


Staff Briefing Papers

Meeting Date	January 24, 2019	Agenda Item **3
Companies	Midcontinent Communications	
Docket No.	P6186/M-18-661; P999/CI-18-634	
	In the Matter of Midcontinent Communications' Petition for Eligible Telecommunications Carrier (ETC) Designation in Minnesota; In the Matter of a Notice to Connect America Fund II (CAF II) Grant Winners	
Issue	Should the Commission approve Midcontinent Communications' Request for ETC status for high cost support in the Census Blocks listed in the docket?	
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 Relevant Documents	Date
Initial Filing-Eligible Telecommunications Carrier (ETC) Designation Midcontinent Communications (Midco)	October 30, 2018
Comments Minnesota Department of Commerce	December 13, 2018
Reply Comments Minnesota Department of Employment and Economic Development, Office of Broadband Development	December 13, 2018
Letter Minnesota Department of Commerce P999/CI-18-634	December 14, 2018
Reply Comments Midcontinent Communications	December 19, 2018

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I. Statement of the Issue

1. Should the Commission approve Midcontinent Communications' Request for ETC status for high cost support in the Census Blocks listed in the docket?

II. Background

FCC Broadband Auction 903

On August 28, 2018, the FCC released a Public Notice announcing the conclusion of Auction 903. Areas that will receive support through this auction are locations in census blocks in rural areas served by price cap carriers that do not have access to broadband at speeds of at least 10 Mbps downstream and 1 Mbps upstream ("10/1"). The FCC has determined that these areas are rural, sparsely populated, and that historically there has not been a viable business case that makes financial and operational sense for investing in state-of-the-art broadband infrastructure in the absence of sufficient and predictable universal service support. CAF Phase II funding, grant funding, loans and other financial tools, provide sufficient incentives for entities, such as Midco, to expand their existing footprints and serve the rural areas identified for support in Auction 903.

Carriers awarded support in this auction must deploy broadband to the specified number of locations in eligible census blocks in the census block groups in which they bid within a six-year period at the speed tier specified in their bid. Funding in the form of CAF II support will be provided monthly over a ten-year period based upon the amount of their winning bid.

Minnesota

Minnesota carriers were awarded a total of \$38.8 million, the 12th largest dollar amount in the nation. Minnesota also has the largest total number of carriers receiving funding, at 16.¹

Upon satisfying the conditions of the award, Midco will receive approximately \$27.9 million over the next ten years to be used to provide broadband and voice service in areas identified by the FCC as unserved or underserved. Among the conditions that Midco must satisfy is that it must be designated as an ETC in each census block for which the FCC has provisionally awarded funding. By this Petition, Midco seeks to expand its ETC service area for the purpose of receiving CAF II funding. This Petition is not intended to affect Midco's ETC status in any areas other than those areas for which Midco has been provisionally awarded CAF I/funding.

Midco is certified by the Commission to provide resold local and long distance service and facilities-based local exchange service.

¹ See August 28, 2018 FCC Connect America Fund State Results Summary, Attachment B.

On October 24, 2011, the Commission granted Midco's petition to be designated as an ETC in specific exchanges. On April 3, 2016, the Commission granted Midco's petition to expand the area in which it is authorized to provide service as an ETC.

On December 13, 2018, the Minnesota Department of Commerce filed comments on Midco's petition.

On December 13, 2018, Minnesota Department of Employment and Economic Development, Office of Broadband Development (OBD) filed reply comments in this matter. In its comments the OBD recommended that the Commission grant the above requests for ETC designation to ensure that federal funding to support the build out of broadband service to unserved, high cost areas flows to this state for the benefit of Minnesotans.

On December 14, 2018 in Docket P999/CI-18-634, the Minnesota Department of Commerce filed a letter serving notice to all carriers seeking ETC status that they should address the telecommunications service provision issues which the DOC raised.

On December 19, 2018, reply comments were filed by Midcontinent Communications (Midco).

