


## Staff Briefing Papers

Meeting Date	<b>January 24, 2019</b>	Agenda Item **4
Companies	Broadband Corp.	
Docket No.	<b>P6994/M-18-665; P999/M-18-634</b>	
	In the Matter of Broadband Corp's 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 Broadband Corp's Request for ETC status for high cost support in the Census Blocks listed in the docket?	
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 <b>Relevant Documents</b>	<b>Date</b>
Initial Filing-Eligible Telecommunications Carrier (ETC) Designation Broadband Corp.	October 30, 2018
Comments Minnesota Department of Commerce	December 11, 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

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## I. Statement of the Issue

1. Should the Commission approve Broadband Corp's 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 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. The CAF Phase II funding, grant funding, loans and other financial tools, provide sufficient incentives for entities 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 12<sup>th</sup> largest dollar amount in the nation. Minnesota also has the largest total number of carriers receiving funding, at 16.<sup>1</sup>

Broadband participated in this auction and was among the 103 providers listed as provisional winners. Broadband will receive \$428,117 over a ten-year period to build a network capable of delivering both the data and voice services that meets or exceeds the public obligations of 100mb and low latency tiers to the 128 locations in the Funded Areas upon completion of certain post-auction requirements. One of these requirements is for Broadband to be designated an ETC in the Funded Areas by February 25, 2019.

On October 30, 2018, Broadband requested an ETC designation for these Funded Areas, which will be given a Study Area Code upon final FCC authorization of CAF II funding. Through its Application, and supporting documents, Broadband seeks an Order from the Minnesota Public Utilities Commission ("MPUC" or "Commission") which designates Broadband's an ETC in the Funded Areas in the census block groups listed in Exhibit A, pursuant to § 214(e) of the Communications Act of 1934.

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

On December 11, 2018, the Minnesota Department of Commerce filed comments on Broadband'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 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.

### III. Parties' Comments

Should the Commission approve Broadband Corp's Request for ETC status for high cost support in the Census Blocks listed in the docket?

**Broadband:** Did not file reply comments.

**DOC:** DOC indicated that 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. DOC believes it is a requirement for an ETC to provide telecommunications service. As such, it is DOC's opinion the petition by Broadband cannot be approved without a clear explanation of how it will satisfy this legal requirement.

DOC indicated that 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 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.

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: broadbandmn.com. Broadband makes no mention of its plans to advertise the availability of its Lifeline universal service offering as required in § 54.201.

DOC recommends that the Commission approve Broadband's request for ETC status for high cost support in the Census Blocks listed in its filing, 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; and
- 5) Broadband should confirm that it will offer Lifeline service and has an advertising plan for it.

**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 8<sup>th</sup> 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 Broadband'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 Broadband as an ETC because Broadband is providing an information service pursuant to the recent 8<sup>th</sup> Circuit Charter decision, and thus not subject to the Commission's jurisdiction, the Commission should provide a letter to Broadband to that effect. This will provide Broadband 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 8<sup>th</sup> 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.

### **Carriers Required to Provide 911 Service by Statute**

With respect to the provision of 911, Minnesota statutes govern in this instance. For example, Minn. Stat. § 403.025 requires that every owner and operator of a wire-line or wireless circuit switched or packet-based telecommunications system to offer 911. Section 403.025 of Minnesota Statutes states the following:

#### **403.025 911 EMERGENCY TELECOMMUNICATIONS SYSTEM REQUIRED.**

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.

Further those carriers offering wireless or wire-line switched or packet-based telecommunications service provider are authorized to collect fees for the provision of 911 service from customers. Minn. Stat § 403.11 Subd, 1 provides the following.

#### **403.11 911 SYSTEM COST ACCOUNTING REQUIREMENTS; FEE.**

##### **Subdivision 1. Emergency telecommunications service fee; account.**

(a) Each customer of a wireless or wire-line switched or packet-based telecommunications service provider connected to the public switched telephone network that furnishes service capable of originating a 911 emergency telephone call is assessed a fee based upon the number of wired or wireless telephone lines, or their equivalent, to cover the costs of ongoing maintenance and related improvements for trunking and central office switching equipment for 911 emergency telecommunications service, to offset administrative and staffing costs of the commissioner related to managing the 911 emergency telecommunications service program, to make distributions provided for in section [403.113](#), and to offset the costs, including administrative and staffing costs, incurred by the State Patrol Division of the Department of Public Safety in handling 911 emergency calls made from wireless phones.

Finally, while wireless service providers service is not regulated by the Commission, the Commission has authority for their designation as an ETC, and Section 403.11 has the following 911 requirement as part of the ETC designation process:

##### **Subdivision 3d Eligible telecommunications carrier; requirement.**

No wireless communications provider may provide telecommunications services under a designation of eligible telecommunications carrier, as provided under Minnesota Rules, part [7811.1400](#), until and unless the commissioner of public safety

certifies to the chair of the public utilities commission that the wireless telecommunications provider is not in arrears in amounts owed to the 911 emergency telecommunications service account in the special revenue fund.

There is no disagreement in this record that Broadband is subject to the state's 911 requirements and no one has filed comments in this docket suggesting that any part of Broadband's petition should be held up for any 911 compliance reasons. Just as with other carriers that are ETCs but do not need a certificate of authority with the Commission, Broadband can work directly with the Department of Public Safety, and if and when necessary either Broadband or Public Safety can communicate with the Commission on 911 issues.

### **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 Broadband'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 Broadband's 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 Broadband's request for ETC status for high cost support in the Census Blocks listed in Company's filing; OR
4. Approve Broadband's request for ETC status for high cost support in the Census Blocks listed in in its filing, if the following conditions are met:
  - a. Broadband provides a clear explanation of how it will satisfy the requirement of providing a telecommunications service; AND



- b. Broadband explains why the provision of the telecommunications service does not require a certificate of authority from the Commission; AND
  - c. Broadband shows that the Department of Public Safety is satisfied that Broadband's 911 arrangements ensure all consumer protections exist with its emergency 911 calling capability; AND
  - d. Broadband shows that it will have a standalone voice offering and its customer agreement reflect the availability of a standalone voice offering; AND
  - e. Broadband confirms that it will offer Lifeline service and has an advertising plan for it.
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 Broadband's ETC status with this Commission.

#### VI. **Staff Recommendation**

Staff recommends that the Commission adopt alternatives 1 and 5.