

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

In the Matter of

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

**COMMENTS OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION  
AND OF THE PEOPLE OF THE STATE OF CALIFORNIA**

The People of the State of California and the California Public Utilities Commission (“California” or “CPUC”) hereby submit these initial comments in response to the Further Notice of Proposed Rulemaking (“FNPRM”) issued by the Federal Communications Commission (“FCC”) in the above-captioned docket.

**INTRODUCTION**

In its FNPRM, the FCC seeks to adopt measures to effectuate Congress’ goal of preserving and advancing universal service in areas where subscribership to basic and other telephone service has been traditionally low – i.e., in unserved and underserved areas, including tribal and insular areas. Among other things, the FCC seeks comment on “issues that may be affecting the availability of universal service in tribal areas, including the assignment of

jurisdiction, designation of eligible telecommunications carriers, and possible modifications to federal high-cost and low-income support mechanisms that may be necessary to promote deployment and subscribership in these areas.” FNPRM, ¶ 9. In addition, the FCC seeks comment on how best to implement Section 214(e)(3) of the 1996 Telecommunications Act (“1996 Act”), which permits the FCC or the states to order a carrier to provide service to an unserved area. FNPRM, ¶ 10. In particular, the FCC seeks comment on the use of competitive bidding procedures to identify a carrier or carriers best able to serve such areas. *Id.* The FCC also seeks comment on possible modifications to federal low-income programs, including the possibility of expanding the LinkUp program to include facilities charges and support for intrastate toll calls. *Id.*

In these comments, California will address the measures that it has adopted for preserving and advancing universal service to unserved and underserved areas. California will also address various jurisdictional issues raised by the FCC concerning the scope of state authority to regulate telecommunications provided to tribal lands.

## **II. TELECOMMUNICATIONS SERVICES PROVIDED ON TRIBAL LANDS**

In California, the CPUC regulates intrastate telecommunications services on tribal lands in the same manner that it regulates intrastate services in non-tribal areas. It is the CPUC’s understanding that the carriers which provide intrastate services to tribal areas are the incumbent local exchange carriers (“ILECs”) which also provide intrastate services to non-tribal areas. To the CPUC’s knowledge, none of these ILECs are owned or operated by tribal interests. To date, no one has questioned the CPUC’s authority to continue regulating the provision of intrastate services to tribal areas.

The CPUC has implemented a number of universal service programs that seek to enhance subscribership in all areas of California, including tribal areas. These include programs that provide explicit subsidies to high cost local exchange service areas; programs to assist low-income customers throughout the state; programs to assist schools, libraries, rural health care providers and community-based organizations; programs to ensure the availability of public payphones in areas otherwise unserved; and programs to assist deaf and disabled customers throughout California. All of these universal service programs are available equally to tribal lands as well as to remote service areas that are served by a designated carrier within the state.

In its FNPRM, the FCC asks whether the FCC has jurisdiction to reclassify calls to tribal lands as interstate, and if so, whether it should do so. FNPRM, ¶ 44. In the CPUC's view, to the extent that carriers otherwise subject to CPUC regulation are providing intrastate services within the state, the carriers and the intrastate services they provide are subject to state regulatory authority. The fact that intrastate telecommunication services are provided to tribal areas does not alter the state's authority to regulate such provision, anymore than it alters the state's authority to regulate the provision of any other intrastate utility service, such as gas and electric service, to tribal areas. Indeed, nothing in the Communications Act of 1934, as amended by the 1996 Act, evidences congressional intent to carve out intrastate service in tribal areas from the scope of state jurisdiction.

