regardless whether subscribers at those locations actually purchased service from them. Those mandates have become increasingly untenable as consumers (even consumers in high-cost areas) switch from POTS to a variety of wireless and wireline alternatives. They also threaten to impede broadband deployment in those areas by forcing carriers to expend scarce capital on maintaining obsolete infrastructure to meet their service obligations rather than on broadband.

In its most recent CAF II-related Further Notice of Proposed Rulemaking (*FNPRM*), the Commission sought comment on several ETC issues, including whether ETCs should have high-cost obligations only in the geographic areas where they receive support.[10] AT&T[11] addresses those issues below but we also advocate for more significant ETC reform to ensure a successful and statutorily compliant CAF II.

The Commission's *FNPRM* mostly seeks comment on issues related to CAF II implementation. However, it does propose several significant rule changes that if adopted would affect its Mobility Fund Phase II (MFII) program and the frozen support that certain mobile wireless providers currently receive.[12] The proposed MFII rule revision, to exclude from MFII eligibility only those areas served by either AT&T's or Verizon's 4G LTE service, is discriminatory and should not be adopted absent the modifications we recommend, below.[13] The Commission's proposal to eliminate on a flash-cut basis certain mobile wireless carriers' support

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[10] *Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order, Declaratory Ruling, Order, Memorandum Opinion and Order, Seventh Order on Reconsideration, and Further Notice of Proposed Rulemaking, FCC 14-54, ¶¶ 179-85, 195-98 (rel. June 10, 2014). Elsewhere in these comments, we refer to the Report and Order as the *CAF II Report and Order*.

[11] AT&T Services, Inc. hereby submits these comments on behalf of its operating affiliates that are ETCs (collectively, AT&T).

[12] *FNPRM* at ¶¶ 235-53.

[13] *See infra* at Section III.A.

is similarly ill-advised and unlawful. AT&T suggests, below, changes to this proposal that would be necessary to make it consistent with the Commission's statutory requirements and are sound public policy should it decide to go forward.[14]

Finally, AT&T suggests several improvements to the Commission's proposed CAF II requirements. In addition to commenting on issues included in the *FNPRM* (e.g., increasing the CAF II downstream speed to 10 Mbps, modifying the definition of "unsubsidized competitor," sunsetting CAF II ETC designations at expiration of service term), AT&T recommends that the Commission clarify several fundamental CAF II issues that remain unclear before it offers any party CAF II support, including what precisely are a CAF II recipient's service area and service obligations.[15]

II. COMPREHENSIVE ETC REFORM MUST BE A PART OF CAF II

A. Summary

If the Commission were creating its high-cost universal service mechanisms from scratch, the design would be simple: The Commission would identify eligible, high-cost areas and calculate the amount of support it was willing to pay some provider to offer broadband service in those areas in accordance with specific service obligations; prospective service providers would compete for funds; the Commission would select one provider in a given geographic area; winning bidders would receive the agreed upon support and perform the required obligations for a defined period of time, after which their funding and their service obligations would terminate; and those service obligations would be relevant only to the service for which the provider

[14] *See infra* at Section III.B.

[15] *See infra* at Section IV.

received funding and apply only in the areas where the provider received funds. This design would be consistent with the Commission's CAF II mechanism except in one significant respect: unless the Commission reforms its ETC rules, a CAF II provider will be required to offer certain services that are unrelated to the service for which it receives funding (e.g., standalone voice) and one class of provider – price cap carriers – will have service obligations in areas where they do not and cannot receive CAF II support.

Because the Commission is not making its universal service reforms "on a blank slate, but rather against the backdrop of a decades-old regulatory system"[16] it needs to undo some of the decisions it and the states made more than a decade ago in order to reach its CAF II goals and comply with its statutory requirements. Most importantly, the Commission must sunset price cap carriers' ETC designations in areas where they cannot receive or choose not to receive any high-cost support, including CAF II support. And that action should occur either at the time the Commission offers price cap carriers the "state-level commitment"[17] or when an ETC declines its high-cost support, whichever occurs earlier. The Commission also should limit its CAF II service obligations to those that are specific to the service that CAF II-eligible areas lack – broadband – and not require recipients to offer voice on a standalone basis or to participate in the Lifeline program.

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[16] *USF/ICC Transformation Order* at ¶ 165.

[17] The state-level commitment is the term the Commission uses to describe its offer of CAF II support to price cap carriers in exchange for the carrier offering broadband service to all of the CAF II-eligible areas in its service territory within a state.

B. Background

In its 1996 Act, Congress established a new designation to enable carriers to obtain federal high-cost universal service support.[18] The purpose of this new designation – ETC – was to expand the types of carriers who could receive federal high-cost support and to make such support explicit. Prior to the 1996 Act, only one type of carrier received high-cost support from the Commission: ILECs. Consistent with the 1996 Act's pro-competitive goals, Congress created this new designation to enable non-ILECs to receive federal high-cost support. This was particularly true for so-called "non-rural" carrier service territories, where Congress *required* state commissions to permit competitive providers to obtain this designation.[19] Congress did not require participants in the Commission's other universal service programs to obtain this new designation in order to receive universal service funding. In fact, Congress explicitly exempted the Commission's Lifeline program from the new universal service rules and it permitted non-ETCs to participate in what became the Commission's E-rate and Rural Health Care programs.[20] As a consequence, the ETC designation is necessary only for providers that seek and obtain federal high-cost support.

