FCC challenges the availability of judicial review, because COMSAT failed to petition the agency for reconsideration, as required by § 405 of the Act. n68 COMSAT responds that the absence of a § 405 petition for rehearing is not a bar to judicial review if the petitioner was a party in the rulemaking proceeding and the FCC was afforded an opportunity to rule on the issue. **[**93]** n69 Because COMSAT did participate in the rulemaking proceeding and did file comments n70 **[*434]** with the agency on this question, we agree that § 405 does not bar our review. n71

n68 47 U.S.C. § 405(a).

n69 "The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass." 47 U.S.C. § 405(a).

n70 See generally *Comments of COMSAT Corp.*, CC Docket No. 96-45 (filed Dec. 19, 1996); *Comments of COMSAT Corp.*, CC Docket No. 96-45 (filed April 12, 1996).

n71 See *Time Warner Entertainment Co., L.P. v. FCC*, 330 U.S. App. D.C. 126, 144 F.3d 75, 80 (D.C. Cir. 1998) ("So long as the issue is

necessarily implicated by the argument made to the Commission, section 405 does not bar our review.").

[94]**

The FCC is more persuasive when it argues that COMSAT is really asking for consideration of its individual circumstance rather than challenging the rule as a whole. In this situation, the FCC argues that waiver is a more appropriate remedy than is judicial review. In fact, COMSAT did file a petition for waiver but withdrew it without explanation shortly before the FCC filed its brief in this case. COMSAT now claims to be bringing this claim on behalf of all international carriers in similar circumstances, but it fails to identify any such entities and remains alone in its petition for review.

While waiver may be an appropriate remedy, the FCC cites no authority for the proposition that consideration of a waiver is required before judicial review may occur, and our research has found no such authority. The case relied on by the FCC stands only for the proposition that waiver will be allowed as long as the underlying rule is rational. n72 We see no statutory basis for denying judicial review on the ground that a party must first seek a waiver. Therefore, we consider the rule on its merits.

n72 See *National Rural Telecomm. Ass'n v. FCC*, 300 U.S. App. D.C. 226, 988 F.2d 174, 181 (D.C. Cir. 1993).

[95]**

COMSAT's attack boils down to the argument that it is being unfairly treated because it will be forced to pay more in universal service contributions than it can generate in interstate revenues. n73 It makes a compelling argument that this result alone violates the equitable language of the statute. The FCC's response to the statutory challenge simply states that there is nothing "inequitable" about requiring a carrier benefiting from universal service from contributing to it.

n73 COMSAT estimates that the application of the FCC's interpretation would require it to contribute more in universal service fees (\$ 5 million) than it would generate in interstate revenues (\$ 3.8 million).

Under this reading, however, it is difficult to know what the FCC would consider inequitable, because any carrier could conceivably benefit from universal service.

Obviously, the language also refers to the fairness in the allocation of contribution duties. In this matter, COMSAT can show that it is being forced to pay more under [**96] this rule than it can generate in revenues, yet the FCC does not find even this situation "inequitable."

Moreover, the FCC dismisses COMSAT's claim that the agency violates the "nondiscriminatory" requirement of § 254(d) simply by saying that the agency has recognized that some providers of international service will be treated differently from others. But this recognition of discrimination hardly saves the agency from the statutory requirement that contributions are collected on a non-discriminatory basis.

The agency falls back on its discretion, under the statute, to balance the competing concerns set forth in § 254(b), which include the need for sufficient revenues to support universal service. While the statute allows the FCC a considerable amount of discretion, however, that discretion is not absolute. The heavy inequity the rule places on COMSAT and similarly situated carriers cannot simply be dismissed by the agency as a consequence of its administrative discretion.

Therefore, the agency's interpretation of "equitable and nondiscriminatory," allowing it to impose prohibitive costs on carriers such as COMSAT, is "arbitrary and capricious and manifestly contrary to the [**97] [*435] statute." *Chevron*, 467 U.S. at 844. COMSAT and carriers like it will contribute more in universal service payments than they will generate from interstate service. n74 Additionally, the FCC's interpretation is "discriminatory," because the agency concedes that its rule damages some international carriers like COMSAT more than it harms others. The agency has offered no reasonable explanation of how this outcome, which will require companies such as COMSAT to incur a loss to participate in interstate service, satisfies the statute's "equitable and nondiscriminatory" language. We therefore reverse and remand this portion of the Order for further consideration.

n74 COMSAT also points out that much of the interstate service it provides is at the request of the government, to ensure service to isolated locations such as Guam and American Samoa.

6. TIMING.

a. TIMETABLE FOR THE IMPLEMENTATION OF AN EXPLICIT SYSTEM OF UNIVERSAL SERVICE SUPPORT.

On statutory and constitutional grounds, GTE attacks the [**98] FCC's timetable for implementation of an explicit system of universal service support. n75 First, GTE argues that the agency's decision to wait until January 1, 2000, before implementing its plan for providing explicit support for universal service violates the statutory requirements of § 254. Second, GTE asserts that the delay in implementation results in an unconstitutional taking.

n75 The FCC asks us to bar review of this question, arguing that GTE and SBC are collaterally estopped from litigating it because they did so during challenges to the Access Charge Order in the Eighth Circuit. *See Southwestern Bell*, 153 F.3d at 537. Before applying collateral estoppel, we must first decide whether (1) the issue under consideration is identical to that litigated in the prior action; (2) the issue was fully and vigorously litigated in the prior action; (3) the issue was necessary to support the judgment in the prior case; and (4) there is no special circumstance that would make it unfair to apply the doctrine. *See Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 391 (5th Cir. 1998), cert. denied, 526 U.S. 1034, 143 L. Ed. 2d 378, 119 S. Ct. 1286 (1999).

We agree with the petitioners that the challenge to the FCC's high-cost support timetable is not "identical," for collateral estoppel purposes, to the issue raised in that case. Although the petitioners challenge the coordination between implicit subsidies in the access charge system and those in the new support system, their challenge in this case involves a broader attack on the timing of the entire universal service high-cost support system rather than on just its interactions with the access charge system.

The Eighth Circuit did not consider the contention that GTE brings before us: that the FCC violated § 254(a) by failing to implement an "explicit" and "sufficient" universal service support system within "fifteen months" of the 1996 Act's enactment. The Eighth Circuit relied on the fact that the deadline for adopting rules on universal service came after the date for adopting rules on opening the market to local competition. *See Southwestern Bell*, 153 F.3d at 537. Therefore, there was no need for that court to decide whether § 254(a) requires full implementation within "fifteen months" of the enactment, and GTE is not collaterally estopped

for pursuing its appeal of § 254(a) in this court. See *Winters*, 149 F.3d at 391 n.3 ("Unless prior issue sought to be precluded from relitigation was a 'critical or necessary part' integral to the prior judgment, collateral estoppel may not apply.").

