

**STATE OF MINNESOTA  
BEFORE THE PUBLIC UTILITIES COMMISSION**

Katie Sieben	Chair
Joseph Sullivan	Vice-Chair
Valerie Means	Commissioner
Matt Schuerger	Commissioner
John Tuma	Commissioner

In the Matter of a Notice to Rural Digital  
Opportunity Fund Grant Winners

DOCKET NO. P-999/CI-21-86

**COMMENTS OF THE OFFICE OF  
THE ATTORNEY GENERAL**

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**INTRODUCTION**

The Office of the Attorney General—Residential Utilities Division (“OAG”) respectfully submits to the Minnesota Public Utilities Commission (“Commission”) these additional Comments in response to the Notice of Comment Period (“Notice”) issued in this docket on June 30, 2021.<sup>1</sup> Consistent with its previous filings in this docket, the OAG concludes that the Commission has the authority to impose obligations on all Rural Digital Opportunity Fund (“RDOF”) Phase I eligible telecommunications carriers (“ETC”) as long as the obligations preserve and advance federal Universal Service and do not conflict with the Federal Communications Commission’s (“FCC”) federal Universal Service rules. Because the OAG’s proposed RDOF Phase I ETC obligations will help preserve and advance federal Universal Service and protect rural Minnesotans, the Commission should adopt them in their entirety.

**BACKGROUND**

On May 28, 2021, the Commission issued two orders in this docket approving ETC designations for RDOF Phase I winning bidders.<sup>2</sup> In those orders, the Commission expressed a desire for additional briefing on the scope of its authority to regulate ETCs, the role of particular state agencies in federal Universal Service, and the federal-state ETC regulatory framework.<sup>3</sup> To advance the discussion, the Commission issued a Notice seeking comments on its ETC designation and recertification authority and the recommended exercise of that authority; the role of certain state agencies in federal Universal Service and the legal basis for those roles; proposed ETC consumer protections, including their necessity, scope, and implementation and enforcement implications; and insight into the ETC practices of other states.<sup>4</sup>

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<sup>1</sup> See generally Docket No. P-999/CI-21-86, Notice of Comment Period (June 30, 2021) (“Notice”).

<sup>2</sup> See generally Docket No. P-999/CI-21-86 et al., ORDER APPROVING PETITIONS FOR ETC DESIGNATION IN CERTAIN CENSUS BLOCKS AND REQUIRING ADDITIONAL FILINGS (May 28, 2021); Docket No. P-999/CI-21-86 et al., ORDER APPROVING PETITIONS FOR ETC DESIGNATION IN CERTAIN CENSUS BLOCKS (May 28, 2021).

<sup>3</sup> *Id.* at 9 and 12-13, respectively.

<sup>4</sup> Notice at 1-2.

## SUMMARY OF CONCLUSIONS

The OAG concludes that the Commission has the authority to impose obligations on all RDOF Phase I ETCs as long as the obligations preserve and advance federal Universal Service and do not conflict with the FCC's federal Universal Service rules. Among other things, the OAG concludes that:

- The Commission has jurisdiction to designate and recertify ETCs (see sections [I.A](#) and [I.B](#) below);
- The Commission is empowered by a Congressional delegation of authority and the federal-state partnership to adopt obligations for RDOF Phase I ETCs (see sections [I.C](#) and [I.D](#) below);
- The Commission's authority to adopt ETC obligations extends to interconnected Voice over Internet Protocol ("VoIP") and broadband Internet access service providers (see section [I.E](#) below);
- Neither the *Computer Inquiries* line of cases nor the *Charter Order* strip the Commission of its ETC authority (see section [I.F](#) below);
- The FCC can only designate and recertify ETCs if a state Commission does not have jurisdiction (see section [I.G](#) below);
- The Commission should exercise its authority to ensure that RDOF Phase I ETCs use their federal High Cost Program ("High Cost" or "High Cost Program") support to preserve and advance federal Universal service (see section [II](#) below);
- The Minnesota Department of Employment and Economic Development is statutorily prohibited from regulating broadband (see section [III](#) below);
- The OAG's recommended RDOF Phase I ETC obligations preserve and advance federal Universal Service and should be adopted in full (see sections [IV](#), [IV.A](#), and [IV.E](#) below);
- A rulemaking is not necessary to adopt the OAG's recommended RDOF Phase I ETC obligations (see section [IV.B](#) below);
- The OAG's recommended RDOF Phase I ETC obligations would apply by census block (see section [IV.C](#) below);
- There is no need to alert Minnesota consumers about specific RDOF Phase I ETC obligations or the census block(s) to which they apply (see section [IV.D](#) below);
- The OAG's proposed RDOF Phase I ETC obligations are not barriers to broadband deployment (see section [IV.F](#) below);
- If the Commission adopts the OAG's RDOF Phase I ETC obligations, it has a variety of options to address non-compliance (see section [IV.G](#) below);
- Other states impose obligations on ETCs beyond what is required by the FCC's rules (see section [V](#) below); and
- A High Cost Program ETC does not need to submit federal Universal Service Lifeline Program ("Lifeline" or "Lifeline Program") plan information to the Universal Service Administrative Company ("USAC") at the Time of Designation (see section [VI](#) below).

