

December 11, 2018

Daniel P. Wolf
Executive Secretary
Minnesota Public Utilities Commission
121 7th Place E. Suite 350
St. Paul, MN 55101-2147

RE: **Petition of Broadband Corp, Inc. for Designation as an Eligible Telecommunications Carrier (ETC)**
Docket No: P6994/M-18-665

Dear Mr. Wolf:

Attached are comments of the Department of Commerce concerning the Petition of Broadband Corp, (Broadband) for Designation as an Eligible Telecommunications Carrier (ETC). This petition is in response to Broadband's winning bid in the Connect America Fund Auction (CAF II).

The petition was filed on October 31, 2018 (all trade secret) and another petition (public) was filed on November 6, 2018, by:

Anthony Will
Vice President
Broadband Corp
1772 Stieger Lake Lane
Victoria, MN 55386

The Department recommends that the Commission approve Broadband's request for ETC status for high cost support in the Census Blocks listed in Exhibit 1, if the following are met:

- 1) Broadband should provide a clear explanation of how it will satisfy the requirement of providing a telecommunications service
- 2) If Broadband demonstrates that it will be providing a telecommunications service, it should explain why the provision of the telecommunications service does not require a certificate of authority from the Commission.
- 3) Broadband should show that the Department of Public Safety is satisfied with its 911 arrangements to ensure consumer protections exist with emergency 911 calling
- 4) Broadband should show that it will have a standalone voice offering and its customer agreement should reflect the availability of a standalone voice offering.
- 5) Broadband should confirm that it will offer Lifeline service and has an advertising plan for it.

Sincerely,
/s/ JOY GULLIKSON
Rate Analyst

JG/jl
Attachment

Before the Minnesota Public Utilities Commission

Comments of the Minnesota Department of Commerce

Petition of Broadband Corp for Designation as an Eligible Telecommunications Carrier (ETC)

Docket No: P6994/M-18-665

I. ISSUE

Whether the Minnesota Public Utilities Commission (Commission) should grant the petition of Broadband Corp (Broadband) for ETC status for high cost support in the census blocks for which Broadband will receive Connect America Funds II (CAFII) funding

II. PROCEDURAL HISTORY

Broadband will provide Internet and voice services.

By public notice from the FCC on August 28, 2018, Broadband was named a winning bidder in the CAF II auction, to receive \$428,117, and serving 128 locations. The CAF II award is given in monthly installments for 10 years (about \$27.87 per location per month for Broadband), as long as Broadband meets certain build out requirements. The 128 locations are in the census blocks listed and shown in Exhibit 1.

In order to receive the CAF II support, Broadband, along with all other recipients, must certify to the FCC and USAC that it has received designation as an ETC eligible for high cost funding no later than February 25, 2019.

Additional requirements for CAF II support recipients include:

- Offer commercially at least one voice and one broadband service meeting the relevant service requirements to the required number of locations in the following timeframe:
 - 40% of the required number of locations in a state by the end of third year of support
 - An additional 20% in each subsequent year
 - 100% by the end of the sixth year of support
- The exact deployment schedule is determined by the carriers themselves, not the FCC.
- File with USAC annual reports and build-out milestone certifications, as well as data on the locations where service is available. Failure to meet the terms and conditions of support can result in increased reporting obligations and possible withholding and/or recovery of support.

- Offer at least one broadband and voice service at rates that are reasonably comparable to the rates for similar service in urban areas. The FCC uses its annual Urban Rate Survey to determine the range of rates that are reasonably comparable¹.

The FCC named fifteen companies as CAF II winners for Minnesota locations. They are:

Company	Amount (\$)	Locations	Amount (\$) /Location	Amount (\$) /Location/10 years/month
Broadband Corporation	428,117	128	3,344.66	27.87
Consolidated Telephone	934,933.80	358	2,611.55	21.76
Farmers Mutual	348,991.60	163	2,141.05	17.84
Federated Coop	1,431,038.80	808	1,771.09	14.76
Garden Valley	880,346	95	9,266.80	77.22
Halstad Telephone	19,635.20	7	2,805.03	23.38
Interstate Telephone	552,329.60	209	2,642.73	22.02
Jaguar	510,587.60	672	759.80	6.33
Johnson Telephone	81,272.50	47	1,729.20	14.41
LTD Broadband	1,104,440.80	840	1,314.81	10.96
Midcontinent	27,977,283.80	7410	3,775.61	31.46
Paul Bunyan	1,313,542.60	315	4,169.98	34.75
Roseau Electric	2,081,769.70	326	6,385.80	53.22
West Central Telephone	611,934.40	532	1,150.25	9.59
Wikstrom	532,556.80	56	9,509.94	79.25
TOTALS	38,808,780.20	11,966	53,378.30	
<i>AVERAGES</i>	<i>2,587,252.01</i>	<i>798</i>	<i>3,558.55</i>	29.65