[**99]

i. STATUTORY LANGUAGE.

GTE contends that the delay in implementation violates § 254(e) because it fails to provide "sufficient" funding to support universal service. n76 In fact, between the Order's release on May 8, 1997, and its implementation on January 1, 2000, the FCC will have provided no explicit support to the ILEC's, while it has already exposed them to outside competition. In theory, then, new entrants could begin "cherry-picking" the ILEC's' best low- [*436] cost, high-profit customers, leaving the ILEC's stuck with the high-cost, money-losing customers that are supposed to be supported by the new universal service subsidy system. This would erode the old implicit subsidy system before the FCC had implemented the new explicit subsidy system.

n76 GTE also claims that the FCC's actions violate the "predictable" and "nondiscriminatory" requirements of § 254(b). We see no merit to this contention and focus instead on GTE's best statutory argument, which relies on the use of the term "sufficient" in § 254(e).

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The question is whether the statute's language plainly requires the FCC to have implemented explicit subsidies at the same time that it issued the Order on May 8, 1997. GTE claims the statute requires immediate implementation. But the plain language of § 254(a)(2) requires us to reach the opposite result:

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*.

47 U.S.C. § 254(a)(2)(emphasis added).

By instructing the FCC to establish a "timetable for implementation" by the statutory deadline, Congress

assumed the implementation process would occur over a transition period after the fifteen-month deadline. There is no reason to believe--and GTE does not offer a reason--that the instruction to establish a timetable actually means immediate implementation of the explicit subsidy system at the statutory [**101] deadline. n77

n77 Section 254(e) contemplates that universal support will be "explicit" and "sufficient" "after the date on which Commission regulations implementing this section [§ 254(e)] take effect." This language further supports the FCC's reading that Congress did not require implementation of the high-cost support program immediately after the 15-month deadline.

Not surprisingly, GTE falls back on the term "sufficient" and argues that even if the FCC may slowly implement the high-cost support program, the statute still requires the agency to ensure that support is sufficient during the transition period. For reasons that we have outlined, the FCC should be accorded a substantial amount of deference when interpreting this word. See *supra* part III.A.a.i.

GTE essentially asks us to hold that "sufficient" is violated whenever there is a change (or the possibility of a change) from the current levels of universal service support. The plain meaning of "sufficient" is far from unambiguous as it pertains [**102] to the timing of the high-cost support program's implementation. Calculating how much support is sufficient to provide support for universal service is a judgment the FCC is better able to make than are we, and we therefore defer to its reasonable interpretation under *Chevron* step-two.

As the agency explains, the amount of competition in local markets depends on a number of different factors, of which the implementation of the universal service plan is only one. To enter a new market, entrants must invoke rights to interconnection agreements under § 251 and 252. n78 In almost all cases, these agreements require lengthy arbitrations by state commissions. Even after the completion of such arbitrations, there may be many court challenges. Because only competition in local markets can erode the current implicit subsidy system to an insufficient level, the FCC made a reasonable determination that there was little [*437] chance of such competition's emerging in the near future.

n78 The Supreme Court did not issue its final word on these sections until January 25, 1999. See *Iowa Utilities*, 525 U.S. 366, 142 L. Ed. 2d 834, 119 S. Ct. 721. In the meantime, many

potential entrants were stymied in the arbitration process and by the uncertainty over the FCC's jurisdiction to implement its local competition order. Therefore, it is not surprising that the agency did not expect an onslaught of local competition during the interim period.

[**103]

Where the statutory language does not explicitly command otherwise, we defer to the agency's reasonable judgment about what will constitute "sufficient" support during the transition period from one universal service system to another. We follow the Eighth Circuit's recent holding on a similar issue: "The Commission has made a predictive judgment, based on evidence in the record and adequately explained in the order, that competitive pressures in the local exchange market will not threaten universal service during the interim period until the permanent, explicit universal service support mechanisms have been fully implemented." *Southwestern Bell*, 153 F.3d at 537.

ii. TAKING.

In some ways, GTE's takings argument is simply another version of its contention regarding lack of "sufficient" support. On both issues, GTE argues that the FCC's decision to leave ILEC's exposed to local competition without first implementing the new universal service plan results in a severe reduction of its revenues from local service. Relying on *Brooks-Scanlon v. Railroad Comm'n*, 251 U.S. 396, 64 L. Ed. 323, 40 S. Ct. 183 (1920), GTE argues that a regulated entity cannot [**104] be forced to operate one segment of its business at a loss on the expectation that it can make up the shortfall from another competitive line of business. At the very least, GTE says, the FCC should adopt a narrow construction of the statutory language to avoid any constitutional infirmities. n79

n79 See *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575, 99 L. Ed. 2d 645, 108 S. Ct. 1392 (1988).

The FCC responds that before a narrowing construction should be considered, GTE must show that a taking will "necessarily" result from the regulatory actions. See *United States v. Riverside Bayview Homes*, 474 U.S. 121, 128 n.5, 88 L. Ed. 2d 419, 106 S. Ct. 455 (1985). Even if GTE can show that some taking will result, it must demonstrate that its losses are so significant that the "net effect" is confiscatory. See *Duquesne*, 488 U.S. at 310-16.

GTE has failed to meet the requirements of *Duquesne*, because it cannot [**105] show that it will lose any revenue at all, much less enough to constitute a taking under more recent precedent. Its attempt to distinguish *Duquesne* is misguided because, contrary to GTE's claim, the *Duquesne* Court did not base its finding of takings on the fact that the market was no longer closed to competition.

Rather, *Duquesne* stands for the proposition that "no single ratemaking methodology is mandated by the Constitution, which looks to the consequences a governmental authority produces rather than the techniques it employs." *Duquesne*, 488 U.S. at 299 (Scalia, J., concurring). *Duquesne* does not require courts to engage in a takings analysis whenever an agency opens a previously regulated market to competition. Further, as we explained in sustaining the forward-cost looking methodology, GTE's reliance on *Brooks-Scanlon* is misplaced, because we will not apply the rule in that case to transitional or temporary periods. See *Continental Airlines*, 784 F.2d at 1251.

b. ACCESS CHARGES AT FORWARD-LOOKING COST LEVELS AS SOON AS COST MODELS ARE AVAILABLE.