III. Parties' Comments

Midco: The DOC has recommended that Midco's petition be granted "if Midco demonstrates that it is providing a telecommunications service in the areas in which it is requesting ETC status." This proposed condition raises two concerns.

First, Midco is not now currently providing service in the census blocks for which it has received conditional approval for CAF II funding. Indeed, the funding will help to finance the construction of infrastructure that will enable Midco to provide service in those areas. ETC status is a necessary condition to receiving that funding. Midco's counsel has raised this issue with the analyst who prepared the DOC comments and, based on that discussion, it is Midco's understanding that the recommendation was intended to require Midco to show that it is or will be providing telecommunications service in the areas for which it will receive funding.

Second, and more importantly, DOC has taken the position that, as a result of a recent Eighth Circuit decision in *Charter Advanced Services v. Lange*, 903 F.3d 715 (8th Cir. Sept. 7, 2018), rehearing denied, December 4, 2018, a carrier that provides service using Voice Over Internet Protocol ("VOIP") is not a "telecommunication carrier" and, therefore, cannot be designated as an ETC. Midco believes that the DOC's recommendation represents a misapplication of the Eighth Circuit's decision.

To qualify for ETC designation under 47 U.S.C. § 214(e) (1), 47 C.F.R. § 54.201, and Minn. Rules 7811.0100, subp. 15, a carrier must meet the following requirements:

- (a) the Company must be a "common carrier" under federal law;

- (b) the Company must offer or be able to offer the supported services using its own facilities, or a combination of its own facilities and resale of another carrier's services;
- (c) the Company must advertise the availability and charges for the supported services using media of general distribution; and
- (d) the Company must provide the supported services throughout its designated ETC service area upon reasonable request.

Midco meets each of the requirements and the DOC does not contend otherwise. None of these requirements limit the type of technology that an ETC may use to provide service. Midco is not aware of any instance where the FCC has said that a common carrier using VOIP to provide service cannot qualify as an ETC. Indeed, to introduce such an arbitrary requirement in connection with the provisioning of voice and broadband services would introduce significant inefficiencies that would unnecessarily interfere with the expansion of the availability of broadband services.

The Charter decision was in a very different context, unrelated to the ETC issues presented by Midco's petition. That case dealt with a specific service offered by Charter and whether that service was an information service, for which state regulation was preempted by federal law, or a telecommunications service, subject to joint state and federal regulation. In determining that the Minnesota Commission was preempted from regulating Charter's service, the Eighth Circuit noted that the FCC had not determined the issue of whether VOIP, generally, is a telecommunications service or an information service, nor had the FCC taken a position in that case regarding the appropriate classification of the Charter service at issue. 903 F.3d at 718. Thus, the Eighth Circuit did not need to address, and did not address, whether a common carrier providing service via VOIP can qualify as an ETC.

Further, during the CAF II application process, Midco submitted documentation to the FCC affirming that it would be using VOIP technology in providing ETC services. Based on the information provided by Midco, the FCC approved Midco as a bidder in the CAF II auction and has provisionally awarded Midco \$38.9 million in CAF II funding. Plainly the FCC does not view the provision of service using VOIP technology as disqualifying a carrier from being designated as an ETC.

However, to the extent that the Commission believes that, because of the Eighth Circuit's decision in the Charter case, it lacks jurisdiction over Midco's petition, then the appropriate course is to refer the matter to the FCC. See 47 U.S.C. § 214(e) (6). This is essentially the approach advocated in the reply comments filed by the Minnesota Employment and Economic Development Office of Broadband Development and Midco joins in those comments.

Finally, Midco was initially approved to provide service in Minnesota as an ETC several years ago, using substantially similar technology. For the avoidance of any doubt, Midco expressly

confirms that, if designated as an ETC, it will continue to provide service in a manner that complies with all applicable Minnesota and federal law.

DOC: In order to be granted ETC status, DOC argues that Midco must offer a telecommunications service. The ETC petitions filed as a result of the CAF II auction, including the petition by Midco, are likely to use IP technology for the voice service offering.

