

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

In the Matter of)	
)	
Telecommunications Carriers Eligible to)	
Receive Universal Service Support)	
)	
COX COMMUNICATIONS, INC.)	WC Docket No. 09-197
)	
Petition for Forbearance)	
)	
)	

COMMENTS OF ATLAS TELEPHONE COMPANY, ET AL.

COMES NOW, Atlas Telephone Company, et al.¹ (“Rural LECs”), by and through their attorneys, and submit the following comments in response to the Petition for Forbearance filed herein by Cox Communications, Inc. (“Cox”). For the following reasons, the Rural LECs respectfully request that the Commission deny Cox’s Petition.

1. Cox’s Request Unlawfully Encroaches on States’ Authority.

In its Petition, Cox requests that the FCC forbear from enforcing Section 214(e)(5) of the Act and Section 54.207 of the Commission’s rules. *Cox Petition* at 1. Section 214(e)(5) grants States primary authority to define service areas for universal service support, including low

¹ Atlas Telephone Company, Beggs Telephone Company, Bixby Telephone Company, Canadian Valley Telephone Company, Carnegie Telephone Company, Central Oklahoma Telephone Company, Cherokee Telephone Company, Chickasaw Telephone Company, Craw-Kan Telephone Cooperative, Inc., Cross Telephone Company, Dobson Telephone Company, Hinton Telephone Company, KanOkla Telephone Association, McLoud Telephone Company, Medicine Park Telephone Company, Oklahoma Telephone and Telegraph, Inc., Oklahoma Western Telephone Company, Panhandle Telephone Cooperative, Inc., Santa Rosa Telephone Cooperative, Inc., Shidler Telephone Company, South Central Telephone Association, Southwest Oklahoma Telephone Company, Valliant Telephone Company.

income support. In addition, Section 214(e)(5) grants states and the FCC shared authority to redefine a rural telephone company's study area if such redefinition is in the public interest and is consistent with the findings of the Federal-State Joint Board. Cox's request, if granted, would effectively preempt states' authority to define the service areas for Lifeline ETCs within their state boundaries and eliminate states' ability to participate in the process to redefine service areas in rural telephone company areas with regard to Lifeline ETCs. Specifically, Cox requests that the FCC forbear from enforcing the requirements of Section 214(e)(5) not only in those areas where the FCC has authority to designation eligible telecommunications carriers (ETC) but also in states that exercise primary authority to designate ETCs under Sections 214(e)(2). *Id.* Given the waste, fraud and abuse acknowledged by the FCC,² now is not the time to remove States from the process of defining ETC service areas and supervising ETC services for any type of carrier.

State commissions have primary jurisdiction to designate ETCs under the Act. In 1996, Congress delegated authority to State commissions to designate carriers that would be eligible to receive state and federal universal service subsidies ("ETCs") within their boundaries. 47 U.S.C. § 214(e)(2). The FCC recognizes State commissions' *primary* jurisdiction to designate ETCs. *Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved Areas, Including Tribal and Insular Areas*, CC Docket No. 96-45, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 15 FCC Rcd 12208, 12255, para. 93 (2000) ("*Twelfth Report and Order*").

² *In the Matter of Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42; *Lifeline and Link Up*, WC Docket No. 03-109; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45; *Advancing Broadband Availability Through Digital Literacy Training*, WC Docket No. 12-23, Report and Order and Further Notice of Proposed Rulemaking, FCC 12-11, ¶ 375 (Rel. February 6, 2012) ("*Lifeline Reform Order*").

The FCC has primary authority to designate ETCs in only two limited areas under federal law. Specifically, the Commission has primary authority to designate ETCs in only the following circumstances: (1) a carrier's request for ETC designation in unserved areas and, (2) only with respect to such carrier's interstate services. 47 U.S.C. § 214(e)(3). Otherwise, the FCC's authority over designation of ETCs is secondary to State commission authority and acts as a backstop to the states' primary jurisdiction only where the carrier is not subject to the jurisdiction of a State commission. 47 U.S.C. § 214(e)(6). The State of Oklahoma, through the Oklahoma Corporation Commission, exercises its primary jurisdiction to designate ETCs in Oklahoma.