[18] 47 U.S.C. § 214(e).

[19] *See, e.g., id.* § 214(e)(2) (providing that state commissions "shall" permit competitors meeting the requirements of section 214(e)(1) to become ETCs in non-rural carrier service territories). For this purpose, all of AT&T's twenty-two price cap carrier affiliates are considered "non-rural."

[20] *See id.* §§ 254(j) ("Nothing in this section shall affect the collection, distribution, or administration of the Lifeline Assistance Program provided for by the Commission . . . ."); 254(h)(1) (stating that "telecommunications carriers" shall provide to rural health care providers and schools and libraries universal service supported-discounts upon a bona fide request for service). *See also Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, 12 FCC Rcd 8776, ¶ 449 (1997) (*First Universal Service Order*) ("[W]e agree with the Joint Board in concluding that Congress intended that any telecommunications carrier, even one that does not qualify as an 'eligible telecommunications carrier,' should be eligible for support for services provided to schools and libraries.").

State commissions designated all of AT&T's price cap carrier affiliates as ETCs by early 1998 and, without exception, these designations mirrored these carriers' service territories. Prior to the Commission implementing the universal service provisions of the 1996 Act, all of these carriers had been receiving high-cost universal service support via implicit subsidies. These carriers continued to receive implicit and, in some cases, explicit support after the 1996 Act until the Commission implemented its high-cost model support mechanism in 2000, which was designed to provide explicit support to non-rural carriers and which replaced the Commission's prior high-cost regime for these carriers. At that point, only three out of AT&T's twenty-two price cap carrier affiliates were eligible for any high-cost model support and nineteen were not.[21]

That most of these affiliates were not eligible for this new support does not mean that these affiliates' service territories do not include rural and other high-cost areas. To the contrary, as AT&T previously has pointed out, AT&T serves far more high-cost customers than so-called rural carriers, but received little high-cost support to do so. Moreover, according to the Commission's CAF cost model, which identifies and calculates support amounts for high-cost areas, AT&T will be eligible to receive approximately $424 million in CAF II support each year for these nineteen affiliates to serve high-cost areas within their service territories.[22] The reason AT&T's price cap carrier affiliates did not receive high-cost model support under the

[21] Until the Commission "froze" this support in 2011, fifteen of AT&T's twenty-two price cap carrier affiliates received interstate access support (IAS) beginning in 2000. The purpose of IAS support was to "provide[] support to carriers serving lines in areas where they are unable to recover their permitted revenues from newly revised SLCs." *CALLS Order*, 15 FCC Rcd 12962, at ¶ 195 (2000). Thus, like other price cap carriers, these AT&T affiliates used their IAS to reduce the subscriber line charge (SLC) increases that would have otherwise occurred as part of the reforms in the *CALLS Order*. Moreover, these carriers applied this support across their entire customer base, not just to customers residing in high-cost areas.

[22] *See* Federal Communications Commission CAF II – CAM 4.1.1. – Report Version 7.0, April 2014, *available at* http://www.fcc.gov/wcb/CAM_4_1_1_Results_FINAL_042514.xlsx.

Commission's legacy high-cost support mechanism was because of the Commission's flawed decision to use statewide averaging, which perpetuated the implicit subsidies the universal service provisions of the 1996 Act were intended to eliminate and replace with explicit support. Carriers, including a legacy AT&T affiliate, repeatedly and successfully challenged the Commission's high-cost model support mechanism methodology, resulting in two remands from the Tenth Circuit Court of Appeals.[23] The court's and carriers' concerns with this mechanism had not been satisfactorily addressed when the Commission announced in its 2011 *USF/ICC Transformation Order* that it was scrapping altogether this mechanism.[24]

During the transition to a fully implemented CAF that will occur with CAF II, the Commission "froze" price cap carriers' legacy high-cost support – both high-cost model support and IAS – at 2011 levels and it required frozen support recipients to use increasingly larger amounts of this support to build and operate broadband-capable networks to offer the recipient's retail broadband service in areas that are substantially unserved by an unsubsidized competitor.[25] Seven of AT&T's twenty-two price cap carrier affiliates receive no frozen support. Again, this does not mean that these affiliates do not serve high-cost or even extremely high-cost areas; rather, these carriers receive no frozen support simply as a result of the Commission's decision to

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[23] *Qwest Corp. v. FCC*, 258 F.3d 1191 (10th Cir. 2003) (*Qwest Corp.*); *Qwest Communications Int'l, Inc. v. FCC*, 398 F.3d 1222 (10th Cir. 2005).

[24] *USF/ICC Transformation Order* at ¶ 128 & n.200 (explaining that it is "eliminat[ing] altogether the current [high-cost model support] and IAS mechanisms for price cap companies"). The Commission itself recognized the deficiencies with its non-rural carrier high-cost mechanism when it described the "rural-rural" divide, where "some parts of rural America are connected to state-of-the-art broadband, while other parts of rural America have no broadband access, because *the existing program fails to direct money to all parts of rural America where it is needed*." *Id.* at ¶ 7 (emphasis added).

[25] *See* 47 C.F.R. § 54.313(c).

use an outcome-driven formula to calculate price cap carrier high-cost support a decade and a half ago.

