

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

In the Matter of:

Connect America Fund

Universal Service Reform – Mobility Fund

ETC Annual Reports and Certifications

Establishing Just and Reasonable Rates for
Local Exchange Carriers.

Developing an Unified Intercarrier
Compensation Regime

WC Docket No. 10-90

WT Docket No. 10-208

WC Docket No. 14-58

WC Docket No. 07-135

CC Docket No. 01-92

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

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I. INTRODUCTION

The California Public Utilities Commission and the People of the State of California (California or CPUC) submit these comments in response to the Federal Communications Commission's (FCC or Commission) Further Notice of Proposed Rulemaking (FNPRM) regarding the rules that should apply to the recipients of Connect American Fund Phase II, the Remote Area Fund and Mobility Fund Phase II. Among other matters, the FCC seeks comment on proposals to increase the downstream speed benchmark for broadband Internet access service from 4 Mbps to 10 Mbps; to modify other public interest and deployment obligations of CAF recipients; to modify the definition of unserved area; to establish rules for the CAF Phase II competitive bidding process; and to adopt changes to the eligible telecommunications carrier (ETC) designation process.

The CPUC here offers comments on the proposed changes to the ETC designation process. We reserve the right to comment on other matters raised in the FNPRM at a later time. Based on its experience in designating ETCs, the CPUC respectfully offers the following observations on, and proposed modifications to, the FCC's proposals.

II. DISCUSSION

Under the federal Communications Act of 1934, as amended (Act), only ETCs designated pursuant to section 214(e) of the Act "shall be eligible to receive specific Federal universal service support."¹ Section 214 (e) (2) gives states primary

¹ 47 U.S.C. § 254(e).

responsibility for ETC designation.² However, section 214(e)(6) provides that the FCC is responsible for processing requests for ETC designation when the service provider is not subject to the jurisdiction of the state public utility commission.³ The FCC requires that entities selected to receive support from Connect America Phase II or the Remote Areas Fund must obtain ETC designation from either a state public utility commission pursuant to section 214(e)(2), or the Commission pursuant to section 214(e)(6), of the Act.

In its *Report and Order* in this proceeding, issued June 10, 2014, the Commission concluded that potential applicants in the CAF Phase II competitive bidding process need not be ETCs at the time they initially *apply* for funding at the Commission. The FCC will permit entities to obtain ETC designation *after* the announcement of winning bidders for the offer of Phase II Connect America funding, which it believes “will encourage greater participation in the competitive process by a wider range of entities.”⁴ The FCC concludes that the benefits of encouraging greater participation in the Phase II competitive bidding process outweigh any potential risk that winning bidders may not meet the necessary requirements to be designated an ETC. However, the FCC noted that ETC status must be confirmed before funding awarded through the competitive process is disbursed.⁵

² Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Report and Order*, 20 FCC Rcd 6371, 6397, para. 61 (2005) (ETC Designation Process Order).

³ 47 U.S.C. § 214(e)(6).

⁴ Report and Order, ¶43.

⁵ Id., at ¶43.

In this *FNPRM*, the FCC seeks comment on implementation issues relating to ETC designation. Specifically, the FCC invites comment on the timeframe in which a winning bidder must seek ETC designation before being deemed in default, and on the role of state ETC designation.⁶

Streamlining the process of seeking federal designation when states may lack jurisdiction is necessary for the efficient implementation of the Connect America Fund, so that we may provide support for access to services in high-cost areas, including the most remote and costly areas of the nation, in an efficient and timely manner. We believe that this can be accomplished within the Act’s framework for state and federal action. Although the Commission has previously stated that it would act on ETC designation applications “only in those situations where the carrier can provide the Commission with an affirmative statement from the state commission or a court of competent jurisdiction that the carrier is not subject to the state commission’s jurisdiction” and that the technology used (e.g., satellite service) “does not *per se* place the carrier outside the parameters of the state commission designation authority under section 214(e)(2),” we tentatively conclude that a different approach is warranted to ensure successful implementation of the Connect America Fund, including the Remote Areas Fund.⁷

In the above Order, we permit entities to seek ETC designation *after* being selected for the offer of Phase II Connect America funding. Here, we propose to adopt a requirement that a winning bidder must submit an application to become an ETC within 30 days of public notice that it is the winning bidder for the offer of support in those areas where it has not already been designated an ETC. We also propose that an applicant for Phase II support that fails to submit such an application within 30 days would be deemed in default and therefore subject to default payments. We propose to require winning bidders to submit proof to the Commission that they have filed the requisite ETC designation application within the required timeframe to the extent filed with a state commission. We seek comment on these proposals.⁸

⁶ Id., At ¶46.

⁷ Id., at ¶180.

⁸ Id., at ¶181.

Second, we propose to adopt a rebuttable presumption that a state commission lacks jurisdiction over an ETC designation petition for purposes of Connect America Phase II competitive bidding or Remote Areas Fund if it fails to initiate a proceeding on that petition within 60 days of receiving it.⁹

A. The CPUC Recommends that the FCC Process Requests for ETC Designation Submitted by Non-Telecommunications Providers, or Undertake a Concurrent Review

In the FNPRM, the FCC poses questions regarding further streamlining of the ETC designation process for the efficient implementation of the Connect America Fund (CAF) Phase II, including the Remote Areas Fund.