III. LEGAL STANDARDS

The Code of Federal Regulations Part 54 governs the federal requirements for common carriers becoming ETCs. Federal Communications Commission (FCC) orders have adjusted some of these regulations over the years. Most of the adjustments have been to reduce reporting requirements. Parts relevant to this petition include:

§ 54.101 (b) requires “an eligible telecommunications carrier must offer voice telephony as set forth in paragraph (a) of this section in order to receive federal

¹ From <https://www.fcc.gov/auction/903>.

universal service support.” Part (a) requires voice grade access to the public switched network or its functional equivalent must be provided.

§ 54.201 states in parts (d), (e), and (h):

(d) “A common carrier designated as an ETC under this section shall be eligible to receive universal service support in accordance with section 254 of the Act and shall, throughout the service area for which the designation is received:

- (1) Offer the services that are supported by federal universal service support mechanisms under subpart B of this part and section 254(c) of the Act, either using its own facilities or a combination of its own facilities and resale of another carrier’s services (including the services offered by another eligible telecommunications carrier); and
- (2) Advertise the availability of such services and the charges therefore using media of general distribution.

(e) For the purposes of this section, the term facilities means any physical components of the telecommunications network that are used in the transmission or routing of the services that are designated for support pursuant to subpart B of this part. (f) For the purposes of this section, the term “own facilities” includes, but is not limited to, facilities obtained as unbundled network elements pursuant to part 51 of this chapter, provided that such facilities meet the definition of the term “facilities” under this subpart.

(h) A state commission shall not designate a common carrier as an eligible telecommunications carrier for purposes of receiving support only under subpart E [Lifeline] of this part unless the carrier seeking such designation has demonstrated that it is financially and technically capable of providing the supported Lifeline service in compliance with subpart E of this part

§ 54.203 states in part: “If no common carrier will provide the services that are supported by federal universal service support mechanisms under section 254(c) of the Act and subpart B of this part to an unserved community or any portion thereof that requests such service, the Commission, with respect to interstate services, or a state commission, with respect to intrastate services, shall determine which common carrier or carriers are best able to provide such service to the requesting unserved community or portion thereof and shall order such carrier or carriers to provide such service for that unserved community or portion thereof.”

As a winner in the CAF II auction, ETCs designated to receive High Cost Program support are

- Required to provide Lifeline-supported broadband in areas where they commercially offer broadband service pursuant to their High Cost Program obligations.

- Required to comply with all service requirements, including any future rules changes, and the annually-updated minimum service standards.²

Minnesota Statute section 403.025, Emergency Telecommunications System Required, subp. 3 states: “Every owner and operator of a wire-line or wireless circuit switched or packet-based telecommunications system connected to the public switched telephone network shall design and maintain the system to dial the 911 number without charge to the caller.”

Minnesota Rules 7811.1400 and 7812.1400, subp. 13 state: “The commission may order an LSP to provide the services that are supported by a federal universal service support mechanism to an otherwise unserved area only as provided in section 102(a) of the act and consistent with Minnesota Statutes, sections 237.081 and 237.16.”

Minn. Rule 7812.0600 subp. 4 and 7811.0600, subp.4 state Subp. 4. An LSP designated an ETC by the commission must provide local service, including, if necessary, facilities-based service, to all requesting customers within the carrier's service area on a nondiscriminatory basis, regardless of a customer's proximity to the carrier's facilities. An LSP may assess special construction charges approved by the commission if existing facilities are not available to serve the customer.