Even though 86 percent of AT&T's price cap carriers never received funding that was designed to enable them to provide service in high-cost areas (i.e., high-cost model support), these carriers nonetheless have ETC designations and service obligations that cover their entire service territories.[26] Such large ETC service areas are in contravention of congressional intent and Commission precedent. First, Congress plainly intended that the states issue ETC designations for non-rural carriers that are smaller than those carriers' study areas (i.e., the carriers' service territories within a state). Section 214(e)(5) states that an ETC's "'service area' means a geographic area established by a State commission . . . for the purpose of determining universal service obligations and support mechanisms."[27] This subsection of the statute establishes a presumption that a *rural* carrier's ETC service area is its study area yet Congress purposefully did not establish any such presumption for *non-rural* carriers.[28] Consistent with Congress's intent, the Commission in its *First Universal Service Order* urged the states to define small service areas when designating non-rural carriers as ETCs.[29] The Commission (and the Federal-State Joint Board before it) expressed concern that ETC service areas covering a large ILEC's study area could potentially violate section 254(f) of the Act by undermining the

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[26] And for the few affiliates that did receive this legacy support, their funding was targeted to specific wire centers even though these affiliates' ETC service areas also covered their entire footprint in the state.

[27] 47 U.S.C. § 214(e)(5).

[28] *Id.* ("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), establish a different definition of service area for such company.").

[29] *First Universal Service Order* at ¶ 116.

Commission's efforts to preserve and advance universal service.[30] But many states ignored congressional intent and the Commission's and Joint Board's admonitions, and designated price cap carriers as ETCs throughout their entire study areas. As a result, these carriers had no business case to deploy broadband in high-cost areas (and struggled to maintain the network to provide traditional POTS services) as competition eliminated the implicit subsidies in these carriers' rates, with no replacement from federal and state universal service support mechanisms. Now, almost two decades later, the adverse effects of those state ETC designations are only getting worse for consumers residing in those areas.

Under section 214(e)(1) of the Act, ETCs are required to "offer the services that are supported by Federal universal service support mechanisms . . ." "throughout the service area for which the designation is received."[31] Although it had warned against overly broad ETC designations, the Commission nonetheless found that, under this provision, price cap carriers designated as ETCs for their entire service territories were subject to ETC service obligations throughout the area covered by that designation even though they may not actually receive *any* high-cost support from the Commission's legacy mechanisms because they nonetheless were "eligible" to receive support.[32] This interpretation imposed federal carrier of last resort-like obligations on price cap carriers, requiring them to provide voice service to uneconomic areas

[30] *Id.* at ¶¶ 184-85; *Federal-State Joint Board on Universal Service*, Recommended Decision, 12 FCC Rcd 87, ¶¶ 176-77 (1996). Section 254(f) of the Act provides in relevant part that a "State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service. . . A State may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms." 47 C.F.R. § 254(f).

[31] 47 U.S.C. § 214(e)(1).

[32] *High-Cost Universal Service Support, Federal-State Joint Board on Universal Service, Alltel Communications, Inc., et al. Petitions for Designation as Eligible Telecommunications Carrier*, 23 FCC Rcd 8834, ¶ 29 (2008).

without any support designed to enable them to do so. The Commission was able to defend this prior interpretation because, under its old rules, price cap carrier ETCs were not categorically barred from receiving high-cost support and the Commission allowed multiple carriers to receive high-cost support for serving the same geographic area. The Commission changed the rules in its *USF/ICC Transformation Order*. And this fundamental change necessitates the ETC reforms we discuss below.

The Commission's prior interpretation of section 214(e)(1) has harmed consumers residing in high-cost areas served by price cap carriers by depriving them of the innovative communications services that have flourished in areas where costs are lower and business opportunities attracted competitors. Imposing ETC obligations on carriers that do not receive high-cost support creates an unfunded mandate that distorts the market and harms exactly the consumers that the Commission's high-cost universal service program is intended to benefit. Now that the Commission has transformed the USF program and created the CAF to target funding to specific areas of need and to a single carrier willing to take on the obligations, it must also "transform" its ETC rules to match the new vision. Failure to do so will hobble, and potentially doom, CAF II before it is even out of the gate.

What is the effect of an ETC designation with no high-cost support? As explained above, most of AT&T's price cap carrier affiliates have had unfunded ETC service obligations across vast expanses of their high-cost, rural areas for years. This has required these carriers to divert countless capital dollars to maintain increasingly antiquated facilities in order to continue to offer a service that consumers do not desire[33] instead of using their capital to expand broadband service to more consumers. The Commission's own statistics cited in its *USF/ICC*

[33] *See* Kovacs Study at 11 (stating that only 5 percent of households subscribe to POTS alone).

Transformation Order bear this out: Over 80 percent of the locations unserved by broadband in 2011 were in price cap carrier areas.[34] Thus, not only has the Commission's prior decision to impose unfunded ETC mandates on price cap carriers adversely affected consumers residing in these unfunded areas, by forcing price cap carriers to divert private capital from broadband deployments, it also has imposed costs on all consumers in the U.S. through an increased burden on the high-cost fund.