As an initial matter, the CPUC notes that the FCC describes potential bidders for CAF grants as “entities”¹⁰ or “providers.”¹¹ These terms are not defined, and the CPUC questions what type of “entities” and/or “providers” the Commission is contemplating might seek CAF funding. Under §214(e), Eligible Telecommunications Carrier designation is, by definition, limited to “telecommunications carriers” which, in turn, are common carriers. To the extent that the FCC envisions that undefined “entities” and “providers” who may bid on CAF Phase II support are not telecommunications carriers, the Commission should be aware that expanding the pool of ETC designee applicants would create a legal conundrum for the States. Section 214 limits the ability of states to designate an entity as an ETC, and the limitation is that the designee must be a

⁹ Id., at ¶182.

¹⁰ Id., at ¶5.

¹¹ Id., at ¶11.

“telecommunications carrier” as defined by federal rules.¹² Similarly, in California, that means the ETC designee must be a telephone corporation as defined by California Public Utilities Code §234. Accordingly, if the FCC contemplates allowing entities or providers who are not telecommunications carriers to seek CAF funding, the best solution would be for the FCC to designate the entity or provider as an ETC once the applicant’s bid has been accepted.

In addition to questions as to whether prospective bidders will be telecommunications carriers (and telephone corporations under California law), the CPUC notes that the FCC is proposing a rebuttable presumption standard that a state commission lacks jurisdiction over an ETC designation petition, for purposes of Connect America Phase II competitive bidding or Remote Areas Fund, if the state fails to initiate a proceeding on that petition within 60 days of receiving it.¹³ Further, the CPUC is mindful of the FCC’s overarching goal to expediently provide CAF funding to selected bidders. Given the questions about the bidders’ status, as well as the rebuttable presumption and the FCC’s laudable goal to expand CAF funding, California recommends that the FCC include in its evaluation of CAF Phase II bids, an ETC review of the bidder to ensure that the bidder can be designated as an ETC. This concurrent review would save time, and would expedite construction and deployment of facilities by eliminating a two-step consecutive review that first evaluates the bid and then evaluates whether the selected bidder qualifies to be an ETC under § 214(e). By adopting this

¹² 47 U.S.C. §153 Definitions (subsections (10) – Common Carrier, (43) - Telecommunications, (44) - Telecommunications Carrier, (46) - Telecommunications Service.

¹³ *Id.*, at ¶182.

approach, the CAF Phase II funding process would avoid waiting for state commission action or alternatively, for the 90-day rebuttable presumption period to pass.

B. The CPUC Opposes a Rebuttable Presumption that the State Lacks Jurisdiction if It Has Not Completed the ETC Designation Process Within a Set Time

As noted above, the FCC proposes to adopt “a rebuttable presumption” that a state commission lacks jurisdiction over an ETC designation petition for CAF Phase II competitive bidding or Remote Areas Fund if the state commission fails to initiate a proceeding on the petition within 60 days of receiving it. The FCC also seeks comment on whether it should adopt a similar rebuttable presumption if a state commission fails to dispose of a petition within a certain amount of time, such as within 90 days of initiating a proceeding.¹⁴ Under this proposal, the ETC applicant may file the ETC designation request with the FCC and point to the lack of state action within the prescribed time period as evidence that the petitioner is not subject to the jurisdiction of a state commission. In determining whether a state commission lacks jurisdiction over the applicant, Commission staff would weigh any statements that a state commission submits during the notice-and-comment period against the lack of action and the arguments of the applicants.

The test of jurisdiction should not be based on the amount of time an agency takes to process an ETC designation petition. The CPUC most likely could not meet the FCC’s

¹⁴ Id. It would be odd for the FCC to conclude that state inaction on an ETC designation request in 90 days connotes lack of state jurisdiction as opposed to some other explanation.

proposed 90-day ETC petition completion cycle under its current ETC designation processes, especially given limited staff resources.

The typical ETC review at the CPUC is handled through an informal process called an Advice Letter. Staff's delegated authority to review Advice Letters is limited to instances where the subject matter is not controversial and does not require a discretionary policy decision. Staff prepares a "Resolution" – essentially an order that is put before the full Commission for a formal vote at one of its public meetings. The Advice Letter review process includes a 30-day period for interested parties to protest or comment on the ETC request, a staff evaluation period, including time to request additional information from the applicant, and a 30-day sunshine period prior to the Commission vote. To protect the USF from waste, fraud, and abuse, the staff conducts a due diligence review of the ETC petitioner to determine if any past behaviors or issues might call into question the petitioner's fitness to receive USF support. All of these tasks put the complete review and voting process close to, if not beyond, 90 days.

