



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
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IN REPLY PLEASE
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February 22, 2016

Ms. Marlene H. Dortch, Secretary
Office of the Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

RE: *Lifeline and Link Up Reform and Modernization, WC Docket No. 11-42,*
Telecommunications Carriers Eligible for Universal Service Support, WC Docket No. 09-
197, Connect America Fund, WC Docket No. 10-90.

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Federal Communications Commission's (FCC's) rules, 47 C.F.R. § 1.1206, undersigned counsel files this letter, on behalf of the Pennsylvania Public Utility Commission (Pa. PUC), to address the legal and policy issues raised in the above-referenced proceeding. In particular, this letter addresses the reasons why, based on federal law and sound public policy, States should continue to maintain their Eligible Telecommunications Carrier (ETC) designation authority for providers of Lifeline services and why non-ETC providers must be precluded from participating in the Low Income program of the federal universal service fund (USF) mechanism.

In sum, the Pa. PUC reiterates its position that the Commission should retain the rule that only ETCs are able to obtain Lifeline universal service support reimbursements. The Pa. PUC believes Section 254(e) of the Telecommunications Act of 1996 (TA-96) makes it clear that a common carrier must fulfill the condition of being designated as an ETC under Section 214(e) of TA-96 before it is *eligible* to receive federal universal service support. Section 214 is an express acknowledgement that the ETC designation process is within the purview of the states. *See* 47 U.S.C. § 214(e)(2). Moreover, allowing non-ETCs to obtain Lifeline universal service support reimbursements would undermine legitimate states interest such as ensuring adequate consumer protection for services supported by Section 254, preserving and enhancing the evolving universal service concept and carrier of last resort obligations, and curbing waste, fraud and abuse of the limited federal USF Lifeline support resources.

Section 254(e) provides that, after the effective date of the Commission's regulations implementing Section 254, only an eligible telecommunications carrier designated under Section 214(e) shall be eligible to receive specific federal universal service support. *See* 47 U.S.C. § 254(e). Accordingly, the Pa. PUC notes that federal rules currently require that a telecommunications services provider must be designated as an ETC prior to receiving federal Lifeline universal service support. *See* 47 C.F.R. § 54.201(a)(1). This Commission rule became effective in 1997. However, as a means to increase competition in the Lifeline marketplace, the Commission sought comment on the notion of creating a process that would allow entities to participate in Lifeline without having to obtain the requisite and statutorily-mandated ETC designation.

It appears the Commission is proposing that having entities become eligible to participate in the Lifeline program separate from the ETC designation process would encourage broader participation by providers. However, the Pa. PUC asserts that non-ETCs should not be eligible to receive federal Lifeline funding support. To begin, there is no concrete or credible evidence in the record indicating that the statutorily-mandated ETC designation process is an impediment to broader participation in the Lifeline program.

An ETC designation is required prior to a common carrier receiving appropriate support from the federal USF mechanism including the Low Income program (Lifeline). The language of Section 254(e) clearly states that only an eligible telecommunications carrier designated under Section 214(e) shall be *eligible* to receive federal universal service support. Furthermore, the Pa. PUC notes that Section 214(e) expressly acknowledges that the ETC designation process is within the authority of the states, except in those limited instances where the common carrier is providing telecommunications services not subject to the jurisdiction of the states.¹ See 47 U.S.C. §§ 214(e)(2) and (6). Nonetheless, even in those rare instances where the states lack jurisdiction to designate a common carrier as an ETC, the common carrier must still obtain an ETC designation from the Commission, and that designation must still be consistent with applicable state law under Section 214(e)(6). Accordingly, the Pa. PUC asserts that a carrier must meet the Section 214(e) criteria as a condition prior to receiving its designation as an ETC and only after obtaining such a designation can the carrier provide the designated services to customers pursuant to the terms of Section 214(e)(1)(A) in order to receive federal Lifeline support.