MCI asks the FCC to reduce access charges--the fees charged by ILEC's on interstate [**106] calls--to the forward-looking cost level used by the agency to calculate support for high-cost areas. Under the FCC's plan, ILEC's will be required to reduce their access charges by the amount they receive in the form of explicit universal service subsidies. MCI argues that by permitting the ILEC's to retain the [*438] amount of access charge revenue above cost, the FCC has violated its statutory mandate to eliminate implicit subsidies when it implements the new universal service plan.

This argument differs from GTE's assertions. While GTE seeks immediate implementation of the explicit subsidy program, MCI seeks to include the elimination of implicit subsidies within the rubric of the explicit subsidy program. In fact, GTE's fear that implicit subsidies will be eroded during the transition period is precisely the goal of MCI's intervention. Because GTE does not seek the elimination of the implicit subsidies, it is making an argument different from MCI's.

For this reason, we agree with the FCC that MCI cannot properly intervene on this issue, because none of the petitioners raised the same challenges to the Order. In *United Gas Pipe Line*, 824 F.2d at 437, we held that "intervenor [**107] may not challenge aspects of the Commission's orders not raised in the petitions for review." Because MCI's challenge does not raise an issue brought up by any of the petitioners, we do not consider its arguments on appeal, but follow the District of

Columbia Circuit and decline to grant intervenor standing in a situation in which "we could grant [the intervenor] the full relief it seeks while rejecting all of the petitioners' challenges, and vice versa." *Illinois Bell Tel. Co. v. FCC*, 286 U.S. App. D.C. 34, 911 F.2d 776, 786 (D.C. Cir. 1990). n80

n80 MCI claims that the FCC is trying to evade review of this question through procedural maneuvering. When BellSouth, in its Eighth Circuit challenge to the Access Charge Order, raised the issue of the FCC's failure to remove all implicit subsidies, the agency argued that this question should be addressed in this court in challenges to the Universal Service Order. Now that MCI has raised that same issue, MCI argues that the agency should not be allowed to dodge review again on procedural grounds.

Unfortunately for MCI, it was not any manipulation of procedural rules by the FCC that prevented MCI from properly raising this issue on appeal. There was no legal reason that prevented MCI from filing a brief as a petitioner rather than as an intervenor. Thus, the FCC's procedural moves are irrelevant for purposes of deciding whether MCI may properly intervene. The only question, then, is whether MCI's challenge to the Order for failing to reduce access charges immediately is the same as GTE's challenge to the Order for failing to implement explicit subsidies immediately. We see no such resemblance.

[108]**

c. PLAN FOR TRANSITION TO A NEW UNIVERSAL SERVICE SYSTEM FOR RURAL, INSULAR, AND HIGH-COST AREAS.

The FCC's transition plan for its new explicit subsidy universal support system does not immediately apply to all ILEC's. All carriers eligible for universal service support will become part of the new system on January 1, 2000. Small rural carriers, however, will not be required to move into the new system until 2001 at the earliest. *See Order P 204*. Specifically, the agency (1) has exempted rural carriers, defined as those carriers serving study areas of less than 100,000 lines, from the new forward-looking cost methodology until at least January 1, 2001, n81 and (2) has allowed carriers with 200,000 or fewer working loops per study area to continue recovering extra support from the high-cost fund until implementation of the new methodology on January 1, 2000. *See Order § 210*.

n81 *See Order P 273* (stating that "non-rural carriers" will come under the new forward-looking cost methodology).

i. ESTABLISHING **[**109]** A LONGER TRANSITION PERIOD FOR RURAL CARRIERS WITH FEWER THAN 100,000 LINES.

Vermont n82 attacks the small rural carrier exemption because it does not permit large carriers who happen to serve rural areas the same delayed transitional treatment that rural carriers with study **[*439]** areas of less than 100,000 lines will receive. Vermont argues that there is no statutory or reasonable basis for distinguishing among rural carriers simply because of their size. For example, census statistics show that Vermont has more residents living in rural areas than does any other state, yet its carrier, Bell Atlantic, does not qualify for the same treatment as do other rural carriers as defined by the FCC's 100,000-line distinctions.

n82 Kansas initially joined Vermont in this challenge but indicates, in its reply brief, that it now withdraws from this portion of the appeal.

Vermont does not point to any statutory authority for its claim that the FCC must give all rural carriers the same treatment under the plan. Instead, it simply **[**110]** argues there is no good reason to treat Bell Atlantic differently from other rural carriers. For these reasons, it asks us to reverse on arbitrary-and-capricious grounds under the APA.

A statute survives judicial scrutiny under the APA's "arbitrary and capricious" standard as long as the agency "articulates a rational relationship between the facts found and the choice made" and "so long as the agency gave at least minimal consideration to relevant facts contained in the record." *Harris*, 19 F.3d at 1096. The FCC provides at least two reasons that articulate such a "rational relationship."

First, because the agency delayed the transition for rural carriers on the ground that its cost models for small carriers were inadequate, it was reasonable to treat Bell Atlantic differently. After all, Bell Atlantic is a large ILEC for which the FCC does have cost models. Second, the FCC justifies its delay for small rural carriers because it has found that they will have greater difficulty adjusting to a new system. Again, such a finding would not apply to Bell Atlantic. These reasons suffice.

ii. CONTINUING APPLICATION OF EXISTING HIGH-COST RULES UNTIL THE NEW UNIVERSAL SERVICE [**111] SYSTEM TAKES EFFECT.

Vermont n83 challenges the decision to maintain extra support for ILEC's with study areas of 200,000 or fewer loops until the new methodology is implemented on January 1, 2000. In other words, by exempting carriers with 200,000 or fewer lines from the new high-cost support methodology, the FCC again decided to give extra support to smaller carriers, in this case defined as those carriers with study areas containing 200,000 or fewer loops. As it did in challenging the 100,000 line distinction, Vermont asserts that the distinction is arbitrary and capricious because the FCC ignores evidence that size is not a reliable predictor of cost.

n83 Kansas initially joined Vermont in this challenge, but has indicated in its reply brief that it now withdraws from this portion of the appeal.

The FCC again argues that the 200,000-line rule is transitional, interim relief. The agency has stated that the extra support provided by this rule will expire when the new forward-looking cost methodology goes into [**112] effect on January 1, 2000. It asks us to accord it the "substantial deference" it needs to develop transitional solutions to complex regulatory problems. See *MCI Telecomms. v. FCC*, 242 U.S. App. D.C. 287, 750 F.2d 135, 140 (D.C. Cir. 1984).