## ANALYSIS

### **I. THE COMMISSION HAS THE AUTHORITY TO DESIGNATE AND RECERTIFY FEDERAL UNIVERSAL SERVICE ETCs AND OVERSEE THEIR FEDERAL UNIVERSAL SERVICE COMPLIANCE .**

The Notice asks parties to comment on the Commission's legal authority over federal Universal Service ETCs, with supporting citation.<sup>5</sup>

The OAG previously provided approximately 18 pages of analysis in this docket on the Commission's federal Universal Service ETC jurisdiction, with extensive citation. The OAG reproduces that analysis in full in Attachments A-1 and A-2 of these Comments.<sup>6</sup>

Rather than repeat its prior analysis, the OAG provides below quotes from federal Universal Service statutes and FCC federal Universal Service orders that affirm the Commission's authority to designate and recertify ETCs and oversee their federal Universal Service compliance.

#### **A. Congress Delegated Authority to the Commission to Designate Federal Universal Service ETCs.**

The Commission derives its authority to designate federal Universal Service ETCs, including interconnected VoIP and broadband ETCs, directly from Congress. As the language below demonstrates, the Commission is responsible for designating federal Universal Service ETCs.

**47 U.S.C. § 214(e)(2)** - "A State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) [of this section] as an eligible telecommunications carrier for a service area designated by the State commission. . . . Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest."<sup>7</sup>

**47 C.F.R. § 54.201(b)** – "A state commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (d) of this section as an eligible telecommunications carrier for a service area designated by the state commission."<sup>8</sup>

**RDOF Auction Notice (FCC 20-77) (2020)** – "Section 214(e)(2) gives states the primary responsibility for ETC designation."<sup>9</sup>

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<sup>5</sup> Notice at 1.

<sup>6</sup> See Attachment A-1 - Docket No. P-999/CI-21-86, Comments of the Office of the Attorney General at 8-13 (Mar. 26, 2021) ("OAG Comments") and Attachment A-2 - Reply Comments of the Office of the Attorney General at 6-17 (Apr. 12, 2021) ("OAG Reply Comments").

<sup>7</sup> 47 U.S.C. § 214(e)(2).

<sup>8</sup> 47 C.F.R. § 201(b).

<sup>9</sup> *Rural Digital Opportunity Fund Phase I Auction Scheduled for October 29, 2020*, AU Docket No. 20-34 et al., Notice and Filing Requirements and Other Procedures for Auction 904, FCC 20-77, para 135 (2020).

**Fifth Report and Order (FCC 19-111) (2019)** – “In 2000, the [FCC] reviewed the text and legislative history of section 214(e) and concluded that ‘state commissions have primary responsibility for the designation of [ETCs] under section 214(e)(2).’ In 2005, it affirmed this conclusion and again noted that section 214(e)(2) ‘provides state commissions with the primary responsibility for performing ETC designations.’ In 2011, the [FCC] again found that states have ‘primary jurisdiction to designate ETCs,’ and that its role was to ‘designate[] ETCs where states lack jurisdiction.’ Even the *2015 Lifeline Order and Notice* recognized that ‘[s]ection 214(e)(2) assigns primary responsibility for designating ETCs to the states.’”<sup>10</sup>

**2005 ETC Order (FCC 05-46) (2005)** – “Section 214(e)(2) of the Act gives states the primary responsibility to designate ETCs and prescribes that all state designation decisions must be consistent with the public interest, convenience, and necessity.”<sup>11</sup>

**B. The FCC’s Rules Authorize the Commission to Recertify High Cost Program ETCs.**

The Commission derives its authority to recertify federal Universal Service ETCs, including interconnected VoIP and broadband ETCs, from the FCC’s rules and orders. As the language below demonstrates, the Commission is responsible for recertifying federal Universal Service ETCs.

