



STATE OF MINNESOTA

January 23, 2019

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TELEPHONE: (651) 297-2040

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

Re: *In Re Midcontinent Communications Expansion of Service Area, Docket No P6186-M-18-661*

In The Matter of A Notice To Connect America Fund II (CAF II) Grant Winners, Docket No: P999/CI-18-634

Dear Mr. Wolf:

On behalf of the Minnesota Department of Commerce, please find attached the Minnesota Department of Commerce Comment in Response to Midcontinent Communications Reply Comments.

Very truly yours,

/s/ **Linda S. Jensen**

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Attorney for Minnesota Department of Commerce

Attachment

cc: Service list

**BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION
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Dan Lipschultz	Commissioner
Matthew Schuenger	Commissioner
John Tuma	Commissioner
Katie Sieben	Commissioner

IN RE MIDCONTINENT COMMUNICATIONS
EXPANSION OF SERVICE AREA

Docket No P6186-M-18-661

IN THE MATTER OF A NOTICE TO CONNECT
AMERICA FUND II (CAF II) GRANT WINNERS

Docket No: P999/CI-18-634

**MINNESOTA DEPARTMENT OF COMMERCE COMMENT IN RESPONSE TO
MIDCONTINENT COMMUNICATIONS REPLY COMMENTS**

On December 19, 2018, Midcontinent Communications (Midco) filed comments in reply to the Department of Commerce's (Department) report on Midco's application to expand the area in which it is an eligible telecommunications carrier (ETC).

Midco made two arguments in its reply comments that are addressed with this response. First, Midco pointed out that it was not currently providing service in any of the areas in which it received CAF II funding, but that it *will* provide service. Second, Midco suggested that the Department's recommendation represents a misapplication of the Eighth Circuit's recent decision which classified communications using voice over internet protocol (VOIP) technology as an information service.

On Midco's first argument, the Department agrees that Midco does not need to provide service in the areas where Midco is receiving CAF II support for three years. However, Midco will need to satisfy the requirements as an ETC within three years, including the offering of a telecommunications service by the end of the third year¹ including "voice telephony as a standalone service" "throughout their designated service area."²

¹ In the Matter of Connect America Fund, WC Docket No. 10-90, ETC Annual Reports and Certifications, WC Docket No. 14-58, and Rural Broadband Experiments, WC Docket No. 14-259, REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING, Released: May 26, 2016, ¶ 40. Service Milestones are to commercially offer service to 40 percent of the requisite number of locations in a state by the end of the third year of funding authorization, and additional 20 percent in each of the subsequent years four, five and six, with 100 percent offered by the end of the sixth year of funding.

² *In Re: Connect America Fund...*, 26 FCC Rcd. 17,663 (Nov 18, 2011)(the "USF Transformation Order") at ¶ 80. (The FCC stated there: "With respect to "standalone service," we mean that consumers must not be required to purchase any other services (e.g., broadband) in order to purchase voice service." (citations omitted).

Midco's second argument is that "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."³ Midco is correct, but that is not the question that was being addressed by the Eighth Circuit. While the Department believes that the court's ruling was incorrect, the Eighth Circuit found that VoIP is an information service, and that decision is binding absent further appeal. If VoIP is an information service, VoIP cannot be a telecommunication service.

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*. "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.

This issue, of whether a provider offering *only* information services could receive USF funding as an ETC was settled on the appeal of the FCC's November 18, 2011 USF Transformation Order; that order stated at para. 64:

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.⁴

On appeal, the 10th Circuit reined in the notion that entities offering only information services could be eligible "telecommunications carriers;" it held that carriers designated as an eligible telecommunications carriers must have common carrier status to access USF funds. Petitioners argued to the 10th Circuit, as Midco does here, that:

[w]hile [USF] recipients must provide 'voice telephony service,' they are not required to provide *telecommunications* service subject to common carrier regulations under Title II of the Communications Act.⁵

The 10th Circuit disagreed, holding:

³ Midco December 19, 2018 comments at pg. 3.

⁴ In Re: Connect America Fund..., 26 FCC Rcd. 17,663 (Nov 18, 2011)(the "USF Transformation Order").

⁵ *In Re: FCC 11-161*, 753 F.3d at 1048 (10th Cir. 2014)(emphasis in original), cert. den. 135 S.Ct. 2072 (May 04, 2015).

The fact remains, however, that in order to obtain USF funds, a provider must be designated by the FCC or a state commission as an “eligible telecommunications carrier” under 47 U.S.C. § 214(e). See 47 U.S.C. § 254(e) (“only an eligible telecommunications carrier designated under section 214(e) ... shall be eligible to receive specific Federal universal service support.”). And, under the existing statutory framework, only “common carriers,” defined as “any person engaged as a common carrier for hire ... in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy,” 47 U.S.C. § 153(10), are eligible to be designated as “eligible telecommunications carriers,” 47 U.S.C. § 214(e).

Thus, considering the Act as a whole, and in context of the realities of existing technology, we agree with the FCC that it was entirely reasonable for it to conclude that, “[s]o long as a provider offers some service on a common carrier basis, it may be eligible for universal service support as an ETC under sections 214(e) and 254(e), even if it offers other services - including ‘information services’ like broadband Internet access- on a noncommon carrier basis.”⁶

The 10th Circuit’s decision is the state of the law; the U.S. Supreme Court denied certiorari appeal of the decision.⁷ Midco will need to satisfy the requirements as an ETC within three years, including the offering of a telecommunications service by the end of the third year in its designated service area.

Midco states that the Eighth Circuit noted that the FCC had not determined whether VoIP is a telecommunications service or an information service. Midco also states that the FCC approved Midco as a bidder in the CAF II auction and has previously awarded Midco CAF II funding. Midco concludes: “Plainly the FCC does not view the provision of service using VoIP technology as disqualifying a carrier from being designated as an ETC.”⁸

The Eighth Circuit made its determination on the classification of VoIP, even though the FCC has had ample opportunity to classify the service, and has chosen not to do so. In the absence of the Eighth Circuit decision, VoIP was the telecommunications service used by carriers to qualify for ETC status. The Eighth Circuit’s determination is only very recent. Whether the FCC will attempt to craft an order that circumvents the decision of the Eighth Circuit (or any decision on further appeal) in the future is not a matter this Minnesota Commission should address. It is, however, the responsibility of this Commission to make the determination on whether a carrier meets the requirements necessary to be an ETC, and that includes the statutory requirement to offer a telecommunications service on a common carrier

⁶ Id. 753 F.3d at 1048-1049.

⁷ Id. (cert. den. 135 S.Ct. 2072 (May 04, 2015)).

⁸ Midco December 19, 2018 comments at 3.

basis. The requirement that a carrier must be engaged in providing telecommunications as a common carrier was created by an act of Congress.

If the Commission approves Midco's ETC application, as well as the other ETC applications that rely on VoIP to satisfy the requirement that an ETC must offer a telecommunications service, there should be a reasonable expectation that the requirement to offer a telecommunications service will be met by the end of three years. This may happen through an action in either the courts or by Congress.

Dated: January 23, 2019

KEITH ELLISON
State of Minnesota
Attorney General

/s/ **Linda S. Jensen**

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Docket No P6186-M-18-661

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