

**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)	
)	

**OPPOSITION OF
CTIA – THE WIRELESS ASSOCIATION™**

I. INTRODUCTION

CTIA – The Wireless Association™ ("CTIA")¹ submits this opposition to the Petition for Reconsideration in the above captioned docket filed by TDS Telecommunications ("TDS") seeking reconsideration of the Commission's Report and Order on eligible telecommunications carrier ("ETC") designation procedures ("ETC Designation Order" or "the Order").² CTIA supports the Commission's efforts to ensure that prospective and existing ETCs satisfy their obligations to provide supported services throughout a designated service area. CTIA is opposed to TDS's Petition for Reconsideration of the Order which seeks an overly burdensome, discriminatory, and wireline-centric ETC designation process.

¹ CTIA – The Wireless Association™ is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers Commercial Mobile Radio Service ("CMRS") providers and manufacturers, including cellular, broadband PCS, ESMR, as well as providers and manufacturers of wireless data services and products.

² See Petition for Reconsideration of TDS Telecommunications, CC Docket No. 96-45, filed June 24, 2005; see also *In re Federal-State Joint Board on Universal Service*, Report and Order, 20 FCC Rcd 6371 (2005).

II. THE STRINGENT REQUIREMENTS DETAILED IN THE *ETC DESIGNATION ORDER* WILL MORE THAN ADEQUATELY ENSURE THAT ETCS SATISFY THEIR STATUTORY OBLIGATIONS

In its *ETC Designation Order*, the Commission set forth build-out criteria designed to ensure that ETCs use universal service funds to improve service in the designated service areas.³ ETCs designated by the Commission must comply with detailed procedures for responding to service requests, including network build-out, if feasible, and the use of resale, if necessary.⁴ Among the criteria that must be satisfied for designation are detailed plans showing how the support will improve signal quality, coverage, or capacity; projected start and completion dates for the planned improvements; geographic regions that will benefit from the improvements; and the estimated population that will be served by the improvements. In the *ETC Designation Order*, the Commission urged state commissions to adopt the annual reporting requirements and apply them to all incumbent and competitive ETCs.⁵ Through these requirements, the Commission has set forth a framework for potential and existing ETCs to meet their obligations under Sections 214 and 254 of the Communications Act, as amended (“the Act”). TDS has asked the Commission to overturn these competitively neutral guidelines in favor of a set of rules that would discriminate against competitive ETCs while not holding incumbent ETCs to the same standards.

III. THE ACT REQUIRES NONDISCRIMINATORY ETC DESIGNATION GUIDELINES

TDS’s proposed changes to the Commission’s ETC designation guidelines must be judged within the context of the Act, which demands “universal service mechanisms and rules”

³ *ETC Designation Order* at ¶ 23.

⁴ *See id.* at ¶¶ 22-23.

⁵ *Id.* at ¶ 71.

that “neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology or another.”⁶ As the Rural Task Force noted during the course of its deliberations, “Section 254(b) and 214(e) of the 1996 Act provide the statutory framework for a system that encourages competition while preserving and advancing universal service.”⁷ This concept was also reiterated in the *Ninth Report and Order*, when the Commission stated that “the same amount of support . . . received by an incumbent LEC should be fully portable to competitive providers.”⁸

The Courts also have ruled in support of nondiscrimination in the universal service context. In *Alenco Communications, Inc. v. FCC*, the United States Court of Appeals for the Fifth Circuit stated that the universal service “program must treat all market participants equally – for example, subsidies must be portable – so that the market, and not local or federal regulators, determines who shall compete for and deliver services to customers.”⁹ As the Fifth Circuit noted, the principle of competitive neutrality “is made necessary not only by the realities of competitive markets but also by statute.”

IV. BOTH INCUMBENT AND COMPETITIVE ETCS ARE SUBJECT TO THE SAME BASIC OBLIGATION TO PROVIDE SUPPORTED SERVICES THROUGHOUT THE DESIGNATED SERVICE AREA

In order to ensure that the obligations of section 214(e) of the Act are achieved, the Commission concluded in the *ETC Designation Order* that a prospective ETC must make

⁶ See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 8801 (1997).

⁷ Rural Task Force, White Paper 5: Competition and Universal Service, at 8 (rel. Sept. 2000) (available at <http://www.wutc.wa.gov/rtf>).

⁸ See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Ninth Report and Order and Eighteenth Order on Reconsideration, 14 FCC Rcd 20432, 20479 (1999).

⁹ *Alenco Comm., Inc. v. FCC*, 201 F.3d 608, 616 (5th Cir. 2000).

specific commitments to serve customers throughout the designated service area upon a reasonable request.¹⁰ Under section 214(e) of the Act, this same basic obligation also applies to incumbent ETCs. The TDS Petition, however, seeks to impose upon competitive ETCs more stringent build-out obligations than those imposed upon incumbents. Under TDS's proposal, competitive ETCs would be required to "achieve 100% coverage throughout the designated geographic service area" "prior to" or "shortly after" designation as an ETC.¹¹ Such a policy would discriminate against new market entrants and would not further the goals of universal service. Moreover, as a wireline carrier, TDS could never satisfy its own proposed "100% coverage" obligation.