As previously interpreted by the Commission, the unfunded ETC obligations include, among other things, a requirement to offer voice service – i.e., the "supported service" – throughout the carrier's extensive ETC service area, and if the carrier receives any amount of high-cost support, no matter how small, it also must offer voice on a standalone basis throughout that area without regard to whether consumers desire such an offering.[35] Notwithstanding the fact that many price cap carriers, including most of AT&T's price cap carrier affiliates, did not receive *any* support that was designed to enable them to provide service in rural, high-cost areas,[36] these carriers nonetheless have been required to maintain (and, indeed, extend in some cases) facilities to provide voice service in areas where it is uneconomic to do so, including areas where other providers were already offering voice service. Such areas include locations where a developer or a building owner granted exclusive marketing rights and/or the exclusive right to sell video and Internet services to another provider. Other unfunded ETC service obligations

[34] *See USF/ICC Transformation Order* at ¶ 127.

[35] *See id.* at ¶ 80.

[36] The Commission cannot say that its legacy IAS mechanism was designed to enable providers to offer voice service in high-cost areas. IAS recipients used this support to reduce SLCs for all customers, without regard to whether those customers resided in Chicago, Illinois, which, according to 2012 Census Bureau data, has a population of 2.73 million, or Union Hill, Illinois, which has a population of 59.

include having to comply with state ETC requirements[37] and participate in the Lifeline program.[38]

Failing to reform ETC designations and obligations as part of CAF II thwarts the Commission's broadband objectives at the expense of consumers because price cap carriers will continue to be required to expend resources to maintain rapidly obsolescing facilities and services, which everyone agrees are better spent on broadband deployment. Price cap carriers will continue to be saddled with legacy service obligations, imposing costs and placing these carriers at a competitive disadvantage. Additionally, as we discuss below, perpetuating legacy ETC designations and obligations once the Commission implements CAF II can no longer be sustained legally because, at that point, price cap carriers that do not receive CAF II support in a particular geographic area are no longer "eligible" for high-cost support.[39]

[37] A number of AT&T's price cap carrier affiliates have to comply with state-specific ETC obligations even though they do not receive any high-cost support. For example, several states require ETCs to file outage reports and maintain and/or file maps showing locations of outside plant. In addition, some states require ETCs to file tariffs, maintain battery backup power that will last for a specified period of time or advertise services in a particular manner and with a particular frequency. Congress and the Commission assumed that a state would establish its own high-cost support fund to preserve and advance universal service within the state, particularly if the state adopts additional requirements. *See* 47 C.F.R. § 254(f). However, Congress's and the Commission's expectation that states would have their own robust high-cost funds did not materialize, at least not with respect to price cap carriers. It has been AT&T's experience that few states provide funding to price cap carriers and those that had "sufficient" funds after enactment of the 1996 Act scaled those funds back dramatically in the past decade. Today, AT&T's price cap carrier affiliates receive state high-cost support in only three states.

[38] *See* Section II.E., *infra*, recommending that the Commission make Lifeline participation voluntary.

[39] We discuss, *infra*, the Commission's proposal for transitioning frozen support to CAF II support at Section II.D.

C. The FCC Should Limit A Carrier's ETC Designation And Service Area To Its Funded Areas And Should Sunset Price Cap Carriers' Legacy ETC Designations And Obligations In Areas Where They Do Not Receive Support.

The Commission's reform of its legacy ETC regime has not kept pace with the sweeping reforms contained in its 2011 *USF/ICC Transformation Order*. In that order, the Commission determined that the most appropriate use of high-cost funds is to support the deployment of broadband in eligible areas of the country that would otherwise not have access to this essential service. To implement this fundamental change in policy in a fiscally responsible manner, the Commission announced that it would apply key limits to CAF II. Specifically, it would make CAF II funding available only in geographically granular areas that it identified through a forward-looking economic cost model; it would award CAF II support to just one provider in a particular area; after an interim period, it would award CAF II funding only through a competitive process; and it would provide a carrier with CAF II support only for a defined period of time.[40] However, the Commission did not, at that time, reform ETC designations and the designation process to conform to these changes. As a consequence, the legacy ETC designations that state commissions awarded price cap carriers fifteen years ago, which were based on a fundamentally different universal service model, continued to apply. And while the Commission since has taken several incremental, and welcome, steps toward modernizing its outdated ETC regime, more needs to be done to ensure that CAF II is implemented in a manner consistent with the Commission's statutory requirements.

In its 2014 *CAF II Report and Order*, the Commission determined that an entity is permitted to seek a CAF II ETC designation *after* the Commission selects it as a winning bidder

[40] *See, e.g., USF/ICC Transformation Order* at ¶¶ 23-25.

in the CAF II competitive bidding process.[41] AT&T commends the Commission for this decision, which appropriately recognizes that potential bidders would be discouraged from participating in the competitive bidding process if, by doing so, they risk being subjected to ETC obligations in "areas for which they are not ultimately awarded support."[42] As a result of this decision, a successful CAF II competitive bidder may tailor its ETC designated service area to correspond precisely with the geographic areas where it will receive CAF II support. Thus, in fulfillment of Congress's intent in section 214(e)(1), these carriers will be able to offer throughout their designated ETC service areas the services that are truly "supported" by the Commission's CAF II support mechanism.