Additionally, separating the ETC designation process from an entity's ability to participate and receive federal Lifeline support would undermine the ability of the states and the Commission to protect consumers for services supported by Section 254, as required by Section 254(i). The Commission and most stakeholders agree that states are best suited to address the consumer or competitor complaints and concerns sure to arise with services supported by Section 254 under the Section 214(e)(2) designation process. This state role is a welcome, not burdensome, feature of cooperative federalism under Section 254(i). This approach makes it easier for the Commission to focus on complex interstate matters, knowing that the states can utilize their ETC designation authority to ensure adequate consumer protection for services supported by Section 254.

Conversely, separating the ETC designation process from an entity's ability to participate and receive federal Lifeline support would mean that the Pa. PUC and other state commissions will be faced with a legal and regulatory quandary if non-ETCs are permitted to

¹ The Commission itself has acknowledged that “[u]nder section 214 of the Act, the states *possess primary authority* for designating ETCs and setting their ‘service area[s],’ although the Commission *may* step in to the *extent* state commissions *lack jurisdiction*.” See *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up*, slip op. at 399, 26 FCC Rcd 17663, 18062, ¶ 1090 (2011), *aff’d In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014), *reh’g petitions denied, certiorari petitions denied, NARUC v. FCC*, S.Ct., No. 14-901, *Allband Com. Coop. v. FCC*, S.Ct., No. 14-900, May 4, 2015 (emphasis added, footnote omitted) (*USF/ICC Transformation Order*). See also Comments of the Pennsylvania Public Utility Commission, WC Docket No. 11-42 *et al.*, August 31, 2015, at 3-4, 32 (Pa. PUC Comments).

obtain Lifeline universal service support. This would allow “entities” or “providers” that do not necessarily or easily fit the definition of a common carrier to enter Pennsylvania without an ETC designation. Aside from the statutory violation of TA-96, these entities would be able to provide Lifeline services and draw federal Lifeline support without any foreknowledge or oversight by the Pa. PUC, notwithstanding the legal obligation to protect consumers in Section 254(i).² The Commission should reject those invitations asking it to exercise forbearance or to adopt some novel, but untenable, interpretation of federal law that does not otherwise exist.

Further, separating the ETC designation process from an entity’s ability to participate and receive federal Lifeline support would undermine legitimate states’ goals under independent state law regarding the preservation and enhancement of the evolving universal service concept and carrier of last resort (COLR) obligations. ETC determinations are inherently connected with the preservation and enhancement of the evolving universal service concept both under federal and independent state law. The Pa. PUC plays an inherent role under the federal Telecommunications Act of 1996 (TA-96), relevant Pennsylvania statutory law,³ and applicable federal and State regulations, in ensuring the reliable and safe operation of common carrier telecommunications network facilities and provided services. The Pa. PUC entertains ETC designation petitions by entities that are customarily engaged in telecommunications carrier (or common carrier) operations, and that provide telecommunications services (or common carrier services). Wireline incumbent local exchange carriers (ILECs) with ETC designations that operate under Pa. PUC regulatory jurisdiction also have carrier of last resort (COLR) obligations for their respective study areas.

Moreover, it must be understood that the maintenance of COLR obligations has largely paralleled the ETC designations for ILECs and is a major contributing factor for the preservation of the evolving universal service concept. The states’ ETC designation furthers compliance with the joint Commission-state mandate to ensure consumer protection for services supported by Section 254. The Pa. PUC is concerned that any Commission determination to relieve ETCs of their statutory obligations, especially with the lack of specificity as to what obligations would be relieved, would undermine the specific statutory universal service-related goals of Sections 214(e)(3) and 254(c)(1) and would have detrimental effects for the maintenance and enhancement of the evolving universal service concept. 47 U.S.C. §§ 214(e)(3) and 254(c)(1). The Pa. PUC states that the Commission must exercise the appropriate degree of care when entertaining invitations to alter statutory interpretations that can negatively affect the preservation of universal service for end-user consumers.

Also, separating the ETC designation process from an entity’s ability to participate and receive federal Lifeline support can lead to serious instances of waste, fraud and abuse of the limited federal USF Lifeline support resources. Pennsylvania, as a net contributor State to the federal USF mechanism of \$130 million in 2014 alone, has a strong interest in avoiding such an

² The Pa. PUC and its Bureau of Consumer Services will be in a rather difficult position in answering or attempting to resolve informal consumer inquiries or complaints involving Lifeline services that are provided by unknown non-ETCs, and the simple referral of such inquiries or complaints to the FCC’s Enforcement Bureau will not be the optimal solution for Lifeline end-user consumers.