Specifically, Section 152(b) provides that, with certain exceptions not relevant here, “*nothing* in this Act shall be construed to apply or to give the Commission jurisdiction with respect to ....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) (emphasis added). See also § 601(c) (1996 Act should not be construed to modify, impair or supersede existing state law unless

expressly so provided). Without qualification, Congress has defined an intrastate service to mean service that originates and terminates within a single state. 47 U.S.C. § 153(22).<sup>1</sup> Nothing in the 1934 Act, as amended, evidences congressional intent to exempt intrastate services provided to tribal areas from the scope of Section 152(b). California v. FCC, 905 F.2d 1217, 1240 (9<sup>th</sup> Cir. 1990) (as long as enhanced services are provided by communications carriers over the intrastate telephone network, § 152(b) places them squarely within the regulatory domain of the states). Similarly, nothing in the 1934 Act, as amended, indicates that Congress intended to exempt telecommunications carriers otherwise subject to state regulation from state oversight because they provide intrastate service to tribal areas. California v. FCC, 905 F.2d at 1240 (the plain meaning of “any carrier” is that the statute applies to communications services provided by common carriers).

To be sure, in light of the above, the FCC itself has consistently regarded services provided by telecommunications carriers to tribal areas that originate and terminate within a state as subject to state authority. FNPRM, ¶ 44. The FCC’s longstanding view is supported by the statutory scheme discussed above.

In any event, California does not believe that any useful purpose is served by reclassifying intrastate calls to tribal areas as interstate calls. Indeed, such reclassification could detrimentally affect such areas. As indicated above, California offers a whole host of universal service programs applicable to tribal areas that seek to enhance the level of subscribership in such areas. None of these programs would be available if calls to tribal areas were classified as interstate. As

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<sup>1</sup> Section 153(22) defines interstate communication to mean communication or transmission from any... Territory, or possession of the United States ...to any other ..Territory, or possession of the United States. The term “Territory” has been understood to refer to entities like Puerto Rico and Guam, and not to tribal reservations.

a result, these areas could become further isolated economically and socially from neighboring non-tribal areas that are the beneficiaries of such state programs.

In its FNPRM, the FCC also seeks comment on when Section 214(e)(6) of the 1996 Act is triggered. Section 214(e)(6) provides that the FCC may designate as an eligible telecommunications carrier a “common carrier providing telephone exchange service and exchange access that is not subject to the jurisdiction of a State Commission.” 47 U.S.C. § 214(e)(6). As the FCC points out, the legislative history of this section makes clear that Congress’ concern was that certain tribally-owned carriers were not subject to state jurisdiction, and hence could not be designated by states as carriers eligible to receive federal universal service support. FNPRM, ¶ 75. n.160 The legislative history, however, provides that Section 214(e)(6) was not meant to “expand or restrict the existing jurisdiction of State commissions over any common carrier or provider in any particular situation.” FNPRM, ¶ 76. Thus, to the extent that the state has authority over a common carrier that provides intrastate service to a tribal area, nothing in Section 214(e)(6) would restrict the state’s authority to designate such carrier as eligible for federal universal service support. As the Ninth Circuit in California v. FCC made clear, it is the nature of the service provider that offers intrastate services, not the particular services provided, that determines whether a carrier is subject to state jurisdiction. 905 F.2d at 1242 (authority of state does not turn on the nature of the service provided). Where that carrier is a common carrier, and offers intrastate services, it is subject to state authority.<sup>2</sup>

Finally, the FCC seeks comment on whether the FCC or states have jurisdiction to designate terrestrial wireless or satellite carriers that offer telephone exchange service as carriers

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<sup>2</sup> Congress expressly exempted from state regulation the rates or entry of commercial mobile radio service, but did not exempt such common carriers from other types of state regulation. 47 U.S.C. § 332(c); Texas Office of Public Office of Public Utility Counsel v. FCC, 183 F.3d 393, 432 (5<sup>th</sup> Cir. 1999).

eligible to receive federal universal service support under Section 214(e)(2) of the 1996 Act. Section 214(e)(2) provides that a “state commission shall upon its own motion or upon request designate a common carrier” as an eligible carrier. The section does not exempt terrestrial wireless or satellite carriers from its scope. Indeed, in Texas Office of Public Utility Counsel v. FCC, the Fifth Circuit made clear that, notwithstanding Section 332 (c) of the Act, which preempts state rate and entry regulation of wireless carriers, such carriers are not exempt from state requirements adopted for the purpose of promoting universal service. 183 F.3d at 432. A state’s designation of carriers eligible to receive federal funding is neither rate or entry regulation, but is a term or condition governing when federal support is available. Regulation of the terms and conditions of intrastate wireless service other than rates and entry remains subject to state authority and is not preempted. This is so even if state action in designating eligible wireless carriers may indirectly relate to entry. Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992).