As stated earlier, the Eighth Circuit Court of Appeals found that all VoIP service is an information service. 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 Circuit's decision, it is the DOC's understanding that VOIP services are information services, in those states that are part of the Eighth Circuit. As such, in the Eighth Circuit, DOC believes that companies may not use their VoIP service offering to satisfy the above stated requirement that an ETC must be a provider of telecommunications services.

In summary, DOC indicated that Midco has been operating successfully for several years as a CLEC and many more years as an incumbent. This history comports with the requirement of 47 CFR § 54.201 (h) that the carrier demonstrate it is financially and technically capable of providing the supported services. However, due to the recent 8th Circuit Decision, DOC believes Midco must demonstrate that it is offering a telecommunications service in the areas in which it is requesting ETC status.

Office of Broadband Development: OBD observes that the FCC has been clear since its 2011 "Transformation Order" that a provider using VoIP service is offering a voice telephony service eligible for federal universal service support. That order also clearly discusses that the regulatory classification of VoIP as either a telecommunications service or an information service is irrelevant.

OBD also notes that a few states, including a state within the 8th Circuit, have designated providers offering voice telephony via a VoIP product as ETCs for purposes of satisfying the requirement that CAF II auction winners receive ETC designation. Specifically, The Iowa Utilities Board has approved the request by Nextlink Internet for ETC designation, and the New Mexico Public Regulation Commission has approved Viasat's request for ETC designation. In addition, several state ETC designation proceedings are still pending for service providers offering voice telephony via a VOIP product.

If the Minnesota Commission is not inclined to rely on FCC statements as to what constitutes voice telephony service for purposes of ETC designation, or if the Commission believes the 8th Circuit's Charter decision did not legally unwind current state requirements around the ETC designation process for approving some or all of the currently pending ETC applications from CAF II auction winners, OBD recommends that the Commission follow the FCC's directives in its July 10, 2018 Public Notice and provide "an affirmative statement...that the carrier is not subject to the state commission's jurisdiction" so that the FCC can make the ETC determination for the petitioning carriers.

In conclusion, OBD observes that its role is to see that broadband service is deployed to all Minnesotans. It notes that the FCC is offering almost \$39 million for the construction of broadband services in some of the most rural areas of the state, and that now is not the time to create barriers to seeing those federal dollars reach Minnesota.

IV. Staff Analysis

Commission Should Treat VOIP Carriers as It Does Wireless Carriers in ETC Petitions

Staff agrees with OBD that the Commission should grant Midco's request for ETC designation based on the directives of the FCC's November 18, 2011 Transformation Order and FCC Rule 54.101, discussed further below. Alternatively, if the Commission believes that it cannot certify Midco as an ETC because Midco is providing an information service pursuant to the recent 8th Circuit Charter decision, and thus not subject to the Commission's jurisdiction, the Commission should provide a letter to Midco to that effect. This will provide Midco the justification needed to seek ETC designation from the FCC.

That said, Staff believes that the Commission does have jurisdiction over this matter. For example, the Commission does not directly regulate wireless carriers, and yet the Commission has granted ETC status to numerous wireless carriers throughout the years.

With respect to the provision of telephony service through interconnected VoIP service, the FCC found in its November 18, 2011 Transformation Order that:

Increasingly, however, consumers are obtaining voice services not through traditional means but instead through interconnected VoIP providers offering service over broadband networks. As AT&T notes, "[c]ircuit-switched networks deployed primarily for voice service are rapidly yielding to packet-switched networks," which offer voice as well as other types of services. The data bear this out. As we observed in the Notice, "[f]rom 2008 to 2009, interconnected VoIP subscriptions increased by 22 percent, while switched access lines decreased by 10 percent." Interconnected VoIP services, among other things, allow customers to make real-time voice calls to, and receive calls from, the PSTN, and increasingly appear to be viewed by consumers as substitutes for traditional voice telephone services. Our authority to promote universal service in this context does not depend on whether interconnected VoIP services are telecommunications services or information services under the Communications Act. (November 18, 2011 11-161 FCC Order at Paragraph 63).