Also, in Docket P999/M-05-1169, *Order Adopting FCC Requirements for Designating Eligible Telecommunications Carriers, As Modified*, the Commission ordered:

“After the date of this Order, petitioners to the Commission to be designated an eligible telecommunications carrier under 47 U.S.C. 214(e)(2) must:

- (1) (A) Commit to provide service throughout its proposed designated service area to all customers making a reasonable request for service. Each applicant shall certify that it (1) provide service on a timely basis to requesting customers within the applicant’s service area where the applicant’s network already passes the potential customer’s premises; and (2) provide service within a reasonable period of time, if the potential customer is with the applicant’s licensed service are[a] but outside its existing network coverage, if service can be provided at reasonable cost by (a) modifying or replacing the requesting customer’s equipment; (b) deploying a roof-mounted antenna or other equipment; (c) adjusting the nearest cell tower; (d) adjusting network or customer facilities; (e) reselling services from another carrier’s facilitates to provide service; or (f) employing, leasing or constructing an additional cell site, cell extender, repeater, or other similar equipment”

In setting the requirements for this round of auction to receive the CAF II funding, the FCC required:

² <https://www.usac.org/li/program-requirements/lifeline-broadband.aspx>

“Each Connect America Fund support recipient must offer voice as a standalone service, but may separately bundle its broadband offerings with a voice service.”³ USF/ICC Transformation Order, 26 FCC Rcd at 17693, para. 80.

Congress, in 47 USC § 214 (e), requires as a precondition to accessing FCC high cost or Lifeline support subsidies, that providers be designated Eligible Telecommunication Carriers by a state commission. Telecommunications carriers are defined by 47 USC § 153 (51) as “any provider of telecommunications services [and a] telecommunications carrier shall be treated as a common carrier . . . only to the extent that it is engaged in telecommunications services.”

The regulatory status of VoIP service has recently been in litigation. The Minnesota Commission found that fixed⁴ VoIP services are subject to applicable consumer protections for telecommunications service under Minnesota statutes, as there has been no federal preemption of the Commission’s authority.⁵ Although the FCC has not classified fixed or over-the-top VoIP as being either an information service or a telecommunications service, in a 2-1 split decision, the Eighth Circuit Court of Appeals found that all VoIP service is an information service.⁶ The Minnesota Commission’s request for an en banc rehearing of the Eighth Circuit decision was recently denied. In the absence of any action that would stay the Eighth Circuits decision, it is the Department’s understanding that VoIP services are information services, in those states that are part of the Eighth Circuit. Thus, in the Eighth Circuit, companies may not use their VoIP service offering to satisfy the above stated requirement that an ETC must be a provider of telecommunications services.

IV. ANALYSIS

In this current application, Broadband requests ETC for high cost in the census blocks it will receive CAF II funds. The census block numbers that are the subject of the CAF II award are listed in Exhibit 1. The following provides some of the primary provisions for ETC certification:

1. Facilities and Commitment to Serve - Broadband states that it will provide broadband and voice telephone over its fiber-optic facilities. Broadband certifies that it will: Provide service to all customers making a request for service that “. . . falls into the CAF II definitions.”⁷

³ USF/ICC Transformation Order, 26 FCC Rcd at 17693, para. 80.

⁴ The term “fixed” represents those services at a stationary location, as opposed to “over-the-top” or “bring your own broadband” VoIP services that may be used from any location that the customer has access to the internet. Over-the-top VoIP is also referred to as “nomadic VoIP.”

⁵ See. *In the Matter of the Complaint of the Minnesota Department of Commerce Against the Charter Affiliates Regarding Transfer of Customers*, Order Finding Jurisdiction and Requiring Compliance Filing, Docket No. P6716,5615/C-14-383. July 28, 2015.

⁶ *Opinion*, 2018 WL 4260322 (8th Cir September 7, 2018)

⁷ Broadband application para. 1.