**47 C.F.R. § 54.314** – “States that desire [ETCs] to receive support pursuant to the high-cost program must file an annual certification with [USAC] and the [FCC] stating that all federal high-cost support provided to such carriers within that State was used in the preceding calendar year and will be used in the coming calendar year only for the provision, maintenance, and upgrading of facilities and services for which the support is intended. High-cost support shall only be provided to the extent that the State has filed the requisite certification pursuant to this section.”<sup>12</sup>

“In order for an [ETC] to receive federal high-cost support, the State . . . must file an annual certification, as described in paragraph (c) of this section, with both [USAC] and the [FCC].”<sup>13</sup>

**C. Congress Delegated Authority to the Commission to Adopt Obligations for Federal Universal Service ETCs.**

Congress empowered the Commission to adopt federal Universal Service ETC obligations, as long as those obligations do not conflict with the FCC’s rules. The FCC *does not* have exclusive jurisdiction to oversee the conduct of ETCs and the Commission may do more than rubber-stamp ETC designation and recertification requests.

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<sup>10</sup> *In the Matter of Bridging the Digital Divide for Low-Income Consumers et al.*, WC Docket No. 17- 287 et al., Fifth Report and Order, Memorandum Opinion and Order and Order on Reconsideration, and Further Notice of Proposed Rulemaking, FCC 19-111, para 37 (2019).

<sup>11</sup> *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, FCC 05-46, para. 61 (2005).

<sup>12</sup> 47 C.F.R. § 54.314(a).

<sup>13</sup> 47 C.F.R. § 54.314(d).

**47 U.S.C. § 254(f)** – “A State may adopt regulations not inconsistent with the [FCC]’s rules to preserve and advance universal service.”<sup>14</sup>

**GAO Telecommunications Report (2020)** – “States may establish their own ETC requirements as long as they supplement and are not otherwise inconsistent with the FCC’s rules to preserve and advance universal service.”<sup>15</sup>

**D. The FCC’s Federal-State Partnership Orders Affirm the Commission’s Authority to Adopt Obligations for Federal Universal Service ETCs.**

The FCC’s federal-state partnership orders affirm the Commission’s authority to adopt obligations for federal Universal Service ETCs. The federal-state ETC partnership has existed since 1996 and is reaffirmed in recent Connect America Fund (“CAF”), Lifeline Program, *Restoring Internet Freedom*, and RDOF orders. The FCC has recognized the importance of the states’ role in overseeing ETCs since at least 2005. Language affirming the Commission’s authority to oversee and adopt obligations for federal Universal Service ETCs is provided below.

**RDOF Auction Notice (FCC 20-77) (2020)** – “A high-cost ETC *may also be subject to state-specific requirements imposed by the state* that designates it as an ETC.”<sup>16</sup>

**Fifth Report and Order (FCC 19-111) (2019)** – “[The FCC] find[s] that the state designation process furthers federal universal service goals—it does not ‘thwart’ them. . . . [T]he traditional state designation role better serves section 254(b)’s policy goals by facilitating thorough state reviews of carriers seeking ETC designations, *as well as state monitoring* of carriers who have received ETC designations. This helps prevent, detect, and curb waste, fraud, and abuse in the program, which in turn promotes efficient and responsible use of limited program funds.”<sup>17</sup>

“The traditional framework . . . has the advantage of providing strong state and federal oversight of ETCs. The *cooperative federalism* that exists under the traditional framework *provides states certainty with respect to their role in monitoring and enforcing the activities of ETCs*. This in turn encourages states to devote staff and resources to thoroughly reviewing ETC designation applications and *policing ETCs*, providing a stronger system for promoting the efficient use of universal service funds, . . . and reducing waste, fraud, and abuse than if states did not serve these critical roles. States have a record of more than twenty years of sound performance in their statutory role and *monitoring the ETCs they designate*. As [the National Association of Regulatory Utility Commissioners (“NARUC”)] has noted, states have been ‘crucial’ in ‘policing the federal fund to eliminate bad actors.’”<sup>18</sup>

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<sup>14</sup> 47 U.S.C. § 254(f).

<sup>15</sup> *FCC Should Enhance Performance Goals and Measures for Its Program to Support Broadband Service in High-Cost Areas*, United States Government Accountability Office, Report at 7, <https://www.gao.gov/assets/gao-21-24.pdf> (Oct. 2020) (last visited Nov. 15, 2021).

<sup>16</sup> FCC 20-77, para. 137 (emphasis added).

<sup>17</sup> FCC 19-111, para 52 (emphasis added).