What can be gleaned from that paragraph is that the FCC views its role as promoting universal telephony service, and it does not matter whether the underlying service utilized to provide the

telephony service is classified as a telecommunications service or an information service. It recognized this years in advance of the recent 8th Circuit decision in the Charter case, which dealt with a different question: is interconnected VoIP service an information service or a telecommunications service, a classification issue that the FCC has not decided yet decided with respect to interconnected VoIP providers.

Further, the FCC directs in paragraph 77 of the Transformation Order that state commissions focus on the functionality of the offering and not the specific technology used to provide the supported service:

We determine that it is appropriate to describe the core functionalities of the supported services as “voice telephony service.” Some commenters support redefining the voice functionalities as voice telephony services, while others oppose the change, arguing that the current list of functionalities remains important today, the term “voice telephony” is too vague, and such a modification may result in a lower standard of voice service. Given that consumers are increasingly obtaining voice services over broadband networks as well as over traditional circuit switched telephone networks, we agree with commenters that urge the Commission to focus on the functionality offered, not the specific technology used to provide the supported service. (November 18, 2018 11-161 FCC Order at Paragraph 77).

In paragraph 78 of the same Order, the FCC goes on to discuss the recognition of additional platforms to provide telephony service:

The decision to classify the supported services as voice telephony should not result in a lower standard of voice service: Many of the enumerated services are universal today, and we require eligible providers to continue to offer those particular functionalities as part of voice telephony. Rather, the modified definition simply shifts to a technologically neutral approach, allowing companies to provision voice service over any platform, including the PSTN and IP networks. This modification will benefit both providers (as they may invest in new infrastructure and services) and consumers (who reap the benefits of the new technology and service offerings). Accordingly, to promote technological neutrality while ensuring that our new approach does not result in lower quality offerings, we amend section 54.101 of the Commission rules to specify that the functionalities of eligible voice telephony services include voice grade access to the public switched network or its functional equivalent;.....

FCC Rule 54.101, as modified at 47 CFR § 54.101 (a) (1) of the FCC’s rules as modified states the following:

(a) Services designated for support. Voice telephony services and broadband service shall be supported by federal universal service support mechanisms.

(1) Eligible voice telephony services must provide voice grade access to the public switched network or its functional equivalent ...

The key here is the term functional equivalent. The issue is whether the VoIP service is the functional equivalent to traditional voice telephony service. The issue is not whether the VoIP service is an information service or a telecommunications service, because that does address the issue identified by the FCC whether the VoIP service provides the functional equivalent to traditional voice telephony.

Administrative Follow Ups

Staff also believes that given the importance of ensuring all administrative details are tied up, the Commission should delegate authority to the Executive Secretary to issue notices or letters as necessary to communicate with the FCC or other entities regarding Midco's ETC status. Carriers are required to submit additional information to the FCC by February 25, 2019 in order to secure their funding, including proof of ETC status with the relevant state commission. While the Commission's Order in this docket will likely fulfill that requirement, staff believes out of an abundance of caution it would be helpful to take the additional step of authorizing the Executive Secretary to make any other written communications that may be necessary.

V. Decision Options

1. Approve Midcontinent Communications' request for ETC status for high cost support in the Census Blocks listed in the Company's filing; OR
2. Determine that the Commission lacks jurisdiction over this matter and provide an affirmative statement that this Commission lacks jurisdiction because VoIP is an information service and outside of this Commission's authority; OR
3. Deny Midco's request for ETC status for high cost support in the Census Blocks listed in Company's filing; OR
4. Approve Midco's request for ETC status if Midco demonstrates that it is providing a telecommunications service in the areas in which it is requesting the ETC status.
5. Delegate authority to the Executive Secretary to issue notices or letters to the Federal Communications Commission or any other entity if necessary to facilitate communication of Midcontinent's ETC status with this Commission.

VI. Staff Recommendation

Staff recommends that the Commission adopt alternatives 1 and 5.