### **III. SERVICE TO UNSERVED AREAS**

In its FNPRM, the FCC seeks to expand universal service support to unserved areas. In doing so, the FCC proposes to define an “unserved area” as “any area in which the facilities would need to be deployed in order for its residents to receive each of the services designated for support by the universal service support mechanisms.” FNPRM, ¶ 86. The FCC then identifies those services which the FCC has designated for universal service support.

California has two concerns with the FCC’s proposed definition. First, this definition does not distinguish between the two types of areas that are unserved. The first type is an area for which no carrier has been designated or certificated to serve. Such an area is referred to as an

“unmapped service area.” The second type of unserved area is one that has been designated or certificated to a carrier, but facilities have not yet been deployed therein because of economic, geographic or other conditions which inhibit expansion of service to such area. The first type of unserved area – the unmapped service area – presents greater obstacles to the provision of telecommunications because no carrier exists for that area. The second type of unserved territory raises the issue of who will pay for the extension of facilities to serve that area.

California’s other concern with respect to the FCC’s definition of unserved area is that such definition may be inconsistent with a state’s definition of “services designated for support.” Specifically, the list of services designated by state and federal regulators may differ. As a result, some states may consider an area as “being served” even though all of the services designated by the FCC are not offered. For example, a state may not have deemed access to emergency services as part of basic service even though the FCC includes such services within its definition of services eligible for universal service support. In such a case, a potentially significant part of the state, or even the entire state, may be defined as “unserved” under the FCC’s definition when that would not be true under the state’s definition. California does not believe that this result is appropriate. Distinctions relating to the nuances of the FCC’s definition of basic services eligible for universal service support should not be imposed on individual states when determining whether an area is unserved. To be sure, Section 214(e)(3) makes clear that it is for the “State commission, with respect to intrastate services” to determine which carrier is best able to provide service to an unserved area. 47 U.S.C. § 214(e)(3). In addition, Section 214(3)(5) leaves it to the state exclusively to establish “for the purpose of determining universal service obligations and support mechanisms” the meaning of a service area.

Notwithstanding the statutory provisions that unambiguously define the scope of state authority to designate eligible carriers seeking to provide intrastate service in unserved areas, the FCC asks whether the states should be required to adhere to national guidelines in determining which carrier is best able to serve such areas. FNPRM, ¶ 95. Based on the above, California does not believe that the FCC has the authority to impose such a requirement on the states. As the Fifth Circuit held in Texas Office of Public Utility Counsel v. FCC, the FCC does not have the authority to prohibit the states from developing additional eligibility requirements pursuant to Section 214(e)(2) for designating carriers eligible to receive federal universal service support. 183 F.3d at 417-418. The same reasoning underlying this holding would preclude the FCC from asserting authority to direct the states to comply with federal guidelines for designating eligible carriers under Section 214(e)(3). Indeed, as the FCC itself recognized, states have “more familiarity with the areas in question,” which is precisely why Congress left it exclusively to the states pursuant to Section 214(e)(3) to designate eligible carriers offering intrastate services in unserved areas.

With respect to unserved areas where no carrier currently provides service, the FCC also seeks comment on whether a competitive bidding mechanism would identify the carrier or carriers best able to serve such areas. FNPRM, ¶ 95. Over two years ago, California conducted workshops to consider whether an auction mechanism was preferable to the current cost proxy model in attracting carriers to serve unserved areas. In the workshop, participants identified what they believed to be certain legal and market impediments that precluded the effective functioning of an auction mechanism at that time. The legal issues concerned the CPUC’s ability to restrict subsidies to winning bidders only, the ability to relieve incumbent LECs of their interconnection

obligations under the 1996 Act, and the ability of the CPUC to require existing carriers of last resort to sell their facilities in accordance with a specified pricing method.