This most recent ETC reform decision builds on the Commission's prior decision to permit prospective Mobility Fund Phase I (MFI) participants to file ETC applications conditioned on actually receiving MFI support.[43] In that 2012 order, the Commission forbore from the requirement in section 214(e)(5) that the service area of an ETC should conform to the service area of any rural carrier serving the same area. Without such action, the Commission was concerned that "parties seeking support may be required to take on *unsupported ETC obligations* in portions of rural carriers' study areas – areas that may not be eligible for support or for which they may not win support. . . ."[44] The Commission correctly concluded that requiring "Mobility Fund Phase I support recipients to serve a wider area runs counter to the

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[41] *CAF II Report and Order* at ¶ 43.

[42] *Id.*

[43] *Connect America Fund et al.*, WC Docket 10-90 et al., Second Report and Order, 27 FCC Rcd 7856 (2012) (*Mobility Fund Phase I ETC Forbearance Order*).

[44] *Id.* at ¶ 15 (emphasis added).

Commission's recent and ongoing efforts to serve the public interest by focusing USF resources on defined areas of need."[45]

AT&T urges the Commission to take the next logical ETC reform steps and to do so in its order finalizing the CAF II rules. First, the Commission should clarify that, if a price cap carrier elects the state-level commitment, its ETC designation, service area, and associated CAF II service obligations are limited to the locations where the Commission announced it will provide CAF II funding to that carrier. Through its decisions in the two orders described above, the Commission already has implemented this reform for competitive bidders that win CAF II support and MFI recipients. It should do the same for price cap carriers that elect the state-level commitment. Just as the Commission found that prospective CAF II competitive bidders may be discouraged from participating if doing so could result in them having unfunded ETC obligations so, too, should the Commission recognize that price cap carriers may decline the state-level commitment if accepting such funding means they will continue to have legacy ETC designations and obligations in their non-CAF II-funded areas.

It is unlikely that most, if any, of the winning CAF II competitive bidders will already be ETCs in all of the areas where the Commission will award them CAF II funding. This means these competitive providers will have to file ETC applications. Filing ETC applications with perfect knowledge about the locations where they will receive support enables these providers to identify precisely which geographic areas are covered by their applications and eliminates the possibility that competitive providers will have ETC obligations in "areas for which they are not ultimately awarded support."[46] By contrast, every price cap carrier already is an ETC throughout

[45] *Id.* at ¶ 16.

[46] *CAF II Report and Order* at ¶ 43.

its entire service territory and, thus, for these carriers further ETC applications are unnecessary in order to obtain CAF II funding. But, as explained above, their existing ETC designations include areas where they cannot receive CAF II support so a change is needed in order to avoid perpetuating unfunded legacy ETC obligations across significant stretches of their service territories.

Consistent with the Commission's objective "to serve the public interest by focusing USF resources on defined areas of need,"[47] and the statutory requirements of sections 214(e) and 254 of the Act, the Commission should declare all existing ETC designations in price cap carriers' service territories to be null and void when the Commission implements CAF II by making the offer of a state-level commitment to price cap carriers or a carrier declines to receive frozen support. More specifically, the Commission should find that price cap carriers' existing ETC designations were tied to the legacy high-cost support mechanisms and declare that those designations sunset by operation of law when and where a carrier either declines to or can no longer receive support under those mechanisms. To the extent the Commission offers explicit high-cost support (either frozen or CAF II support) to a price cap carrier, that carrier could elect to retain its ETC designation in those areas where it has agreed to receive support. For price cap carriers that elect the state-level commitment, this means they would retain their ETC designation only in CAF II-funded locations.[48]

AT&T is asking the Commission to reinterpret section 214(e)(1)(A) of the Act knowing that the Tenth Circuit recently upheld the Commission's prior interpretation of this section of the

[47] *Mobility Fund Phase I ETC Forbearance Order* at ¶ 16.

[48] As an alternative and at the price cap carrier's choosing, the Commission could sunset a price cap carrier's designation completely and permit the price cap carrier to seek a CAF II ETC designation from the relevant state commission (or the Commission), just as a winning CAF II competitive bidder will do.

statute. Several months ago, the Tenth Circuit found that "[h]ad Congress intended designated ETCs to automatically receive USF funds, it could and should have omitted the phrase 'be eligible to' from the language of § 214(e)(1)"[49] and "[n]othing in the language of § 214(e) entitles an ETC to USF funding."[50] The court was responding to petitioners' assertion that the Commission's failure to relieve ETCs of their service obligations as it eliminated their support was arbitrary and capricious.[51] The court responded that the petitioners "make no attempt to explain precisely how it was arbitrary or capricious" and, in any event, the Commission permits "any carrier negatively affected by the universal service reforms . . . to file a petition for waiver that clearly demonstrates that good cause exists for exempting the carrier from some or all of those reforms, and that waiver is necessary and in the public interest to ensure that consumers in the area continue to receive voice service."[52]

AT&T respectfully suggests that the Tenth Circuit's analysis misses the mark. Under its current interpretation, the Commission has allowed state commissions to incorrectly implement section 214(e)(1) as if the ETC designation was a federal version of carrier of last resort, an outdated state policy mechanism that required one carrier to stand ready to serve all consumers throughout its service territory in exchange for its monopoly franchise and implicit subsidies.

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[49] *Direct Communications Cedar Valley v. FCC*, 753 F.3d 1015, 1067 (10th Cir. 2014). Section 214(e)(1) provides, "A common carrier designated as an eligible telecommunications carrier under paragraph (2), (3), or (6) shall *be eligible to* receive universal service support in accordance with section 254 . . . ." (Emphasis added).