The sole purpose of Cox's Petition is to avoid State's ability to participate in the statutory service area definition process. Specifically, Cox admits that it "intends to seek ETC designation in various rural service areas" and believes that the service area redefinition process under the Act and the FCC's rules is "wasteful" and "unnecessary." *Cox Petition* at 4. Cox's arguments are misplaced and disregard the increasing level of fraud and abuse currently targeting the low income support mechanism. Section 214(e)(5) of the Act provides:

(5) SERVICE AREA DEFINED – The term "service area" means *a geographic area established by a State commission* for the purpose of determining universal service obligations and support mechanisms. In the case of an area served by a rural telephone company, "service area" means such company's "study area" unless and until *the Commission and the States*, after taking into account recommendations of a Federal-State Joint Board instituted under section 410(c), establish a different definition of service area for such company."

Congress clearly reserved to the States authority to define service areas for universal service purposes and intended them to be critical participants in evaluations to change such service areas. The FCC has interpreted the statute to mean that "neither the Commission nor the states may act alone to alter the definition of service areas by rural carriers." *Federal-State Joint*

Board on Universal Service, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 8880, ¶187 (1997) (*Universal Service First Report and Order*). Yet, if the FCC grants Cox's request, Cox would be permitted to define its own service areas without supervision by either the States or the FCC contrary to the FCC's earlier conclusion. The Rural LECs believe that Congress' adoption of this process of involving both State and federal cooperation in evaluating ETC service areas was deliberate and serves the public interest. State involvement is critically important in evaluating service territories of carriers competing with rural telephone companies because States possess valuable evidence pertaining to the location, the population, the demographics, the level of competition, competitive resources and the potential impacts to other areas served by the rural telephone company when evaluating the public interest of carving out disparate service areas in rural parts of their State. Therefore, the Commission should not remove the State commissions' role in defining service areas for ETCs operating within their boundaries.

2. Granting Cox's Petition would reverse long-standing FCC policy allowing States to create their own rules for ETC designation.

The FCC has not required States exercising primary authority to designate ETCs to follow the rules governing federally-designated ETCs. For example, in 2005, the FCC adopted additional requirements, beyond those contained in the Act³, that "ETC applicants must meet to be designated an ETC by [the FCC]." *In the Matter of High-Cost Universal Service Support, Federal-State Joint Board on Universal Service*, Report and Order, CC Docket No. 96-45, at ¶17 (rel. March 17, 2005). The FCC specifically declined to mandate that states adopt those same requirements for ETC designations. *Id.*, ¶61. Rather, the FCC's order is replete with language limiting the mandatory applicability of its additional requirements to only those ETC

³ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (the "Act").

applications over which the FCC has jurisdiction. *See, e.g., Id.*, ¶¶ 17, 20, 68. The FCC referred to the additional requirements as “permissive guidelines” for state ETC proceedings. *Id.*, ¶ 58.

The FCC’s decision to make its additional ETC requirements permissive is consistent with the Fifth Circuit Court of Appeals. *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 418 (5th Cir., 1999) (nothing in the [Act] prohibits the states from imposing their own eligibility requirements.) The FCC reaffirmed this position earlier this year when it confirmed States rights to impose state-specific obligations on state-designated ETCs. *In the Matter of Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42, FCC 12-11, at ¶375 (Rel. Feb. 6, 2012). Clearly, the FCC has stopped short of imposing mandatory requirements for states to apply when considering ETC designations. Where the FCC attempted to limit states from adopting their own additional requirements, the Fifth Circuit rejected the FCC’s ability to do so. State commissions must remain free to impose their own requirements for ETC designations.

Prior FCC forbearance decisions are consistent with the statutory division of authority over ETC designation. For example, the FCC limited forbearance of the facilities-based requirement in *TracFone* those areas where the FCC exercised either primary or secondary authority. *In the Matter of Federal-State Joint Board on Universal Service, Petition of TracFone Wireless, Inc. for Forbearance from 47 U.S.C. § 214(e)(1)(A) and 47 C.F.R. § 54.201.(i)*, CC Docket No. 96-45, Order, ¶ 6, (rel. Sep. 8, 2005) (“*TracFone Order*”) (applicability of the order limited to the purpose of the FCC considering TracFone’s Petitions for ETC Designation for Lifeline support then pending at the FCC). When the State of Florida gained jurisdiction over wireless ETC designation under state law during the pendency of TracFone’s Petition before the FCC, the FCC dismissed TracFone’s request with respect to Florida and simply “encourage[ed]”

the Florida Public Service Commission to require TracFone to adhere to the plan adopted by the FCC with respect to TracFone's applications for federally-designated ETC. *Tracfone Order* at ¶ 10. In short, the FCC has previously been respectful of States' primary authority to designate ETCs and to impose their own requirements on ETC designation. A decision by the FCC to forbear from enforcing provisions of federal law that grant primary authority to the States is contrary to the FCC's prior policies.