The FCC correctly has concluded that requiring prospective competitive ETCs to provide supported services prior to obtaining its designation puts the cart before the horse – in essence, requiring competitors to provide supported services prior to having access to high-cost and low-income universal service funding. While section 214(e)(1) requires an ETC to "offer" the services supported by the federal universal service support mechanisms, the Commission has determined that this does not require a competitive carrier to actually provide the supported services throughout the designated service area before designation as an ETC.¹²

TDS's requested 100% coverage requirement also would place an undue burden on potential ETCs to provide coverage in areas where there is no need to build out. Prospective ETCs cannot logically be required to provide coverage in areas where there are no current or potential

¹⁰ *ETC Designation Order* at ¶¶ 21-24.

¹¹ TDS Petition at 3-5.

¹² *See ETC Designation Order*, at ¶ 17 n.39; *see also 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, 15172-75, paras. 10-18 (2000), recon. pending.

customers. To impose such an obligation on prospective ETCs would use limited universal service funds to provide service in areas where there are potentially no beneficiaries to the expenditures – the very kind of waste that should be avoided. In contrast, under the Commission’s more reasonable guidelines, ETCs would be required to build out only to areas where customers actually use service.

A 100% coverage requirement also would place an obligation on competitive ETCs that the incumbent wireline ETC is not required, or potentially able, to satisfy. Whereas incumbent wireline ETCs are only able to provide service at a single point of connection to their network (*i.e.*, a customer’s premises), wireless ETCs provide service throughout their coverage area.

In proposing a “100% coverage” requirement, TDS also argues that all “carrier of last resort” obligations imposed on incumbents should also be imposed upon competitive ETCs. As the Commission correctly concluded in the *ETC Designation Order*, ETC obligations should only be imposed “to the extent necessary to further universal service goals.”¹³ Regulations meant to curb abuses of market power (such as rate regulation), for example, while appropriate when regulating a dominant carrier in a given market, should not be applied to competitive ETCs simply for parity of regulation.

V. TDS’S PROPOSALS TO LIMIT THE NUMBER OF ETCs WOULD NOT PROTECT THE STABILITY OF THE UNIVERSAL SERVICE FUND OR THE PUBLIC INTEREST

TDS also supports discriminatory limits on the number of new ETCs – allegedly in an effort to protect the stability of the universal service fund – while retaining support levels for incumbents. In the *ETC Designation Order*, the FCC was right to reject such proposals, which would reward incumbent local exchange carrier (“LEC”) inefficiencies, discriminate against

¹³ *ETC Designation Order* at ¶ 30.

competitive ETCs, and potentially deny consumers in high-cost areas the obvious benefits of high-quality, affordable services provided over a variety of technology platforms. Such a result would be inconsistent with section 254(b) of the Act, which demands comparable service offerings for consumers located in both low- and high-cost areas.

TDS's proposal to limit the number of competitive ETCs based on the amount of support available to the incumbent would – instead of promoting the stability and sustainability of the fund – further encourages and rewards incumbent LEC inefficiency, while denying consumers residing in high-cost areas the competitive and technological choices available in more urban locations. The level of per-line high-cost support received by an incumbent LEC is not an appropriate public interest justification for denying ETC designations to competitors in that area. At a time of greater focus on fraud and abuse, this proposal would create powerful and perverse incentives for incumbent carriers to inflate their costs in order to deny competitors access to high-cost subsidies. It is completely inappropriate for incumbent carriers to be rewarded for being inefficient. If anything, the presence of an incumbent carrier receiving above a certain level of per-line support should cause the Commission to more closely scrutinize the incumbent carrier's cost data. The presence of such an inefficient incumbent carrier may also be an indication that wireline technologies may not be the appropriate platform for delivering services to that geographic area.

For similar reasons, the Commission should also reject TDS's proposal to cap the total number of ETCs designated in a given area.¹⁴ By arbitrarily limiting the number of ETCs in a given service area, the Commission would provide a significant cost advantage to certain, favored competitors in a marketplace. Such marketplace distortions will discourage competitive

¹⁴ TDS Petition at 11.

entry by more efficient carriers that potentially could deliver lower priced, higher quality, innovative services to consumers.

The Commission must also reject TDS's proposal to deny competitive ETCs access to access charge related universal service support (*i.e.*, interstate common line support, interstate access support, and any new mechanisms created as a result of intercarrier compensation reform). TDS asserts that providing wireless ETCs access-charge related support mechanisms would be providing "money for nothing" since wireless carriers have never recovered access charges.¹⁵ First, TDS ignores the fact that wireless carriers have "never recovered access charges" because the Commission has never empowered wireless carriers to assess access charges.¹⁶ Second, prohibiting competitive ETCs from receiving access-charge related high-cost support would provide incumbents an unfair advantage in the competitive marketplace. As long as high-cost mechanisms, including access charge-related mechanisms, defray the cost of providing supported service within the designated area they must be portable to all designated ETCs. Any system with support mechanisms that are not portable creates a situation where state and federal regulators, and not the free market, choose winners and losers, in direct contradiction to the holding in *Alenco Communications, Inc. v. FCC*.¹⁷

TDS's proposed methods for controlling the growth of the high-cost mechanisms do not address the true cause of the growth, a legacy system that rewards incumbent LEC inefficiency. Rural incumbent LECs received nearly three-quarters of the high-cost support in 2003, while

¹⁵ *Id.* at 11-12.