Additionally, the ETC designation process under §214 essentially is an unfunded federal mandate. The CPUC has allocated one staff person to process ETC designation requests, which we do on a first-in-first-out basis. Currently nine ETC designation requests are pending at the CPUC, at various stages of review. Staff strives to have one request approved every two weeks, commensurate with the CPUC's public meeting calendar.

An alternative ETC designation process for more complex matters requiring a CPUC policy decision, such as determining whether the ETC petitioner is a "telecommunications carrier" under federal rules and a "telephone corporation" pursuant

to the California Public Utilities Code,¹⁵ is accomplished in a formal docket. In the case of an ETC Application, the CPUC would process the Application, and initiate a formal proceeding by opening a docket and assigning an Administrative Law Judge. The formal docket process involves hearing the evidence, developing and reviewing a record, reviewing pleadings, and preparing a formal Commission decision to dispose of the Application. This formal process has the same due process requirements as the Advice Letter process described above. All of the steps in the formal process, without question, would take more than the proposed 90-day period.

C. The FCC Should Not Adopt a Predetermined Sunset Period for ETC Designation for Successful CAF Phase II Bidders.

The FCC also seeks comment on sunsetting ETC designations tied to participation in the Connect America Phase II competitive bidding process or the Remote Areas Fund

¹⁵ Public Utilities Code Sections:

§216(a) “Public utility” includes every common carrier, toll bridge corporation, pipeline corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, sewer system corporation, and heat corporation, where the service is performed for, or the commodity is delivered to, the public or any portion thereof.

§234 (a) “Telephone corporation” includes every corporation or person owning, controlling, operating, or managing any telephone line for compensation within this state.

§ 233 “Telephone line” includes all conduits, ducts, poles, wires, cables, instruments, and appliances, and all other real estate, fixtures, and personal property owned, controlled, operated, or managed in connection with or to facilitate communication by telephone, whether such communication is had with or without the use of transmission wires.

after the 10- year funding term has expired and the entity has fulfilled its build-out and public interest obligations.¹⁶ The FCC asks whether it is consistent with the federal Communications Act to sunset ETC designations tied to participation in the CAF Phase II competitive bidding process or the Remote Areas Fund after the 10-year funding term has expired¹⁷ and the entity has fulfilled its build-out and public interest obligations.

The FCC should not adopt a predetermined sunset period for ETC designation for successful CAF Phase II bidders. Currently, there are procedures for relinquishing ETC designation in areas served by more than one ETC.¹⁸ However, the areas contemplated by the CAF and Remote Areas Fund may be unserved at this time, in which case, the winning bidder would be the only ETC in the area. Consequently, having a predetermined sunset date for expiration of ETC designation and the attendant obligations and responsibilities may jeopardize continuity of service in the area. To ensure that customers in such areas continue to have service, the FCC would need to adopt rules for relinquishing ETC designation where there is only one ETC in the area.

D. Once An Incumbent LEC No Longer Receives Federal High-Cost Support, ETC Requirements Associated With That Support Would No Longer Be Applicable

The FCC seeks comment on whether ETCs should be deemed to only have a federal high-cost obligation for the geographic areas for which they receive support.¹⁹ Does such a reading comport with the statutory language in section 214 which specifies

¹⁶ Id., at ¶184.

¹⁷ Id., at footnote 369, p. 63.

¹⁸ 47 U.S.C. § 214(e)(4).

¹⁹ Id., at ¶¶ 197-198.

that ETCs “shall, throughout the service area for which the designation is received offer the services that are supported by Federal universal service support mechanisms under section 254(c)?” Note that under such a statutory interpretation, if an incumbent LEC ETC no longer received high-cost support, it would effectively become a Lifeline-only ETC throughout its service territory. From which specific ETC obligations would an incumbent LEC be relieved under such an interpretation of the statute?

The CPUC recommends that once an incumbent LEC no longer receives federal high-cost support, ETC requirements associated with that support should no longer be applicable. Assuming that the incumbent LEC continued to receive federal low-income support, ETC obligations for low-income support would remain in effect. Loss of any federal support would not have any effect on an incumbent LECs obligations and responsibilities under state law. All of the incumbent LECs operating in California are Carriers of Last Resort (COLR), a designation that is not dependent upon receipt of federal USF support, either low-income or high-cost. COLR responsibilities would not end as the result of the expiration of USF funding.

III. CONCLUSION

In summary, the CPUC asks the FCC to clarify the meaning of “entities” and “providers.” If the FCC intends these terms to include non-common carrier, non-telecommunications providers, we urge the FCC to conduct ETC designation for such entities and allow for concurrent ETC review where status of the entity is in question. Given the questions about the bidders’ status, a concurrent review likely would save time and expedite construction and deployment of facilities by eliminating a two-step

consecutive review. Since California most likely would not meet 90-day ETC processing deadline, the CPUC encourages the FCC to not adopt a predetermined sunset period for ETC designation for successful CAF Phase II bidders. Finally, once an incumbent LEC no longer receives federal high-cost support, the CPUC asserts that ETC requirements associated with that support would no longer be applicable.

We again commend the Commission for its desire to expedite the ETC process and thank it for considering our proposed refinements.

Respectfully submitted,

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