In contrast to the situation involving the rural carrier exemption, the FCC has set a specific date for the end of this transitional period: January 1, 2000. Accordingly, the agency's commitment to a specific date for termination of the support resulting from the 200,000-loop rule makes the rule sufficiently transitional to avoid judicial review. Therefore, for lack of ripeness, we will not review Vermont's challenge to the effects of the 200,000-loop distinction. n84

n84 Vermont argues that the 200,000-loop distinction will become permanent through its incorporation into the "hold harmless" rule articulated in the *Seventh Report and Order*. As we have discussed, *supra*, we do not have jurisdiction to consider the merits of that new Order except in the way that it affects our review of the Order. The "hold harmless" principle was introduced in the *Seventh Report and Order* and remains outside the scope of this proceeding.

[**113]

[*440] B. SUBSIDIZATION OF SERVICES FOR SCHOOLS, LIBRARIES, AND HEALTH CARE PROVIDERS.

Section 254(h) adds a new wrinkle to the concept of universal service by directing the FCC to provide support to elementary and secondary schools, libraries, and health care providers. Thus, the agency has a new statutory mandate to subsidize support for certain beneficiaries, irrespective of whether they are high-cost consumers. GTE raises objections to the agency's implementation of this broad statutory mandate, n85 and Cincinnati Bell and the states challenge the proposal to assess contributions to this new universal service fund.

n85 As a threshold matter, GTE challenges the timing of the proposal, because it would require support for schools, libraries, and health care providers before the new system for explicit subsidies has been implemented. For the same reasons we have discussed, *see supra* part III.A.6.1., we extend the FCC greater discretion in deciding what will be "sufficient" during the transition period, especially when there is little reason to believe that the old subsidy system will break down during that period.

[**114]

1. MANDATING SUPPORT FOR INTERNET ACCESS AND INTERNAL CONNECTIONS TO SCHOOLS AND LIBRARIES.

While section 254(h) plainly authorizes the FCC to support discounted telecommunications services to schools and libraries, GTE finds no equivalent statutory authority to support discounted internet access and internal connections. Therefore, GTE argues that the agency exceeded its statutory authority when it mandated support for discounted internet services and internal connections.

Although we agree with GTE that the statute and its legislative history do not support the FCC's interpretation, the language of the statute is ambiguous enough to require deference under *Chevron* step-two. Because, however, the FCC's decision to extend universal service support to internet access and internal connections raises grave doubts as to whether § 254(h) creates an unconstitutional tax, we construe the statute narrowly to avoid raising these constitutional problems. n86

n86 Judge Garza does not join our analysis of the constitutional issues raised by the FCC's

decision to provide discounts on internet services for schools and libraries, set forth in note 97, *infra*. He would not address these issues, because the parties did not raise them on appeal. See *Carducci v. Regan*, 230 U.S. App. D.C. 80, 714 F.2d 171, 177 (D.C. Cir. 1983) (refusing to consider a constitutional issue of first impression "where counsel has made no attempt to address the issue" and "where, as here, important questions of far-reaching significance are involved"). But see *United States Nat'l Bank v. Independent Ins. Agents of Am.*, 508 U.S. 439, 446, 124 L. Ed. 2d 402, 113 S. Ct. 2173 (1993) (approving lower court's consideration of legal claim not argued by either party as part of courts' "independent power to identify and apply the proper construction of governing law")(internal quotations omitted); *United States v. Moore*, 324 U.S. App. D.C. 53, 110 F.3d 99, 101 (D.C. Cir. 1997) (en banc) (Silberman, J., dissenting) (conceding that the "rigor and integrity of *Carducci* was severely impaired by the unanimous decision of the Supreme Court" in *Independent Insurance Agents*).

[115]**

The FCC concedes that internet access and internal connections cannot be defined as "telecommunications services" for purposes of the section. n87 It argues, however, that the plain language of § 254(h)(1)(B) and (c)(3) authorizes it to require discounted internet access and internal connections to schools and libraries (but not to health care providers).

n87 The FCC has recognized that internet access or internal connection services are "information services" that cannot be equated with "telecommunications services." See Order P 439 n.1145.

Subsection 254(h)(1)(B) requires all telecommunications providers to provide to elementary schools, secondary schools, and libraries, on request, discounted services "that are within the definition of universal service under subsection (c)(3) of this section." Subsection (c)(3) authorizes the FCC to designate "additional services for such support mechanisms for schools, libraries, and health care providers for the [*441] purposes of subsection (h) of this section." These [****116**] "additional services" are "in addition to services included in the definition of universal service under paragraph (1)," which defines universal service as an "evolving level of telecommunications services."

The FCC points out that there is no language restricting these "additional" services to telecommunications services. Furthermore, Congress used the limiting term "telecommunications services" in § 254(h)(1)(A) when discussing the provision of universal service support for rural health care providers. The agency argues that "the varying uses of the terms 'telecommunications services' and 'services' in § 254(h)(1)(A) and (B) suggests that the terms were used consciously to signify different meanings." Order P 439. Therefore, the FCC concluded that the term "additional services" is not limited to telecommunications services. It then decided that, based on the legislative history and its understanding of the purposes of the statute, it should require internet access and internal connections n88 support for schools and libraries.

n88 Calling "internal connections" a good and not a service, GTE separately attacks the "internal connections" requirement. The FCC argues that courts have recognized internal connections as services, see *NARUC v. FCC*, 277 U.S. App. D.C. 99, 880 F.2d 422, 430 (D.C. Cir. 1989), and that the legislative history's emphasis on connections to "classrooms" makes such a requirement reasonable. Given that the maintenance and installation of regular telephone lines also is characterized as a "service," we reject GTE's attempt to distinguish "internal connections."

[117]**

We first consider whether the FCC's interpretation conflicts with the plain language of § 254(h)(1)(B) and (c)(3). Although the best reading of the statute does not authorize the agency's actions, we find the statute sufficiently ambiguous to invoke step- two of *Chevron*.

The statute restricts the FCC's authority to interpret the phrase "additional services" in subsection (c)(3) to "the purposes of subsection (h) of this section." The use of the phrase "telecommunications services" in the title of § 254(h) indicates that the "purposes of subsection (h)" are to provide discounted support for *telecommunications services*. n89

n89 See *United States v. Wallington*, 889 F.2d 573, 577 (5th Cir. 1989) (stating that the "section heading enacted by Congress in conjunction with statutory text [is considered] to 'come up with the statute's clear and total meaning.'" (citation omitted)).