3. Cox's request would limit States' rights to conduct a public interest inquiry as required by the Act.

State commissions must consider the public interest when evaluating requests for ETC designation. Section 214(e)(2) contains the following requirements for State commissions:

(2) DESIGNATION OF ELIGIBLE TELECOMMUNICATIONS CARRIERS – A State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the State commission. Upon request and *consistent with the public interest*, convenience, and necessity, the State commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of paragraph (1). *Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest.* (emphasis added).

Clearly, the Act requires the State commission to evaluate the impact to the public and make a determination that the addition of another eligible telecommunications carrier in areas served by rural telephone companies is in the public interest before designating an ETC.

Congress recognized that a public interest determination should be mandatory in areas served by rural telephone companies. In March 2005, the FCC found, "As part of the public interest analysis for ETC applicants that seek designation below the service area level of a rural

incumbent LEC, we will perform an examination to detect the potential for creamskimming effects that is similar to the analysis employed in the Virginia Cellular ETC Designation Order and the Highland Cellular Designation Order.” at ¶48. The FCC further stated:

In order to avoid disproportionately burdening the universal service fund and ensure that incumbent LECs are not harmed by the effects of creamskimming, the commission strongly encourages state to examine the potential for creamskimming in wire enters served by rural incumbent LECs. This would include examining the degree of population density, disparities among wire centers within rural service areas, the extent to which an ETC applicant would be servicing only the most densely concentrated areas within a rural service area, and whether the incumbent LEC had disaggregated its support at a smaller level than the service area (*e.g.*, at the wire center level.) (emphasis added).

Moreover, the evaluation of public interest impacts, including a decision to employ a creamskimming analysis, falls on the State commissions that have primary jurisdiction to designate ETCs within their boundaries and to evaluate the public interest of granting additional ETCs in areas served by rural telephone companies. The FCC, in its recent *Lifeline Reform Order*⁴, confirmed that States “have a right to impose a state-specific obligation on each existing Lifeline-only ETC . . .” Indeed, this separation of authority between States and the FCC was further clarified when the FCC modified its rules applicable to “federally-designated” ETCs, in its *Lifeline Reform Order*⁵.

If granted, Cox’s Petition would circumvent the Oklahoma Corporation Commission’s ability to consider the public interest of designating Cox an ETC for Lifeline only in partial rural telephone company service areas. In forbearing from enforcement of Section 214(e)(5) previously, the FCC clarified that its “action [did] not disturb the roles of state commissions” in

⁴ *In the Matter of Lifeline and Link Up Reform and Modernization, WC Docket No. 11-42; Lifeline and Link Up, WC Docket No. 03-109; Federal-State Joint Board on Universal Service, CC Docket No. 96-45; Advancing Broadband Availability Through Digital Literacy Training, WC Docket No. 12-23, Report and Order and Further Notice of Proposed Rulemaking, FCC 12-11, ¶ 375 (Rel. February 6, 2012) (“Lifeline Reform Order”).*

⁵ *Id.*, ¶¶ 388, 389.

the ETC designation process.⁶ The FCC also concluded that “State commissions are still required to consider the public interest, convenience and necessity” of designating a competitive ETC in a rural area already served by a rural telephone company. With respect to the State of Oklahoma, however, a grant of forbearance by the FCC at this juncture would disturb the Oklahoma Corporation Commission in the ETC designation process and would prevent it from fully considering the public interest of designating Cox as a Lifeline-only ETC in only partial rural telephone company service areas.

