

Staff Briefing Papers

Meeting Date April 16, 2020

Agenda Item *4

Company Fond du Lac Communications, Inc.

Docket No. **P7029/M-20-386**

**In the Matter of the Fond du Lac Communications, Inc. Request for the
Minnesota Public Utilities Commission to Defer Designation as an Eligible
Telecommunications Carrier to the Federal Communications Commission**

Issues 1. Should the Commission decline to exercise jurisdiction over Fond du Lac Communications, Inc.'s request for designation as an Eligible Telecommunications Carrier (ETC) and Defer the Matter to the FCC?

Staff Marc Fournier Marc.Fournier@state.mn.us 651-214-8729

Relevant Documents

Date

Fond Du Lac Communication's Petition to the FCC for Designation as an Eligible Telecommunications Carrier (ETC) (FCC filing date September 12, 2018)

Fond Du Lac Communication's Further Supplement to Petition For Designation as an Eligible Telecommunications Carrier (FCC filing date January 24, 2020)

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The attached materials are work papers of the Commission Staff. They are intended for use by the Public Utilities Commission and are based upon information already in the record unless noted otherwise.

I. Statement of the Issues

Should the Commission decline to exercise jurisdiction over Fond du Lac Communications, Inc.'s request for designation as an Eligible Telecommunications Carrier (ETC) and Defer the Matter to the FCC?

II. Background

The Fond du Lac Band obtained approximately \$12 million in funding to construct a high speed fiber network on the Fond du Lac Reservation completed in 2019. To provide services over the Fond du Lac network, the Band established Fond du Lac Communications, Inc. ("FDLCI"), wholly owned by the Fond du Lac Band of Lake Superior Chippewa.

In September 2018, FDLCI petitioned the FCC for designation as an ETC, pursuant to Section 214(e) (6) of the Communications Act of 1934, *as amended* (the "Act"). ETC designation is the prerequisite for eligibility for federal universal service support through the Universal Service Fund ("USF"), including Lifeline, Link-Up and access to high cost funds from the Connect America Fund II ("CAF II").

On August 28, 2018, the FCC issued a notice announcing the CAF II Auction 903 winners. FDLCI was included as an auction winner. From the CAF II funding, FDLCI will receive \$55,010.80 over a 10 year period.

On January 24, 2020, the FDLCI filed supplemental information with the FCC. To date, the FCC has not ruled on the FDLCI's petition.

On February 20, 2020, FDLCI's counsel contacted Commission staff requesting that the Commission prepare a letter supporting the Band's petition to the FCC. Because FDLCI directly petitioned the FCC, no Commission docket was opened as a result of this request.

III. Parties' Comments

FDLCI: Requests a letter from the Commission indicating that the Commission is declining to exercise jurisdiction over FDLCI's petition to be designated as an ETC.

IV. Analysis

Legal Analysis

Generally, it is left to the state commissions to determine ETC designations. Section 214(e)(2). However, section 216(e)(6) provides for the designation of ETCs by the FCC in certain limited circumstances for common carriers that are not subject to the jurisdiction of a state commission.

Carriers seeking designations from the FCC pursuant to section 214(e) (6) must demonstrate that they fulfill the requirements of section 214(e)(1). The Carrier must provide a certification

and brief statement of supporting facts demonstrating that the petitioner is not subject to the jurisdiction of a state commission.

In the petition to the FCC, the Band asserts that, as a sovereign tribal nation, it is not subject to state commission jurisdiction.¹ As such, FDLCI requests that the FCC exercise jurisdiction over its request and grant it ETC status.²

In the *Twelfth Report and Order*, the FCC set out the procedure for a Tribal carrier to petition for ETC designation.³

In the *Twelfth Report and Order*, the FCC specifically acknowledges that Congress did not intend the FCC to use section 214(e) (6) to usurp the role of a state commission that has jurisdiction over a carrier providing service on tribal lands. In fact, the FCC specifically acknowledged that in adopting section 214(e)(6), Congress recognized that some state commissions had asserted jurisdiction over tribal lands.

Rather than a simple bright line rule as to state jurisdiction, the *Twelfth Report and Order* states:

The determination as to whether a carrier providing service on tribal lands is subject to the jurisdiction of a state commission is a complicated and intensely fact-specific legal inquiry informed by principles of tribal sovereignty, and requiring the interpretation of treaties and federal Indian law and state law. Such determinations usually consider whether state regulation is preempted by federal regulation, whether state regulation is consistent with tribal sovereignty and self-determination, and whether the tribe has consented to state jurisdiction, either in treaties or otherwise.

The inquiry as to whether a state commission has authority to regulate the provision of telecommunications service on tribal lands is a particularized one, and thus specific to each state and the facts and circumstances surrounding the provision of the service. As the U.S. Supreme Court has stated, “there is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian reservation or to tribal members.”

FCC

¹ Please see FDLCI’s September 13, 2018 Petition at pages 6-8.

² *Id.*

³ *Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas*, Twelfth Report and Order, 15 FCC Rcd 12208, 12263-67, ¶¶ 115-127 (2000) (“*Twelfth Report and Order*”).

Given this complexity, the FCC established a framework designed to streamline the process of eligibility designation of carriers providing service on tribal lands.