We find further support for this reading in the legislative history of § 254(h): "New subsection (h) of [**118] section 254 is intended to ensure that health care providers for rural areas, elementary and secondary school classrooms, and libraries have affordable access to modern *telecommunications* services" n90 The House Conference Report also elaborates on the interaction between subsections (h)(1)(B) and (c)(3):

New section (h)(1)(B) requires that any telecommunications carrier shall, upon a bona fide request, provide services for educational purposes included in the definition of universal service under new subsection (c)(3) for elementary and secondary schools and libraries at rates that are less than the amounts charged for similar services to other parties, and are necessary to ensure affordable access to and use of such *telecommunications services*. n91

And while the legislative history of subsection (c)(3) supports giving the FCC discretion when designating services for schools and libraries, it nevertheless describes the subsection (c)(3) definition as "applicable only to public institutional *telecommunications* users." n92 This language provides more evidence that Congress intended that [**442] the FCC designate additional *telecommunications* services under [**119] subsection (c)(3) rather than any additional services that the agency deems desirable.

n90 H.R. CONF. REP. 104-458, at 132 (1996) (emphasis added), *reprinted in* 1996 U.S.C.C.A.N. 144.

n91 H.R. CONF. REP. 104-458, at 133 (1996) (emphasis added), *reprinted in* 1996 U.S.C.C.A.N. 144.

n92 *Id.*

Indeed, the agency's broad reading of "additional services" would mean that the use of the word "services" in other parts of § 254(c) could be broadened to include non-telecommunications services. For instance, § 254(c)(2) authorizes the Joint Board to recommend modifications to the definition of "services." Under the FCC's interpretation, the Joint Board (composed of state telecommunications regulators and members of the FCC) could be free to redefine "services" to include services unrelated to telecommunications. This result is an implausible reading of Congress's intent. n93

n93 We also agree with GTE that the FCC is asserting unlimited authority to prescribe support for whatever it wishes. At oral argument, counsel for the FCC could not point out how its interpretation could be limited even to internet access services. For instance, the agency could not explain why satellite television services or even janitorial services would not fit within its understanding of "additional services." In contrast, the plain language of § 254 provides an easily recognizable limit on FCC authority by confining § 254(h) support to telecommunications services. The superiority of GTE's reading, however, does not necessarily make Congress's intent unambiguous.

[**120]

This is not the end of the analysis, however, because some aspects of the statute's language and legislative history also support the FCC's reading. First, the plain language of § 254(c)(1) invites the FCC periodically to re-define "universal service" to "take into account advances in telecommunications and information technologies and services." Moreover, the "purposes of subsection (h)" language in subsection (c)(3) could include more than the "telecommunications services" referred to in § 254(h)'s section heading. After all, subsection (h)(2)(A), which is also one of the "purposes of subsection (h)," instructs the FCC to establish competitively neutral rules to "enhance . . . access to advanced telecommunications and information services"

Finally, some of the legislative history implies that Congress intended for subsection(h) to support internet access:

The provisions of subsection (h) will help open new worlds of knowledge, learning and education to all Americans--rich and poor, rural and urban. They are intended, for example, to provide the ability to browse library collections, review the collections of museums, or find new information on the treatment of [**121] an illness, to Americans everywhere via schools and libraries. n94

The reference to "browsing library collections" indicates that in drafting subsection (h), Congress envisioned some kind of support for internet access.

n94 H.R. CONF. REP. 104-458, at 132 (1996), *reprinted in* 1996 U.S.C.C.A.N. 144.

The best reading of the relevant statutory language nonetheless indicates that the FCC exceeded its authority by mandating discounts for internet access and internal connections. The statutory invitation in subsection (c)(1) to "re-define" universal service to include information services does not necessarily relate to the FCC's authority under subsection (c)(3).

Additionally, subsection (h)(2)(A) provides the agency only with authority to "establish competitively neutral rules to enhance access" to information services. It does not contain specific language supporting provision of such services "at rates less than the amounts charged for similar services to other parties," as in subsection (h)(1)(B). [**122] And finally, the legislative history does not indicate whether Congress thought the statute would enhance access to internet services through discounts on telecommunications services or, instead, through direct subsidies for internet access. Even though GTE has offered a persuasive reading of the statute, its plain language does not make Congress's intent [*443] sufficiently "unambiguous" for *Chevron* step-one review. Therefore, we defer to the FCC's interpretation under *Chevron* step-two and affirm those aspects of the Order providing internet services and internal connections to schools and libraries. n95

n95 Before we defer to the FCC's interpretation of an ambiguously worded statute under the deferential *Chevron* step-two standard of review, we consider whether the agency's approach raises constitutional problems that should lead us to construe the statute in the manner urged by GTE. "Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *Jones v. United States*, 526 U.S. 227, 143 L. Ed. 2d 311, 119 S. Ct. 1215, 1222 (1999) (internal citations omitted). This rule "has for so long been applied by this Court that it is beyond debate." *DeBartolo*, 485 U.S. at 574-75. It is also of such importance that a court will reject an agency interpretation of a statute that would ordinarily receive deference under *Chevron* step-two if it believes the agency's reading raises serious constitutional doubts. *Id.* (construing statute narrowly to avoid First Amendment problem).

We have identified two ways in which the agency's interpretation could raise constitutional concerns that might lead us to construe the statute more narrowly. First, the FCC's application of the universal service fund for non-

telecommunications services could constitute an improperly delegated tax. Second, its interpretation of the reach of § 254(h)(1)(B) could have transformed the Act into a "bill for raising revenue" in violation of the Origination Clause.

Though it is a close question, we conclude that the FCC's interpretation does not raise sufficiently serious constitutional doubts to override our normal *Chevron* step-two deference. While the relationship between internet services and the public telecommunications network is more attenuated than is that of paging services, *see supra* part III.A.5.a, we are not convinced that even this attenuated relationship raises serious doubts under *Munoz-Flores*. For similar reasons, this attenuated relationship does not raise serious doubts as to whether the FCC's interpretation makes the assessment an improperly delegated tax. *See Rural Tel. Coalition v. FCC*, 267 U.S. App. D.C. 357, 838 F.2d 1307, 1314 (D.C. Cir. 1988) (rejecting unconstitutional tax challenge to universal service support allocation finding).

[**123]

2. AUTHORITY TO PROVIDE SUPPORT PAYMENTS TO NON-TELECOMMUNICATIONS ENTITIES THAT PROVIDE INTERNET ACCESS AND INTERNAL CONNECTIONS TO SCHOOLS AND LIBRARIES.

The FCC invokes its rulemaking power under § 254(h)(2)(A) and its "necessary and proper" authority under § 154(i) to provide support payments to non-telecommunications entities that provide internet access and internal connections to schools and libraries. GTE attacks this decision as violating the express intent of Congress as read through the plain language of the statute.

The FCC does not argue that any specific provision of the statute authorizes it to add non-telecommunications companies to the universal service payment system. Rather, it avers that (1) the statute gives it broad authority to establish competitively neutral rules; (2) the statute does not speak directly to the issue of non-telecommunications providers; and (3) the statute's silence indicates that the agency should receive *Chevron* deference.