[50] *Id.*, 753 F.3d at 1088.

[51] *Id.*

[52] *Id.*, 753 F.3d at 1088-89 (quoting *USF/ICC Transformation Order* at ¶ 539). While the court notes that the Commission's review of such petitions will be "rigorous," the court does not to mention that a condition precedent for relief is that there is no other terrestrial-based voice service alternative. *See USF/ICC Transformation Order* at ¶ 539 ("a carrier seeking such waiver must demonstrate that it needs additional support in order for its customers to continue receiving voice service in areas where there is no terrestrial alternative.").

Section 214(e)(1) simply defines the service obligations a provider must perform in an ETC service area where it receives federal high-cost support. AT&T is not advocating for additional high-cost support to provide a service – POTS – that consumers do not desire and in areas where there are numerous other voice providers. Instead, AT&T agrees with the Commission that high-cost dollars should be focused on ensuring broadband availability in high-cost areas. However, to implement that vision fully, AT&T believes that the Commission should reinterpret section 214(e)(1) so that ETCs are actually able to offer "services *that are supported by Federal universal service support mechanisms*" "throughout the service area for which the designation is received."[53] The Commission is of course able to depart from its precedent as long as it offers a reasoned basis for doing so.[54]

AT&T and others have explained the policy rationale for why it is essential to relieve price cap carriers of their ETC designations and obligations in areas where they do not receive high-cost support. In addition, USTelecom filed an ETC modernization white paper with the Commission several months ago.[55] In it, USTelecom detailed the Commission's legal authority to reinterpret section 214(e) and sunset price cap carriers' legacy ETC designations that state commissions issued about fifteen years ago.[56] AT&T agrees with USTelecom's analysis and urges the Commission to implement ETC reform as described therein.

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[53] 47 U.S.C. § 214(e)(1) (emphasis added).

[54] *See, e.g., Williams Gas Processing – Gulf Coast Co. v. FERC*, 475 F.3d 319, 326 (D.C. Cir. 2006).

[55] *See* Letter from Jonathan Banks, USTelecom, WC Docket Nos. 10-90, 05-337 (filed March 14, 2014) (attaching a white paper titled, Modernizing the Eligible Telecommunications Carrier Designation) (USTelecom White Paper).

[56] *Id.* at 11-17.

Briefly, the Commission could issue a declaratory ruling or adopt rules pursuant to section 201(b) that ties ETC designations to support such that the designation expires when the support sunsets. As interpreted in *Iowa Utilities Board*, section 201(b) authorizes the Commission to adopt rules guiding the states' exercise of the duties allocated to them elsewhere in Title II.[57] Just as the Commission may adopt rules that limit the states' prerogative and determine what costs may and may not be included to "establish . . . rates" for unbundled network elements,[58] so too can it adopt rules that interpret and implement section 214(e)(1) by limiting ETC designations in areas served by price cap carriers only to those areas in which an ETC receives high-cost support. Thus, while section 214 assigns the states a significant role in the ETC designation process, the Commission plainly has authority to interpret the text of section 214, and the states are bound by its interpretation of the areas within a price cap carrier's service territory where a provider may be designated as an "ETC." And to the extent that the statutory language is ambiguous, the courts likewise must defer to the Commission's interpretation of section 214.[59] As USTelecom explains, that deference should be especially strong here, because section 254 grants the Commission broad authority to implement the entire federal universal service program, of which ETC designations form only a small part.[60] Moreover, the declaratory ruling sought by USTelecom is consistent with Commission ETC precedent going back to 2000. In its *Western Wireless Order*, the Commission concluded state

[57] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 377-86 (1999) (*Iowa Utilities Board*).

[58] 47 U.S.C. § 252(c)(2); *Iowa Utilities Board*, 525 U.S. at 384-85.

[59] With respect to section 214 in particular, the Tenth Circuit has noted that "[t]he FCC's interpretation of the Telecommunications Act's provisions addressing state ETC designations is, of course, subject to deference." *WWC Holding Co., Inc. v. Sopkin*, 488 F.3d 1262, 1273 (10th Cir. 2007).

[60] USTelecom White Paper at 13-14.

commissions may not adopt policies or eligibility criteria pursuant to section 214(e)(2) that thwart federal universal service goals because doing so would "effectively undermine[] congressional intent in adopting the universal service provisions of section 254."[61]

Another statutory basis for a declaratory ruling is the universal service statute itself. Once the Commission implements the CAF II limits described above (e.g., Commission identifies targeted, granular areas for support, one recipient per area), the excessively large price cap carrier ETC designations are even more plainly in contravention of section 254(f). Unless the Commission sunsets these designations, these carriers – and these carriers alone – will have unfunded ETC obligations because of the states' ill-advised decision to award study area-wide ETC designations to price cap carriers about fifteen years ago. USTelecom is correct that unfunded ETC service obligations impede the Commission's broadband goals by forcing price cap carriers to expend private capital to maintain facilities and services that consumers do not want (i.e., standalone wireline voice service) to meet unnecessary regulatory requirements instead of spending those limited resources to deploy broadband service, which is the service that consumers desire and policymakers want to be as ever-present in the near term as voice service is today.[62] Imposing unfunded ETC service obligations on price cap carriers also violates the Commission's competitive neutrality universal service principle, Congress's requirement that the

[61] *Western Wireless Corporation Petition for Preemption*, 15 FCC Rcd 15168, ¶ 29 (2000) ("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.... [W]e 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. To do so effectively undermines congressional intent in adopting the universal service provisions of section 254.").