¹⁶ *Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Service Providers*, Notice of Proposed Rulemaking, 11 FCC Rcd 5020 at ¶ 111 (1996).

¹⁷ *Alenco*, 201 F.3d at 611.

serving only 12% of the nation's wireline access lines.¹⁸ Moreover, contrary to suggestions that wireless carrier ETC status has strained the fund, the overwhelming percentage of the growth in the size of the fund is attributable to the additional support flowing to incumbent LECs. From 2000 to 2003, 87% of the growth of the fund was attributable to incumbent LECs.¹⁹ Incumbent LECs continue to receive more than 90 percent of all high-cost funding even though the number of wireless handsets has overtaken LEC wireline switched access lines.²⁰

Any attempt to reduce the growth of the fund, while still providing quality service through the high-cost support mechanisms, therefore, must address rising incumbent LEC costs and the mechanisms that provide incumbent LECs with an incentive to keep costs high, and discourage efficiency. CTIA has proposed a single forward-looking cost mechanism that would significantly reduce administrative burdens, reward efficiency, and direct appropriate levels of support to eligible carriers serving consumers in high-cost areas.²¹ CTIA has urged the Commission to also consider other market-driven mechanisms that would reward efficiency, such as a system of competitive bidding (or reverse auctions) to determine high-cost support levels for both incumbents and competitors.

¹⁸ Universal Service Administrative Company, 2003 Annual Report, at 26, *available at* <http://www.universalservice.org/Reports/>; Universal Service Administrative Company, Federal Universal Service Support Mechanisms Fund Size Projections for the Third Quarter of 2004, at Appendix HC05 (filed Apr. 30, 2004).

¹⁹ See Universal Service Administrative Company, 2003 Annual Report, at 26, *available at* <http://www.universalservice.org/Reports/>; Universal Service Administrative Company, 2000 Annual Report, at 30, *available at* <http://www.universalservice.org/Reports/>.

²⁰ See Universal Service Administrative Company, 2004 Annual Report, at 27, *available at* <http://www.universalservice.org/Reports/>.

²¹ See, Comments of CTIA – The Wireless Association at 17-26, CC Docket No. 96-45, filed Oct. 15, 2004.

VI. ADOPTION OF VOLUNTARY GUIDELINES FOR STATE COMMISSIONS IS CONSISTENT WITH THE ACT

In the *ETC Designation Order*, the Commission adopted voluntary guidelines for state commissions to follow in their designation of ETCs within their jurisdiction.²² TDS urges the Commission to make these guidelines mandatory for state designations. Such a mandate is in clear contradiction to the plain language of Section 214(e) of the Act.²³ The authority to designate ETCs is, by Congressional mandate, divided between the states and the Commission. This division rightly allows a state commission to determine whether carriers subject to its jurisdiction should be designated as ETCs, consistent with the public interest, convenience, and necessity in that state. Under this framework, states have the discretion to impose public interest obligations on ETCs within their jurisdiction as long as they do so in a rational and non-discriminatory way.²⁴

VII. APPLICATION OF NEW DESIGNATION AND REDEFINITION STANDARDS TO PENDING PETITIONS IS UNNECESSARY AND UNFAIR

The Commission also should not reconsider its decision to review petitions for ETC designation and service area redefinition using the standards applicable at the time the petition was filed, rather than by applying any new standards adopted in the *ETC Designation Order*.²⁵ Many of these petitions were pending for many months (and in some cases years) awaiting the outcome of the *ETC Designation Order*. In the case of petitions for redefinition of service areas, the Commission took the unusual step of holding these petitions in abeyance well beyond the

²² ETC Designation Order at ¶ 58.

²³ See 47 U.S.C. § 214(e).

²⁴ See *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 417-18 (5th Cir. 1999).

²⁵ TDS Petition at 18.

automatic 90-day approval period in the Commission's rules. CTIA agrees with the Commission that it would be unfair to retroactively apply new rules to petitions filed prior to the effective date of the new rules. Moreover, all Commission-designated ETCs will be required to meet the new reporting and build-out obligations by the time of their October 2006 re-certification. This approach, therefore, provides current and potential ETCs with adequate notice while ensuring timely compliance with the Commission's new standards.

VIII. CONCLUSION

For the foregoing reasons, the Commission should reject TDS's attempts to impose upon prospective ETCs an unnecessarily burdensome, discriminatory, and wireline-centric designation process.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, David Redl, hereby certify that a copy of the foregoing “Opposition of CTIA – The Wireless Association™” was sent on this 4th day of August, 2005, by first class U.S. mail, postage prepaid, to the following:

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