GTE relies on the traditional maxim of statutory construction, "*expressio unius est exclusio alterius*." n96 GTE points out that § 254(h)(1)(B) already discusses how carriers will be reimbursed for providing [**124] discounted services: "[a] telecommunications carrier

providing service under this paragraph" According to GTE, Congress's choice of the phrase "telecommunications carrier" precludes the FCC from providing those same payments to non-telecommunications carriers.

n96 "The expression of one thing implies the exclusion of another." "Hence, a statute that mandates a thing to be done in a given manner . . . normally implies that it shall not be done in any other manner" 73 AM. JUR. 2D Statutes § 211 (1995).

We conclude that the combination of the FCC's "necessary and proper" authority under § 154(i) and the limited usefulness of the *expressio unius* doctrine in the administrative [*444] context permit the FCC to expand the reach of universal support to non-telecommunications carriers. While courts have rightly warned against using silence in a statute to give "agencies virtually limitless hegemony," n97 we are convinced that Congress intended to allow the FCC broad authority to implement this section [**125] of the Act.

n97 *Ethyl Corp. v. EPA*, 311 U.S. App. D.C. 163, 51 F.3d 1053, 1060 (D.C. Cir. 1995).

In *Iowa Utilities Board*, the Eighth Circuit offered this explanation of the reach of § 154(i) in denying the FCC jurisdiction over the pricing of local telephone service: "[Section 154(i)] merely supplies the FCC with ancillary authority to issue regulations that may be necessary to fulfill its primary directives contained elsewhere in the statute. [It does not] confer[] additional substantive authority." 120 F.3d 753, 795. In this matter, however, the FCC is not asserting additional substantive authority, as it tried to do in *Iowa Utilities*. It is not asserting additional jurisdictional authority, but, rather, is issuing a regulation "necessary to fulfill its primary directives."

The agency's primary directive is to "enhance access to advanced telecommunications and information services" for schools and libraries. See § 254(h)(2)(A). It is taking modest steps to [**126] ensure that Congress's instructions on expanding universal service in the form of internet access and internal connections will not be frustrated by local monopolies. n98 For these reasons, we affirm the decision to permit support of non-telecommunications carriers providing internet access and internal connections to schools and libraries.

n98 The District of Columbia Circuit has upheld FCC actions under § 154(i) that require payments from parties even without express statutory authorization. See *Mobile Communications Corp. of Am. v. FCC*, 316 U.S. App. D.C. 220, 77 F.3d 1399 (D.C. Cir. 1996); *New England Tel. & Tel. Co. v. FCC*, 264 U.S. App. D.C. 85, 826 F.2d 1101 (D.C. Cir. 1987).

3. ENCROACHING ON STATE AUTHORITY TO SET DISCOUNT RATES FOR INTRASTATE SERVICES TO SCHOOLS AND LIBRARIES.

Section 254(h)(1)(B) divides the regulation of discount rates on services offered to schools and libraries between the FCC and the states. "The discount shall be an amount that the Commission, [**127] 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." § 254(h)(1)(B).

The FCC has decided to offer federal universal service funds to help support the intrastate rate discounts. Predictably, the agency has conditioned such funding on the states' "establishing intrastate discounts at least equal to the discounts on interstate services." Order P 550. GTE challenges this condition as an encroachment on the states' statutory right to "determine [what is] appropriate and necessary to ensure affordable access."

GTE has failed to point to any statutory or other authority prohibiting the FCC's condition for funding. States are free to refuse federal support for intrastate discounts and, therefore, remain free to determine what is "appropriate and necessary," consistent with the plain language of the statute. In the Tenth Amendment context, this court has refused to view similar federal conditional grants as "equivalent to coercion." See *Texas v. United States*, 106 F.3d 661, 666 (5th Cir. 1997). Without express statutory [**128] language prohibiting such a practice, we reject GTE's challenge to the FCC's funding conditions.

4. EXERCISING AUTHORITY IN DECIDING THAT SCHOOLS AND LIBRARIES CAN OBTAIN DISCOUNTS ON ALL COMMERCIALY AVAILABLE TELECOMMUNICATIONS SERVICES.

The FCC has also decided that, pursuant to its authority under § 254(c)(3), it will allow schools and libraries to obtain supported discounts on all commercially [*445] available telecommunications services. The agency believes that this approach will maximize schools' and libraries' flexibility to purchase whatever package of services they need.

GTE challenges the agency's statutory authority to refuse to limit the types of services that will be available for support. It contends that the plain language of § 254(c)(3) requires the FCC to "designate" which telecommunications services will receive universal service support and which telecommunications services will not. The key to GTE's argument is the meaning of "designate."

According to GTE, "designate" denotes some action of specific selection. The standard dictionary definition of "designate" includes "to distinguish as to class" and "to indicate and set apart for a specific purpose, office, or [**129] duty." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 313 (10th ed. 1994). GTE claims that by using the word "designate," Congress instructed the FCC to "indicate and set apart" which services may receive support under § 254(h). GTE also finds support in the legislative history, which says the FCC should "take into account the *particular* needs of . . . schools and libraries." n99

n99 See H. R. CONF. REP. 104-458, at 133 (emphasis added), reprinted at 1996 U.S.C.C.A.N. 144.

We disagree with GTE that the plain-meaning understanding of "designate" demonstrates Congress's unambiguous intent to require the FCC to specify which services will be supported. By using the word "designate," Congress also could have meant for the agency to authorize a broad class of services. Thus, by "designating" all commercially available telecommunications service, the FCC can be said to have "designated" which services may be supported. For this reason, the designation "commercially available telecommunications services" does [**130] not violate the plain meaning of the statute under *Chevron* step-one.

Under *Chevron* step-two, the FCC has reasonably concluded that it can fulfill its statutory duty to "designate" while giving schools and libraries the maximum flexibility to choose which services they need. It is not unreasonable for the FCC to conclude that it could best "take into account . . . the particular needs" of schools and libraries by allowing support for all commercially available telecommunications services. n100 Because Congress's use of "designate" in subsection (c)(3) does not unambiguously require the FCC to limit which services may be supported, and because the FCC's decision is reasonable under *Chevron* step-two, we reject GTE's request and affirm the decision to allow schools and libraries to obtain support for all "commercially available telecommunications services."

n100 The FCC further concluded that its decision will ensure that schools and libraries can obtain discounted "state-of-the-art telecommunications technologies as those technologies become available." *Order* P 433.