[62] USTelecom White Paper at 15.

Commission's universal service support mechanisms provide sufficient support,[63] and Congress's requirement in section 706 of the 1996 Act that the Commission remove barriers to broadband infrastructure investment.[64]

As an alternative to a declaratory ruling, the Commission could forbear from applying section 214(e) to price cap carriers in any geographic area where the carrier does not elect to receive universal service support.[65] Section 10 prohibits states from "continu[ing] to apply or enforce any provision of this chapter that the Commission has determined to forbear from applying under subsection (a) of this section."[66] USTelecom discusses how Commission forbearance from section 214(e) in these circumstances satisfies the forbearance criteria.[67] We do not repeat that analysis here but we agree with USTelecom and urge the Commission to forbear from section 214(e) to the extent necessary to relieve price cap carriers of their legacy ETC designations in geographic areas where they do not receive high-cost support.

D. It Is Unnecessary For The Commission To Support Voice Service In Areas That Are Already Served By Another Voice Provider.

The Commission proposes to eliminate its current requirement that price cap carriers use all of their frozen support in 2015, and thereafter, to build and operate broadband-capable networks used to offer the provider's own retail broadband service in areas substantially unserved by unsubsidized competitors. Instead, the Commission seeks comment on whether it should continue providing some amount of frozen support on an interim basis to price cap

[63] *Id.*

[64] Section 706 of the 1996 Act is codified as 47 U.S.C. § 1302.

[65] USTelecom White Paper at 15.

[66] 47 U.S.C. § 160(e).

[67] USTelecom White Paper at 15-17.

carriers that are ETCs to provide voice service in areas where "no other providers wish to serve."[68] By that, it appears that the Commission is referring to the high-cost and extremely high-cost areas where no other ETC is providing voice telephony service.[69] If that assumption is correct, then there are no such areas in AT&T's price cap carrier affiliates' service areas as there are at least 3 ETCs, including Lifeline-only ETCs, providing service in all of these affiliates' wire centers. If the Commission means areas where there is no other provider of voice telephony service (i.e., ETC and non-ETC alike), AT&T's price cap carrier affiliates obviously have no such areas.[70]

Rather than focusing on whether some other ETC provides voice service in a particular area to determine if continued funding is warranted, AT&T respectfully suggests that the Commission instead consider whether a particular high-cost area is unserved by *any* provider of voice telephony service, including satellite providers.[71] AT&T believes that it is only in such areas where the Commission should consider providing high-cost support for voice service.[72]

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[68] *FNPRM* at ¶ 192.

[69] *Id.* at ¶ 191 & n.379 ("Such interim support would not be necessary if and when other providers are designated ETCs to such areas.").

[70] For example, in just two representative states where AT&T's price cap carrier affiliates operate there are approximately 132 entities certificated by the Illinois Commerce Commission to provide telecommunications "throughout the state" and 118 entities similarly certificated in Louisiana to provide statewide service.

[71] *See Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, FCC 14-98, ¶ 29 (rel. July 14, 2014) (*Rural Broadband Experiments Order*) (explaining that winning satellite providers may satisfy the Commission's requirements for quality of voice service by demonstrating that they can provide voice service that meets a Mean Opinion Score of four or greater).

[72] This limitation gives effect to the Commission's new "Support for Advanced Services" universal service principle, which provides that "[u]niversal service support should be directed where possible to networks that provide advanced services, as well as voice service." *USF/ICC Transformation Order* at ¶ 45.

Such a decision is consistent with Commission precedent. When the Commission overhauled its high-cost support mechanisms and established the CAF, it correctly concluded that "providers that offer service without subsidy [should] no longer face competitors whose service in the same area is subsidized by federal universal service funding."[73] There is no reason why that principle should apply only if the service at issue is broadband, not voice.

As AT&T understands it, the Commission is proposing that price cap carriers spend any remaining frozen support in 2015 on providing voice service in cost model-identified, high-cost and extremely high-cost areas within their ETC service areas where there is no CAF II recipient. According to the Commission's cost model, such areas lack broadband service by an unsubsidized provider and are high-cost to serve. While these areas also may be (or even likely are) high-cost for voice service providers, it simply does not follow that there is a dearth of voice providers in CAF II-eligible areas and thus funding voice service is necessary to ensure that consumers do not lose access to this service post-CAF II implementation. The voice marketplace has been radically transformed over the last decade, as illustrated by various studies. For example, according to USTelecom, price cap carriers continue to provide circuit-switched voice service to a mere 26 percent of households in their service areas.[74] And another study finds that only 5 percent of U.S. households rely solely on POTS as their voice offering, whereas almost 90 percent subscribe to wireless service and the percentage of households that do not subscribe to any interconnected voice service is just 2.5 percent.[75] This means that an

[73] *Id.* at ¶ 177 (explaining that this decision is consistent with the Commission's competitive neutrality universal service principle).

[74] *See Growing Voice Competition Spotlights Urgency of IP Transition*, Patrick Brogan, USTelecom Research Brief (Nov. 22, 2013).