2. Broadband's Basic Universal Service Offering - Broadband agrees to provide voice telephony in the Service Area at rates that are reasonably comparable to the rates for similar service in urban areas. Broadband agrees to offer at least one broadband and voice service at rates that are reasonably comparable to the rates for similar service in urban areas. The FCC uses its annual Urban Rate Survey to determine the range of rates that are reasonably comparable. Broadband intends to charge \$35 per month for the phone service. This includes all options and calling areas including long distance. However, Broadband's Customer Agreement, provided as Appendix B, requires a two year contract term and also states: "All agreements require a minimum of Internet service purchase but Customer may op [sic] to change service level to a higher or lower rate during their term and after." Requiring the customer to purchase Internet service along with voice service violates the terms of the CAF II funding requirement of offering a "stand alone" voice service.
3. Broadband's Advertising Plan - Broadband states that it will meet the advertising requirements through several different channels of general distribution, including newspaper, radio, and direct mail. Broadband will also utilize its website: broadband-mn.com. Broadband makes no mention of its plans to advertise the availability of its Lifeline universal service offering as required in § 54.201.
4. Broadband's Ability to Remain Functional in Emergency Situations - Broadband states that its network can and will remain functional in emergencies. The central office serving Broadband's customers is equipped with battery power supply and electrical generators to provide service in the event of a commercial power outage. The interoffice facilities serving the service area are on a diverse routed fiber optic ring, which if cut will be automatically rerouted. Unlike other ETC applicants, Broadband does not commit to comply with the Commission's Rules in Chapter 7810 establishing minimum standards on various operational matters, such as 7810.3900 (Emergency Operations); 7810.4900 (Adequacy of Service); and 7810.5300 (Dial Service Requirements). As these rules are applicable to telecommunications service, if Broadband provides a telecommunications service requiring a certificate of authority from the Commission, then these rules will apply.
5. The Department has no information regarding Broadband's filing of a 911 plan. As an ETC, Broadband will be the retail provider to customers of local service and will be the means for customer to dial 911 to reach emergency services. In the course of certifying a local service provider, companies are required to file a 911 plan as part of that process. Although Broadband's VoIP service is an information service, the company should still work with the Department of Public Safety to ensure all of the 911 arrangements necessary to protect consumers have been addressed.
6. Broadband's Satisfaction of Consumer Protection and Service Quality Standards – Broadband makes no commitment to comply with the Commission's Rules pertaining to service quality and consumer protection, as such requirements do not apply to information services. Broadband similarly makes no commitment to file a tariff. Also, since Broadband

will not be a certified local service provider in Minnesota, its local service customer will not be able to receive the Minnesota Telephone Assistance Plan credit.

7. Broadband's Requirement to Serve Unserved Areas. Under Minnesota Rules 7812.1400 and 7811.1400, the Commission may order an LSP to provide the services supported by a federal universal service support mechanism to an otherwise unserved area. Under 47 C.F.R. § 54.203, the FCC may do the same. Since Broadband's VoIP offering is an information service, the Commission should be aware that it will not have the jurisdiction to enforce these rules, unless Broadband demonstrates that it is providing a telecommunications service.
8. Requirement to provide telecommunications services. Congress, in 47 U.S.C. § 214 (e), required as a precondition to accessing FCC high cost or consumer specific "lifeline" support subsidies, that providers be designated "Eligible Telecommunications Carriers" (ETCs) by a State commission.⁸ As explained by the National Association of Regulatory Utility Commissioners (NARUC) and the National Association of State Utility Consumer Advocates (NASUCA) in their September 28, 2108 Amicus Brief to the United States Court of Appeals for the Eighth Circuit: "State commissions across the country have certified numerous ETCs based on their provision of I-VoIP as a telecommunications service. Neither the FCC nor any State Commission can ignore the Congressional restrictions and certify carriers that only provide information services."⁹ To do otherwise would be defrauding the USF fund. Thus, in order to be granted ETC status, Broadband must offer a stand-alone voice telecommunications service.

Broadband maintains that it offers information services and that it is not subject to Commission jurisdiction except for the purpose of obtaining status as an ETC. The position of Broadband is consistent with the Eighth Circuit decision classifying VoIP as an information service. However, since it is a requirement for an ETC to provide telecommunications service, the petition by Broadband cannot be approved without a clear explanation of how it will satisfy this legal requirement.

Broadband does not have a certificate of authority from the Commission to operate as a telecommunications carrier in Minnesota. To the extent that Broadband does not offer a telecommunications service, there is no need for a certificate of authority, nor will there be

⁸ "Telecommunications carriers" are defined as "any provider of telecommunications services [and a] telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services." 47 U.S.C. § 153 (51). (emphasis added). The federal universal service fund program is "under this chapter" in 47 U.S.C. § 254 (51).

⁹ See Motion Seeking Leave to File Brief of Amici Curiae The National Association of Regulatory Utility Commissioners and The National Association of State Consumer Advocates Supporting Defendant-Appellants Petition for Rehearing En Banc, Appeal from the U.S. District Court for the District of Minnesota, No.15-cv-3925, at page 5.

the protections provided for in the statutes and Commission's rules over Broadband services. However, to the extent that Broadband demonstrates that it will be providing a telecommunications service, as required to receive its ETC certification, then Broadband should explain why the provision of the telecommunications service does not require a certificate of authority from the Commission.