[**131]

5. AUTHORITY TO SUBSIDIZE TOLL-FREE TELEPHONE CALLS TO INTERNET SERVICE PROVIDERS BY NON-RURAL HEALTH CARE PROVIDERS.

Congress directed the FCC to provide universal service support for "any public or nonprofit health provider that serves persons who reside in rural areas." § 254(h)(1)(A). Congress also instructed the agency "to enhance, to the extent technically feasible and economically reasonable, access to advanced telecommunications and information services for all public and nonprofit . . . health care providers." The FCC has seized on the more general language in the second provision as authority for subsidizing telephone calls to internet service providers by both rural and non-rural health care providers.

GTE advances an argument based on the *expressio unius* canon. Because the first provision gives specific instructions on [*446] providing subsidized support for health care providers and explicitly limits that support to rural health care providers, GTE argues that the FCC has no statutory authority to expand such support to non-rural health care providers. In the agency's view, Congress could have extended support to non-rural providers, but chose not to. This signifies [**132] a Congressional decision that the FCC should respect.

The FCC responds that the *expressio unius* canon should not resolve a question of statutory interpretation in an administrative law context. Additionally, it argues that § 254(h)(2)(A) *obligates* the FCC to "enhance, to the extent technically feasible and economically reasonable, access to advanced telecommunications and information services."

We do not read § 254(h)(2)(A)'s "enhancing" language to *require* the FCC to act as it did here. But, we conclude that the language in § 254(h)(2)(A) demonstrates Congress's intent to authorize expanding support to "advanced services," when possible, for non-rural health providers.

GTE has already established that § 254(h)(1)(A) requires support for telecommunications service to rural health care providers only. We can then read § 254(h)(2)(A) as an instruction to the FCC to work to support "advanced services" for non-rural health care

providers when "economically reasonable." Importantly, the FCC's plan does not extend, to non-rural health providers, the same telecommunications discounts enjoyed by § 254(h)(1)(A) rural health providers. Rather, the agency chose to support [**133] access (through subsidized telephone calls) to an "advanced . . . information service" (an internet service provider), finding that this subsidy was "economically reasonable" and "technically feasible." Order P 748.

The FCC has found a way to "enhance access," as authorized by the plain language of § 254(h)(2)(A), so we affirm this portion of the Order.

6. CONTRIBUTION SYSTEM TO PROVIDE UNIVERSAL SERVICE FUNDING FOR SCHOOLS, LIBRARIES, AND RURAL HEALTH PROVIDERS.

The FCC decided to fund the universal support mechanisms for schools, libraries, and rural health care providers by "assessing both the interstate and intrastate revenues of providers of interstate telecommunications services." Order P 808. The uncertainty of state support for the new § 254(h) subsidies and other financial considerations, according to the FCC, justifies assessing both the intrastate and interstate revenues of interstate carriers.

Cincinnati Bell ("CBT"), a small carrier with a mostly intrastate revenue base, attacks the decision as a violation of § 2(b)'s prohibition on federal regulation of intrastate services. The states challenge the FCC's related assertion that it has the authority to require [**134] carriers to recover their intrastate contributions from the states.

a. AUTHORITY TO ASSESS CONTRIBUTIONS ON THE COMBINED INTERSTATE AND INTRASTATE REVENUES OF CARRIERS THAT PROVIDE INTERSTATE TELECOMMUNICATIONS SERVICES.

Along the same lines as Bell Atlantic's challenge to the "no disconnect" rule, CBT argues that the FCC's decision to assess intrastate revenues exceeds its jurisdiction, in violation of the still-intact *Louisiana PSC* reading of § 2(b). CBT contends that unlike the provisions considered in *Iowa Utilities*, § 254 does not "apply" to intrastate matters in a sufficiently unambiguously manner so as to confer federal jurisdiction.

As we have discussed, we understand § 2(b) to serve as both a rule of statutory construction in considering whether a provision applies to intrastate matters and as a jurisdictional fence against assertions of the FCC's ancillary jurisdiction. See *Iowa Utilities*, 119 S. Ct. at 731. Like Bell Atlantic, CBT is using § 2(b) to

challenge the [**447] FCC's construction of § 254 to apply to intrastate ratemaking.

The FCC's first defense denies that its actions even constitute a "regulation" that would fall under the rule [**135] of statutory construction created by § 2(b) and *Louisiana PSC*. The agency argues that simply factoring intrastate revenues into calculations of universal service contributions does not constitute regulation of those services. The FCC has used both intrastate and interstate revenues as a basis for imposing accounting obligations or tariff requirements in other contexts without any court's finding § 2(b) violations. Additionally, the FCC has stated that carriers may recover their contributions only from interstate rates. The agency believes this last requirement will prevent its contribution requirements from improperly affecting intrastate rates.

Despite the persuasiveness of this argument, we conclude that § 2(b)'s broad language encompasses the FCC's decision to assess intrastate revenues. The plain language of § 2(b) discusses "jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service" We agree with CBT that the inclusion of intrastate revenues in the calculation of universal service contributions easily constitutes a "charge . . . in connection with [**136] intrastate communication service."

The plain language of § 2(b) directs courts to consider FCC jurisdiction over a very broad swathe of intrastate services. We decline to exempt the FCC's assessment of intrastate revenues from the ambit of § 2(b). n101

n101 The FCC's decision to prohibit carriers from recovering through intra state rates does not save it from § 2(b) analysis. There is no question that the amount of a carrier's universal service contributions will increase with the inclusion of intrastate revenues. This cost, even if recovered only through interstate revenues, still constitutes a "charge in connection with intrastate service" under § 2(b).

If the point of § 2(b) was to protect state authority over intrastate service, allowing the FCC to assess contributions based on intrastate revenues could certainly affect carriers' business decisions on how much intrastate service to provide or what kind it can afford to provide. This federal influence over intrastate services is precisely the type of intervention that § 2(b) is designed to prevent.

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The FCC then contends that § 254 does apply to intrastate matters, because it unambiguously authorizes the agency to develop universal service mechanisms that are sufficient to support both interstate and intrastate service. In support of this assertion, the agency points to § 254(d)'s requirement that "every telecommunications carrier that provides interstate telecommunications services shall contribute . . . to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service." The FCC then compares this language to § 254(f), which allows states to adopt universal service regulations as long as they do not "rely on or burden Federal universal service support mechanisms." This language, the FCC claims, shows that Congress intended for it to bear the primary responsibility for ensuring the sufficiency of universal service for both interstate and intrastate services.

These two provisions do not reflect enough of an unambiguous grant of authority to overcome the presumption established by § 2(b). While, under *Chevron* step-two, we usually give the agency deference in its interpretation of ambiguous statutory language, [**138] the Supreme Court continues to require the agency to overcome the § 2(b) statutory presumption with unambiguous language showing that the statute applies to intrastate matters. See *Iowa Utilities*, 119 S. Ct. at 731.