[75] Kovacs Study at 11.

overwhelming majority of households, including those in high-cost and extremely high-cost areas, have cut the POTS cord and have elected to obtain voice telephony service through some other means.

In the event that the sole provider of voice service in a high-cost or extremely high-cost area where there is no CAF II recipient is the price cap carrier, then the Commission could offer that carrier some amount of support in exchange for it continuing to provide voice service in that discrete area as an ETC. Again, AT&T's price cap carrier affiliates have no such areas. However, it is conceivable that other price cap carriers may now offer voice services in areas that are not served by any competing provider of wireline or wireless voice services. The Commission's offer of support in this narrow circumstance must be voluntary, which is consistent with the Commission's statement in the *Seventh Order on Reconsideration* that if a frozen support recipient did not want to comply with the Commission's broadband obligations, the provider could simply decline that frozen support.[76]

If the price cap carrier declines the Commission's offer of support to provide voice service, its legacy ETC designation would sunset in that area just as it would in non-CAF II-eligible areas and in areas where some other provider is receiving CAF II support. However, as the Commission itself acknowledges, simply because the Commission sunsets an ETC designation does not mean that the affected provider would cease providing service in that area because "carriers may not discontinue voice service without receiving authorization pursuant to section 214. . . ."[77] To the extent a price cap carrier accepts continued frozen high-cost support after CAF II implementation, then the price cap carrier would elect to maintain its legacy ETC

[76] *Seventh Order on Reconsideration* at ¶ 120.

[77] *FNPRM* at ¶ 184.

designation only in those areas funded by frozen support until either it declines further frozen funding or the Commission eliminates this interim support. At that time, this last remaining part of the price cap carrier's legacy ETC designation would sunset by operation of law.

The Commission sought comment on the methodology it should use to calculate the amount of frozen support it may offer price cap carriers in exchange for providing voice service in high-cost and extremely high-cost areas where no party has been selected as a CAF II recipient.[78] While such funding will not be necessary except in the limited circumstances described above, if the Commission adopts its proposal, then AT&T recommends that the Commission devise some methodology to calculate offered support amounts other than the one it proposed in the *FNPRM*. There, the Commission suggests applying a certain formula to derive a percentage of a price cap carrier's existing frozen support that it may continue to receive post-CAF II implementation.

First, AT&T does not believe the Commission could apportion some amount of frozen support for this purpose because of the simple fact that not all price cap carriers receive frozen support. Almost one-third of AT&T's price cap carrier affiliates do not receive any frozen support. For these affiliates and similarly situated unaffiliated price cap carriers, there is no legacy high-cost support to continue providing in exchange for the carrier agreeing to remain an ETC in specific geographic areas. Second, even if a price cap carrier currently receives some frozen support, the Commission should assume that the amount of support is insufficient[79] for the purpose of enabling that ETC to extend facilities to provide voice service to new customers or to maintain existing service in these high-cost and extremely high-cost areas. The legacy IAS

[78] *See id.* at ¶ 191 & n.378.

[79] *See* 47 U.S.C. § 254(b)(5) (requiring the Commission to adopt universal service mechanisms that are "sufficient").

that many price cap carriers now receive as "frozen support" was never designed or calculated for this purpose and too few carriers ever received legacy high-cost model support. As the Commission itself acknowledged about its now-legacy non-rural carrier high-cost support mechanism, "the existing program fails to direct money to all parts of rural America where it is needed."[80] The only way to address this sufficiency concern is to ensure that the offer of interim support to provide voice service in these areas is purely voluntary. In the event that a carrier declines this funding, the Commission should sunset its legacy ETC designation in that area. If the Commission declines to make this support voluntary, then it will have to establish a different methodology that accurately reflects the costs of providing voice service in these areas.[81] Otherwise, it will be back again at the Tenth Circuit defending the sufficiency of this support.

E. CAF II Service Obligations Should Not Include A Requirement To Offer Voice On A Standalone Basis Or Lifeline; Participation In The Lifeline Program Should Be Voluntary For All Providers.

As a mere aside, the Commission in its *USF/ICC Transformation Order* stated that "[a]s a condition of receiving support, we require ETCs to offer voice telephony as a standalone service throughout their designated service area."[82] The Commission offers no reasoned basis

[80] *USF/ICC Transformation Order* at ¶ 7.

[81] AT&T has analyzed the cost to provide standalone voice service in high-cost areas served by price cap carriers using the CostQuest Broadband Access Tool (CQBAT). Using the model, AT&T estimated that the cost to provide standalone voice in CAF II-eligible areas would be $3.5 billion/year. The cost to provide standalone voice in Remote Areas Fund-eligible areas would be an additional $2.5 billion/year. Additionally, the cost to provide standalone voice service to high-cost areas that are already served by competitors (i.e., non-CAF II-eligible areas that are nonetheless high-cost) would be an extra $2.7 billion/year. Moreover, the cost to provide standalone voice in extremely high-cost areas that are already served by competitors (i.e., that are not Remote Areas Fund-eligible) would be an additional $300 million/year. We note that AT&T's model runs using CQBAT are CQBAT Licensed Materials and the Property of CostQuest Associates, Inc. These materials are intended for use only in conjunction with the analysis of the Federal USF System and its reform. Any other use without permission is strictly prohibited.

[82] *USF/ICC Transformation Order* at ¶80.