V. COMMISSION OPTIONS

- A. Approve Broadband's request for ETC status for high cost support in the Census Blocks listed in Exhibit 1.
- B. Approve Broadband's request for ETC status for high cost support in the Census Blocks listed in Exhibit 1, if the following are met:
 - 1. Broadband should provide a clear explanation of how it will satisfy the requirement of providing a telecommunications service
 - 2. If Broadband demonstrates that it will be providing a telecommunications service, it should explain why the provision of the telecommunications service does not require a certificate of authority from the Commission.
 - 3. Broadband should show that the Department of Public Safety is satisfied with its 911 arrangements to ensure consumer protections exist with emergency 911 calling
 - 4. Broadband should show that it will have a standalone voice offering and its customer agreement should reflect the availability of a standalone voice offering.
 - 5. Broadband should confirm that it will offer Lifeline service and has an advertising plan for it.
- C. Deny Broadband's request for ETC status for high cost support in the Census Blocks listed in Exhibit 1.
- D. Take other action, as the Commission deems appropriate.

VI. DEPARTMENT RECOMMENDATION

The Department recommends that the Commission order option B: Approve Broadband's request for ETC status for high cost support in the Census Blocks listed in Exhibit 1, if the following are met:

- 1) Broadband should provide a clear explanation of how it will satisfy the requirement of providing a telecommunications service

- 2) If Broadband demonstrates that it will be providing a telecommunications service, it should explain why the provision of the telecommunications service does not require a certificate of authority from the Commission.
- 3) Broadband should show that the Department of Public Safety is satisfied with its 911 arrangements to ensure consumer protections exist with emergency 911 calling
- 4) Broadband should show that it will have a standalone voice offering and its customer agreement should reflect the availability of a standalone voice offering.
- 5) Broadband should confirm that it will offer Lifeline service and has an advertising plan for it.