While the text of the statute does not impose any limitation on how universal service will be funded, it also does not explicitly state that the FCC has the responsibility to fund intrastate universal services. The agency seeks authority "in the broad language" of the statute, but [*448] "we do not find the meaning of the section so unambiguous or straightforward as to override the command of § 152(b)." See *Iowa Utilities*, 119 S. Ct. at 731 (quoting *Louisiana PSC*, 476 U.S. at 377).

Without a finding that § 254 applies, the FCC has no other basis to assert jurisdiction, because *Iowa Utilities* explicitly prohibits FCC jurisdiction over intrastate matters stemming from the agency's plenary powers. See *id.* Therefore, we reverse that portion of the Order that includes intrastate revenues in the calculation of universal service contributions.

b. AUTHORITY TO REFER CARRIERS TO THE STATES TO SEEK RECOVERY OF INTRASTATE [139] CONTRIBUTIONS.**

Though it stated that it had "the authority to refer carriers to the states to seek authority to recover a portion of their intrastate contribution from intrastate rates," Order P 818, the FCC also declined to exercise this

authority. Instead, it directed carriers to recover their contributions from interstate revenues only.

The states and CBT challenge this assertion of authority on the same grounds they question the inclusion of intrastate revenues for universal service contributions. Because the FCC bases its authority on the same provisions it cited on that issue, our decision to deny the agency jurisdiction on that question applies equally to the its claim of authority to assess intrastate rates.

The FCC also raises a prudential defense, arguing that because it has not chosen to exercise its authority, the issue is not yet ripe for judicial review. Additionally, the agency argues that both petitioners lack standing. We do not accept either of these prudential defenses.

i. RIPENESS.

Conceding that the FCC has not yet acted on its decision to assert authority over intrastate services, the states reject the agency's ripeness claim because the "question presented [**140] is purely legal." See *New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans*, 833 F.2d 583, 587 (5th Cir. 1987). n102 Pointing also to *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 75 L. Ed. 2d 752, 103 S. Ct. 1713 (1983), the states argue that when the FCC has asserted its authority in a final decision on a legal question such as its jurisdiction over intrastate rates, "one does not have to await the ultimate impact of the threatened injury to obtain preventive relief." See *id.* at 201.

n102 In its most recent action, the FCC reaffirmed its jurisdictional authority to require carriers to contribute based on both intrastate and interstate revenues. See *Seventh Report and Order* PP 87-90. In fact, the FCC appears to be awaiting a decision by this court before taking further action: "Accordingly, pending further resolution of this matter by the Fifth Circuit, the assessment base and recovery base for contributions to the high-cost and low-income universal service support mechanism that we adopted in the *First Report and Order* shall remain in effect." *Seventh Report and Order* P 90. This invitation to judicial action further undercuts the FCC's ripeness defense.

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This issue is ripe for judicial review. The two factors for considering ripeness--fitness for judicial decision and hardship to the parties--support our consideration of this question. Courts should be able to resolve a question

such as jurisdiction and authority under the Act. Additionally, the states already have shown one example of the harm in withholding review. For instance, MCI, in the face of state opposition, has already begun billing some customers based on revenue from intrastate calls. n103

n103 MCI has filed a supplemental brief rejecting this characterization. It relies on *MCI Telecomm. Corp. v. Virginia State Corp. Comm'n*, 11 F. Supp. 2d 669 (E.D. Va. 1998), vacated as moot, 1999 U.S. App. LEXIS 8749 (4th Cir. May 10, 1999) (unpublished), in which the court granted MCI's motion for injunctive relief from a Virginia state commission's order and ruling that MCI's disputed charges were not charges for intrastate calls. MCI also points to the FCC's recent order rejecting Virginia's administrative petition of the same issue. See *Virginia State Corp. Comm'n v. MCI Telecomm. Corp.*, No. E-99-01.FCC 99-42 (released Mar. 22, 1999). This ruling actually supports the states' ripeness argument, however, because the district court's final order on this question, along with the FCC's recent order, further demonstrates the propriety of judicial review of this question.

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[*449] ii. STANDING.

The FCC's standing defense has even less merit. First, states have a sovereign interest in "the power to create and enforce a legal code." See *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601, 73 L. Ed. 2d 995, 102 S. Ct. 3260 (1982). Moreover, the FCC's refusal to exercise its declared authority does not deprive states of standing. The states point out that the District of Columbia Circuit will not find a lack of standing simply because an agency has refused to enforce its own regulations. See *Alaska v. United States Dep't of Transp.*, 276 U.S. App. D.C. 112, 868 F.2d 441, 444 (D.C. Cir. 1989). For the same reasons, we also reject the FCC's standing defense.

iii. MERITS.

Having disposed of the FCC's prudential defenses, we reverse its claim that it can refer these carriers to the states for recovery of those contributions. This is for the

same reasons that we reject the agency's assertions of jurisdiction to assess intrastate revenues for contributions. The FCC has failed to point to any statutory authority that explicitly demonstrates how § 254 applies to intrastate universal service. Therefore, we deny the agency's [**143] claim of jurisdiction and reverse this portion of the Order. n104

n104 Having concluded that the FCC has no jurisdiction over intrastate rates for universal service purposes, we do not reach CBT's final argument challenging the agency's requirement that carriers recover their contributions solely from interstate revenues.

IV. CONCLUSION.

It is difficult to disagree with the Supreme Court's assessment that the Act is "a model of ambiguity or indeed even self-contradiction." *Iowa Utilities*, 119 S. Ct. at 738. As the Court notes, Congress realizes that many of these ambiguities will be resolved by the FCC during its implementation of the statute, and we, like the Court, generally defer to the agency's interpretation of the sometimes-mysterious sections. See *Chevron*, 467 U.S. at 842-43. In this case, we have done so, and we affirm most aspects of the Order implementing the universal service program and dismiss challenges to several parts of the Order as moot.

Still, our deferential [**144] approach does not require us to affirm the FCC in every circumstance. In particular, the agency exceeded its statutory authority in (1) prohibiting the states from imposing eligibility requirements and (2) requiring ILEC's to recover their contributions from access charges. Applying the Court's most recent pronouncements on the Act, we also deny the FCC jurisdiction over state control of local service disconnections and universal service contributions based on intrastate revenues. We remand one petition to the agency for reconsideration, so it can reconsider the propriety of assessing the international revenues of interstate carriers.

For the reasons stated, the petitions for review are GRANTED IN PART and DENIED IN PART. The May 8, 1997, Universal Service Order is AFFIRMED in part, REMANDED in part, and REVERSED in part, in accordance with this opinion.