³ See generally 66 Pa. C.S. § 3011(2). See also Pa. PUC Comments at 31.

outcome. Furthermore, a state’s withdrawal of an ETC designation is a timely and decisive policing method for preserving the integrity of the federal Low Income program. The Pa. PUC has an inherent State and federal legal interest in ensuring that carriers are required to seek ETC designations and that they also fulfill certain facility and service parameters. This is especially true when such an ETC designation will provide an entitlement to scarce federal Lifeline support funding resources. Thus, allowing non-ETCs to obtain Lifeline funding is a position that should not be sustained by the Commission.

Lastly, the Commission does not possess the requisite statutory authority to override Section 214(e)(2), which gives primary responsibility to the states to designate ETCs.⁴ Specifically, Sections 214(e)(2) and (6) collectively limit FCC ETC designation authority only to instances where the state lacks jurisdiction, and Commission ETC designation must be consistent with state law under Section 214(e)(6). The Pa. PUC asserts that the technology utilized to provision service is immaterial for the purpose of exercising appropriate jurisdiction under Section 214(e) for ETC designation purposes, in light of the Section 254(b)(3) mandate, among others, of comparable rates for comparable services.

Hence, pursuant to this long-standing statutory authority, the Pa. PUC and a number of other state commissions actively exercise their Section 214(e)(2) jurisdiction and authority in adjudicating ETC designation petitions or applications from both wireline and wireless carriers. Moreover, in the *Net Neutrality Order*, the Commission invoked its Title II authority to reclassify fixed and mobile broadband Internet access service (collectively “BIAS”) as a telecommunications service. See *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order (rel. March 12, 2015) (*2015 Open Internet Order*). Thus, the states have primary jurisdiction over ETC designations regardless of the type of “service” being offered by a provider to the Lifeline end-user customer.

It is clear from the statute that Congress acknowledged and has preserved a vital role for the states in the ETC designation process. Consequently, the Pa. PUC states that the FCC cannot invoke Section 214(e)(6) to supplant the state jurisdictional authority that is clearly and unambiguously prescribed by Section 214 of the Act. The Commission does not have the statutory authority to rewrite federal law by substituting agency interpretations in place of clear legislative intent.⁵ The Pa. PUC cautions the Commission that it is inadvisable for it to follow certain proposals involving the use of FCC forbearance in the ETC designation process in an attempt to change the clear and independent statutory role of the Pa. PUC and other state utility commissions. As expressed above, such proposals run contrary to both the letter and the spirit of cooperative federalism that is embodied in the unambiguous statutory language of Section 214(e).

The Pa. PUC and other state utility commissions have a strong interest in preserving and enhancing the evolving concept of universal service both under federal and applicable state law. The Pa. PUC has long been supportive of Commission efforts to promote universal service for services supported by Section 254. The Pa. PUC’s primary jurisdiction and responsibility for

⁴ See footnote 1.

⁵ Pa. PUC Comments at 32.

adjudicating ETC designation petitions is inextricably linked with the preservation and enhancement of the evolving universal service concept. Indeed, the Commission’s proposed intent to increase competition in the Lifeline marketplace by reducing or eliminating certain ETC obligations such as changing the currently long-standing applicable ETC designation process does not appear to comport with applicable federal law, specifically, Sections 214 and 254. Indeed, in reforming the federal USF mechanism the Commission chose “not to subsidize competition through universal service in areas that are challenging for even one provider to serve.”⁶

For these reasons, the Pa. PUC respectfully suggests that the FCC should cooperatively work with the states in addressing these matters without resorting to direct or indirect federal preemption that is statutorily unsustainable and inadvisable.

Thank you for your attention to this correspondence.

Sincerely,

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⁶ *USF/ICC Transformation Order*, 26 FCC Rcd at 17780, para. 319, (2011) (footnote referencing elimination of identical support rule omitted).