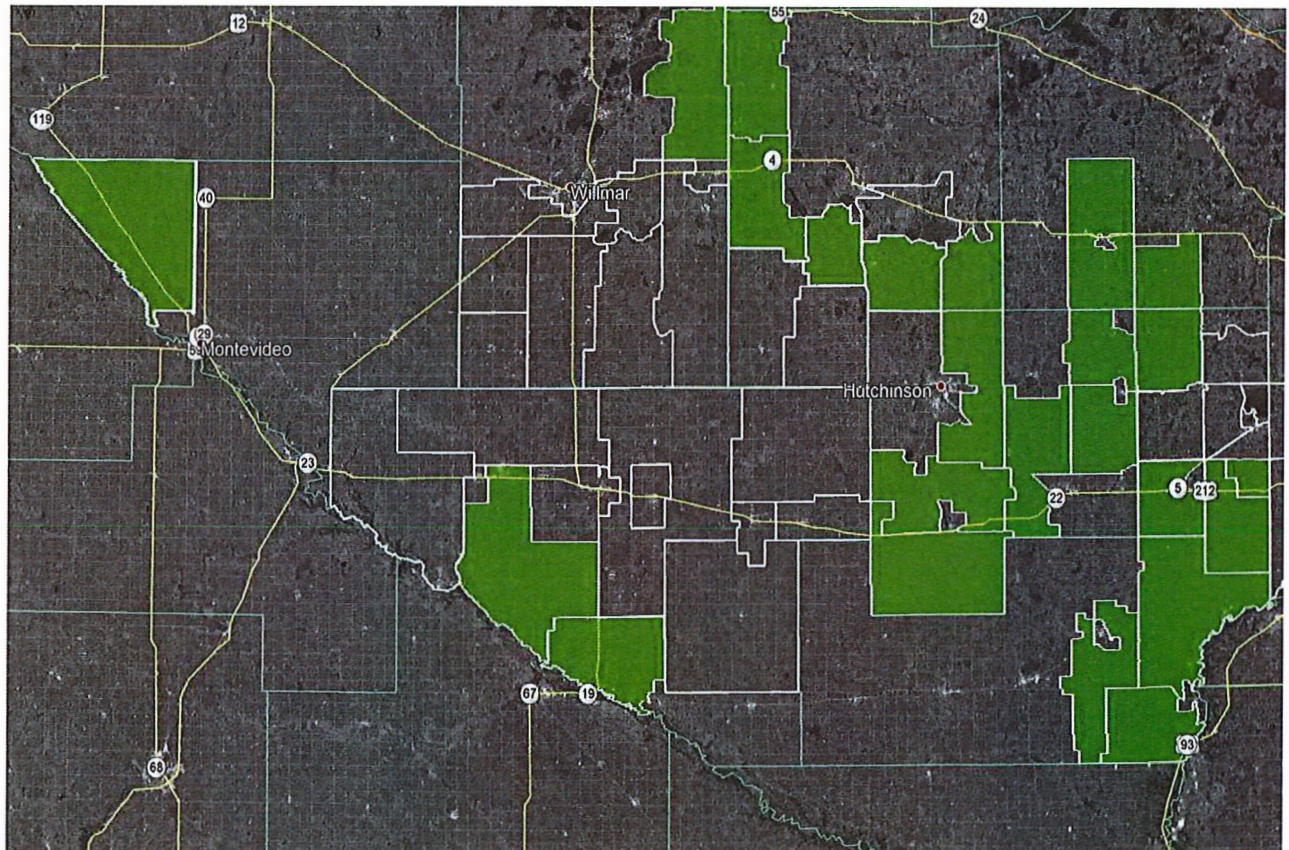
/jl

Attachment

Appendix A

Proposed ETC Service Areas shown in green:

CAF II AUCTION	Census Block Groups	Broadband Corp
MN-019-0902001	MN-085-9505001	MN-129-7904002
MN-019-0912011	MN-085-9505003	MN-143-1701981
MN-019-0912021	MN-085-9506002	MN-143-1704001
MN-019-0912022	MN-085-9506003	MN-143-1704003
MN-023-9505002	MN-093-5601004	MN-171-1011003
MN-067-7801002	MN-093-5606001	MN-171-1012001
MN-085-9501002	MN-093-5606003	MN-171-1012003
MN-085-9502001	MN-129-7904001	MN-093-5602003
		MN-093-5605001



CERTIFICATE OF SERVICE

I, Sharon Ferguson, hereby certify that I have this day, served copies of the following document on the attached list of persons by electronic filing, certified mail, e-mail, or by depositing a true and correct copy thereof properly enveloped with postage paid in the United States Mail at St. Paul, Minnesota.

**Minnesota Department of Commerce
Comments**

Docket No. P6994/M-18-665

Dated this 11th day of December 2018

/s/Sharon Ferguson

First Name	Last Name	Email	Company Name	Address	Delivery Method	View Trade Secret	Service List Name
Linda	Chavez	linda.chavez@state.mn.us	Department of Commerce	85 7th Place E Ste 280 Saint Paul, MN 55101-2198	Electronic Service	No	OFF_SL_18-665_M-18-665
Generic Notice	Commerce Attorneys	commerce.attorneys@ag.state.mn.us	Office of the Attorney General-DOC	445 Minnesota Street Suite 1800 St. Paul, MN 55101	Electronic Service	Yes	OFF_SL_18-665_M-18-665
David	Denton	david.denton@state.mn.us	DPS ECN	445 Minnesota Street Suite 137 St. Paul, Minnesota 55101	Electronic Service	No	OFF_SL_18-665_M-18-665
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Pete	Eggimann	PEGGIMANN@MN-MESB.ORG	Metropolitan Emergency Services Board	2099 University Ave W Ste 201 St. Paul, MN 551043431	Electronic Service	No	OFF_SL_18-665_M-18-665
Dana	Wahlberg	dana.wahlberg@state.mn.us	Department of Public Safety	Town Square Ste 137 444 Cedar St St. Paul, MN 551015126	Electronic Service	No	OFF_SL_18-665_M-18-665
Anthony	Will	anthonyw@broadband-mn.com	Broadband Corp	585 Hwy 7 W Hutchinson, MN 55350	Electronic Service	No	OFF_SL_18-665_M-18-665
Daniel P	Wolf	dan.wolf@state.mn.us	Public Utilities Commission	121 7th Place East Suite 350 St. Paul, MN 551012147	Electronic Service	Yes	OFF_SL_18-665_M-18-665