The competitive issues primarily concerned the lack of potentially interested bidders for the less desirable service areas, e.g., those that are high cost, low density, and remote. An auction presupposes multiple bidders ready, willing and able to provide service. Significant facilities-based local exchange competition, however, has yet to develop in urban areas, and is expected to emerge in the more remote areas of California only after the development of competition in urban areas. In the absence of competition in remote areas, implementation of an auction mechanism, such as that recommended by the FCC, would most likely result in only one bidder, the ILEC, which in turn could inflate the level of subsidy in those areas with the least amount of competition.

Based on these legal and policy concerns, the CPUC has thus far declined to adopt an auction mechanism for designating carriers to serve in remote areas.

In its FNPRM, the FCC asks whether it can require states to adopt competitive bidding for service to unserved areas in cases where Section 214(e)(6) does not apply. FNPRM, ¶ 95. As discussed, that section authorizes the FCC to designate carriers eligible to receive federal universal service support only when a common carrier providing telephone exchange service or exchange access is not subject to the jurisdiction of a state commission. However, in cases where such a common carrier is subject to state jurisdiction, Congress unequivocally provided in Section 214(e)(3) that it is the “State commission, with respect to intrastate services, [which] shall determine which common carrier or carriers are best able to provide such service to a requesting unserved community or portion thereof and shall order such carrier or carriers to provide such service for that unserved community or portion thereof.” 47 U.S.C. § 214(e)(3). Congress further made clear that the FCC may only designate a carrier best able to serve an unserved area

with respect to interstate services. As the legislative history of this section indicates, the section simply “makes explicit the implicit authority of the [FCC] with respect to interstate services, and a State, with respect to intrastate services...” to order a common carrier to provide service. Conf. Report at 141. The section does not expand the FCC’s jurisdiction to determine how to select carriers eligible to provide intrastate services in unserved areas.

#### **IV. SERVICE TO UNDERSERVED AREAS**

In its FNPRM, the FCC also seeks comment on how to define “underserved area” for the purpose of targeting federal universal service support. FNPRM, ¶ 118. The FCC proposes to define an area as underserved if the penetration rate of the community is significantly below the national average. The CPUC supports this definition but recommends expanding it to consider an area to be underserved if, within that service area, there are identifiable population segments whose telephone penetration rates are significantly below the national average.

The FCC next seeks comment on whether its Link-Up program should be expanded to include support for line extension charges or construction costs. California does not support an expansion of the federal program which inevitably will increase the the size of the federal universal service fund and the current funding requirements imposed on net contributor states like California. Currently, the FCC Link-Up program funds service connection charges for low income customers. States that are net contributors are already shouldering a significant level of contribution to federal universal service programs. The expansion of services to pay for the extension of facilities to unserved and underserved areas would substantially increase the funding burden on these states, and outweighs the benefit that such an expansion would otherwise provide. California, however, does support the FCC’s proposal to expand the availability of toll

blocking and toll limitation options to low income customers to ensure that they do not lose their basic telephone services for nonpayment of toll charges. FNPRM, ¶ 124.

The FCC also seeks to determine whether statewide rate averaging requirements or limited local calling areas imposed by the states may make the costs of telecommunications services unaffordable to low income customers in unserved and underserved areas. FNPRM, ¶ 122. Indeed, quite the opposite is true. Statewide averaging and limited local calling serve to keep the price of basic service affordable, particularly benefiting high cost, rural and remote areas. While the CPUC has imposed a moratorium for establishment of additional Extended Area Service (“EAS”) routes, it did so in part because of the anti-competitive effects that expanded local calling areas have on providers of competitive toll services. The same anti-competitive concerns would arise if the FCC were to establish or mandate the establishment of EAS zones, assuming it had the authority to do so.

Respectfully submitted,

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November 9, 1999

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused the foregoing document to be served upon all known parties of record by mailing, by first-class mail, postage prepaid, a copy thereof properly addressed to each party.

Dated at San Francisco, California, this 9<sup>th</sup> day of November, 1999.

/s/ Ellen S. LeVine

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ELLEN S. LEVINE