Cox filed an application with the Oklahoma Corporation Commission (OCC) seeking designation as a Lifeline-only ETC in certain rural telephone company areas on February 22, 2011. Cox did not seek to redefine the rural telephone company service area. The OCC conducted a hearing on Cox’s application on August 25, 2011, and the record in the matter is now closed. Therefore, Cox’s request for ETC designation, which is not based on any change in the underlying rural telephone company’s service area or request to serve less than all of such rural telephone company’s service area, is currently under consideration by the OCC. Evidence pertaining to the public interest of Cox’s request currently before the OCC is based on Cox’s offer and provision of Lifeline service to the entire rural telephone company service area. Had Cox intended to only serve a portion of the rural telephone company service area, the proper procedure would have been to file a Petition to redefine the service area in which the FCC and the OCC would jointly consider the public interest in redefining the service area. Yet, if the FCC grants Cox’s Petition for Forbearance, the Oklahoma Corporation Commission will be prevented from considering the public interest of designating Cox as a Lifeline-only ETC in partial rural

⁶ *In the Matter of Telecommunications Carriers Eligible for Universal Service Support, NTCH Petition for Forbearance from 47 U.S.C. § 214(e)(5) and 47 C.F.R. § 54.207(b), Cricket Communications, Inc., Petition for Forbearance*, WC Docket No. 09-197, FCC 11-137, ¶14 (Rel. Sept. 16, 2011).

telephone company service areas. Likewise, the OCC will be prevented from taking evidence on and evaluating the public interest of redefining the rural telephone company service area if the FCC grants Cox's Petition for Forbearance following a hearing in which the only public interest evidence is based on Cox's provision of Lifeline service to the entire service area. Therefore, if the FCC grants Cox's request, the OCC will not be permitted to consider the public interest of Cox serving only a part of a rural telephone company's service area, contrary to the FCC's earlier decisions.

The introduction of additional Lifeline providers in rural telephone company areas should be subject to a public interest evaluation which can include a creamskimming analysis. Under a traditional creamskimming analysis, the concern is that a carrier without a study area-wide service obligation may target high customer density areas or those areas where costs to serve are lower, leaving the rural telephone company with the obligation to serve high cost areas with low customer density. Similarly, a creamskimming analysis was used to ensure that a competing carrier served not just high margin business customers, but also residential customers. In rural telephone company areas, the rural telephone company can suffer the same adverse effects from additional Lifeline providers as observed under traditional creamskimming analyses. Specifically, the rural telephone company likely has a much higher percentage of residential customers than in more urban areas. Additionally, a significant percentage of rural telephone company customers are low income customers. As those customers migrate to other Lifeline providers, the number of lines served by the rural telephone company decline, causing its cost per line to increase. Under the policies and rules adopted by the FCC in its *USF/ICC Transformation Order*, this pushes the rural telephone company closer to the FCC per line cap on total universal service, obscures corporate operations expense and unjustifiably pushes it toward

the FCC's cap - without the rural telephone company adding any expense or cost - and further disadvantages the rural telephone company in future CAF reverse auction procedures. All of these potential impacts are relevant to a Petition for ETC designation whether for high cost support to Lifeline only. Additionally, all of these potential impacts are within a State's obligation to consider the public interest of designating an ETC.

If the FCC grants Cox's petition with respect to all states, as requested by Cox, the practical effect is to lock States out of the service area designation process for low-income, Lifeline support. The Rural LECs do not believe such a result was the intent of Congress when drafting the Act. Congress delegated specific authority to State commissions and, while it also granted the FCC the ability to forbear from enforcing any provisions of the Act, allowing the FCC to circumvent those areas where Congress delegated primary authority to the States would in effect allow a single provision to strike all State authority.

WHEREFORE, premises considered, the Rural LECs respectfully request that the FCC deny Cox's Petition in its entirety. However, if the FCC is persuaded that an ETC's service area and the States' ability to consider the public interest of granting an ETC is not relevant to requests for ETC designation for low-income support purposes, it should limit the scope of its forbearance to only those areas where the FCC has primary authority and not where States are exercising primary authority over ETC designation.

Respectfully submitted,



RON COMINGDEER, OBA #1835
MARY KATHRYN KUNC, OBA #15907

- for the firm -

RON COMINGDEER & ASSOCIATES
6011 N. Robinson
Oklahoma City, OK 73118
Telephone: (405) 848-5534
Fax: (405) 843-5688

ATTORNEYS FOR ATLAS TELEPHONE
COMPANY, ET AL.