

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Nancy Lange	Chair
Dan Lipschultz	Vice Chair
Matt Schuerger	Commissioner
John Tuma	Commissioner
Katie Sieben	Commissioner

In re Midcontinent Communications Expansion of Service Area	Docket No P-6186-M-18-661
----------------------------------------------------------------	---------------------------

MIDCONTINENT COMMUNICATIONS REPLY COMMENTS

Midcontinent Communications (“Midco”) respectfully submits these reply comments in support of its application for designation as an Eligible Telecommunications Carrier (“ETC”) in specific census blocks for which Midco has been provisionally approved to receive funding under the second phase of the Connect America Fund program (“CAF II”). Pursuant to that *CAF II* award, Midco is eligible to receive \$38.9 million over the next ten years to provide broadband and voice service in areas in Minnesota, North Dakota, and South Dakota that have been identified by the Federal Communications Commission (“FCC”) as unserved or underserved.

Midco has satisfied all of the requirements for designation as an ETC and granting Midco’s petition is a necessary condition to receipt of millions of dollars in federal funding that will substantially benefit rural Minnesota. Midco requests that its petition be granted without the condition proposed in comments filed by the Department of Commerce (“DOC”). In the alternative, Midco requests that the Commission refer the issue to the FCC.

DISCUSSION

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.

Respectfully submitted,

Dated: December 19, 2018

GRAY, PLANT, MOOTY, MOOTY
& BENNETT

By: /s/Gregory R. Merz
Gregory R. Merz
500 IDS Center
80 South Eighth Street
Minneapolis, MN 55402-3796
(612) 632-3257 (phone)
(612) 632-4257 (fax)
gregory.merz@gpmlaw.com

Attorneys for Midcontinent Communications