Under the FCC framework, a carrier seeking an eligibility designation for service provided on tribal lands may petition the FCC under section 214(e) (6) for a determination of whether the carrier is subject to the state commission's jurisdiction. In instances where the state lacks jurisdiction, the FCC will decide the merits of the designation request. This streamlined designation process was intended to facilitate the expeditious resolution of requests so as to increase the availability of affordable telecommunications services to tribal land, while preserving the state commissions' jurisdiction consistent with federal, tribal, and state law.

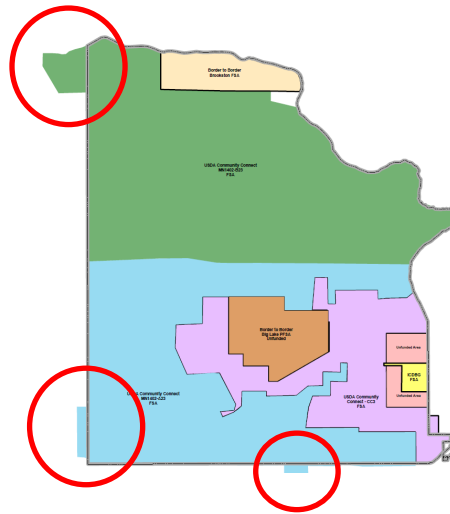
The FCC recognized that a determination as to whether a state commission lacks jurisdiction over a carrier providing service on tribal lands is a legally complex inquiry involving interpretations of state law, tribal sovereignty, federal Indian law, and treaties. Accordingly, the FCC concluded that it was the appropriate entity to resolve this threshold jurisdictional question.

When the FCC determines that the state commission lacks jurisdiction to make the designation and the petition is properly before the FCC under section 214(e) (6), the FCC will decide the merits of the request within six months of release of an order resolving the jurisdictional issue. If the carrier fails to meet its burden of proof that it is not subject to the state commission's jurisdiction, the FCC will dismiss the request and direct the carrier to seek designation from the appropriate state commission. In such cases, the FCC asks the state commission to act within a similar time frame (i.e. six months) to resolve requests. However, the FCC specifically declined to place on the affected state commission the burden of proving that it has jurisdiction over a particular carrier.

Commission Options

Counsel for FDLCI has requested a letter from the MPUC declining to exercise jurisdiction over FDLCI's petition to be designated an ETC. If the service area was entirely on tribal lands, the FCC would likely have already ruled on the jurisdictional question. However, the service area is defined by census blocks, and there are three small slivers of service area outside of the tribal lands.

As you can see from the attached map, there are three (3) sections of the proposed ETC service area which fall outside of the reservation.



Although these areas may be considered de minimis by the FCC and the parties, as a technical matter, the FCC likely cannot designate the ETC service areas outside of tribal land without the consent of the MPUC. Given this, there appears to be two paths forward.

First, the FCC could designate the carrier as an ETC as to the tribal lands, and refer the three slivers of non-tribal land to the MPUC for a determination. Second, the MPUC could essentially draft a letter (see language below) declining to exercise jurisdiction as to these three non-tribal areas and allowing the FCC to issue an order on the merits. In the Commission's letter, the Commission would be explicit that the waiver of jurisdiction is narrow and should not be construed to extend to any aspect of the Commission's jurisdiction other than the authority to designate FDLCI as an ETC.

From a practical perspective, the most efficient way forward is to decline jurisdiction and allow the FCC to make the determination. Fond du Lac's petition has been pending since September of 2018, and all parties involved at the FCC are anxious to resolve the petition. Staff agrees that the three areas falling outside the reservation are de minimus and there is no public policy reason why this state commission taking jurisdiction over only those sections provides any value to the petitioner, the public, or any stakeholder.

Finally, if the MPUC is inclined to decline jurisdiction in this case, it will want to do so on the narrowest grounds possible to avoid future precedent and/or unforeseen consequences. Below is draft letter language for the Commission's consideration:

In September 2018, Fond du Lac Communications, Inc. ("FDLCI") petitioned the Federal Communications Commissions ("FCC") for designation as an Eligible Telecommunications Carrier ("ETC") pursuant to section 214(e)(6) of the Communications Act of 1934, as amended "(the Act)".

This letter is to confirm that, based on the specific facts and circumstances of this case, the Minnesota Public Utilities Commission ("MPUC") is declining to

exercise jurisdiction over FDLCI's petition for designation as an ETC, to the extent it would have authority to do so under section 214(e)(2) of the Act. This waiver of jurisdiction is limited to this specific case and should not be relied upon as precedent in future cases. Moreover, this waiver of jurisdiction is limited to the MPUC's authority to designate FDLCI as an ETC, and should not be construed to extend to any other aspect of the MPUC's jurisdiction.

To the extent the FCC determines that FDLCI has met the requirements of section 214(e) (1) of the Act, the MPUC would be supportive of FDLCI's designation as an ETC.

V. Decision Options

1. Accept FDLCI's request, and direct the Executive Secretary to provide FDLCI's counsel written confirmation that the Commission declines jurisdiction and allow the FCC to make the ETC determination.
2. Decline FDLCI's request, and direct the Executive Secretary to provide FDLCI's counsel written confirmation that the Commission cannot consider any ETC designation issues absent the FDLCI filing an ETC Designation Petition with the Commission.
3. Take other action.

Staff recommends option #1.