<sup>18</sup> FCC 19-111, para. 58 (emphasis added).



**RDOF/CAF NPRM (FCC 19-77) (2019)** – “Moreover, the Universal Service Fund is a *federal-state partnership*.”<sup>19</sup>

**FCC ETC Reminder (DA 18-714) (2018)** – “Carriers subject to state jurisdiction *should follow state rules and requirements* to apply for [ETC] designation.”<sup>20</sup>

**2016 CAF Order (FCC 16-64) (2016)** – “We also do not at this time make any rules regarding *state-imposed ETC obligations* or permit winning bidders to default without penalty *if states impose obligations on ETCs*.”<sup>21</sup>

**2011 Transformation Order (FCC 11-161) (2011)** – “[W]e now establish a national framework for oversight that will be implemented as a *partnership between the [FCC] and the states*, U.S. Territories, and Tribal governments, where appropriate.”<sup>22</sup>

“We clarify that the specific reporting and certification requirements adopted below are a floor rather than a ceiling for the states. In section 254(f), Congress expressly permitted states to take action to preserve and advance universal service, so long as not inconsistent with the [FCC]’s universal service rules. *The statute permits states to adopt additional regulations to preserve and advance universal service* so long as they also adopt state mechanisms to support those additional substantive requirements. Consistent with this federal framework, *state commissions may require the submission of additional information* that they believe is necessary to ensure that ETCs are using support consistent with the statute and our implementing regulations, so long as those additional reporting requirements do not create burdens that thwart achievement of the universal service reforms set forth in this Order.”<sup>23</sup>

**2005 ETC Order (FCC 05-46) (2005)** – “As with the other requirements adopted in this Report and Order, *state commissions* that exercise jurisdiction over ETC designations *may* either follow the [FCC]’s framework or *impose other requirements consistent with federal law to ensure that supported services are offered in a manner that protects consumers*. . . . In determining whether any additional consumer protection requirement should apply as a prerequisite for obtaining ETC designation from the state – *i.e.*, where such a requirement would not otherwise apply to the ETC applicant – *we encourage states to consider, among other things, the extent to which a particular regulation is necessary to protect consumers in the ETC context* . . . . *We . . . encourage states that impose requirements on an ETC to do so only to the extent necessary to further universal service goals*.”<sup>24</sup>

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<sup>19</sup> *In the Matter of Rural Digital Opportunity Fund, Connect America Fund.*, WC Docket Nos. 19-126 and 10-90, Notice of Proposed Rulemaking, FCC 19-77, para. 13 (2019) (emphasis added).

<sup>20</sup> *WCB Reminds Connect America Fund Phase II Auction Applicants of the Process for Obtaining a Federal Designation as an Eligible Telecommunications Carrier*, WC Docket Nos. 09-197 and 10-90, Public Notice, DA 18-714, n.4 (2018) (emphasis added).

<sup>21</sup> *In the Matter of Connect America Fund, ETC Annual Reports and Certifications, Rural Broadband Experiments*, WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, FCC 16-64, n.316 (2016) (emphasis added).

<sup>22</sup> *In the Matter of Connect America Fund et al.*, WC Docket Nos. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161, para. 573 (2011) (emphasis added).

<sup>23</sup> FCC 11-161, para. 574 (emphasis added).

<sup>24</sup> FCC 05-46, para 30 (emphasis added).

“We decline to mandate that state commissions adopt our requirements for ETC designations.”<sup>25</sup>

“Furthermore, state commissions . . . are particularly well-equipped to determine *their own ETC eligibility requirements*.”<sup>26</sup>

“[S]tate commissions will continue to maintain the flexibility to impose *additional eligibility requirements* in state ETC proceedings, if they so choose.”<sup>27</sup>

**E. The Commission’s Ability to Adopt Obligations for Federal Universal Service ETCs Extends to Interconnected VoIP and Broadband Internet Access Service Providers.**

The FCC has *not* classified interconnected VoIP as an information service or a telecommunications service. Instead, it regulates interconnected VoIP providers in specific areas, including 911 and ETC designation and oversight. As the FCC explains in its *2011 Transformation Order*, interconnected VoIP providers are subject to federal Universal Service regulation regardless of how those services are classified.

**Transformation Order (FCC 11-161) (2011)** – “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.”<sup>28</sup>

“If interconnected VoIP services are telecommunications services, our authority under section 254 to define universal service after ‘taking into account advances in telecommunications and information technologies and services’ enables us to include interconnected VoIP services as a type of voice telephony service entitled to federal universal service support. And, . . . if interconnected VoIP services are information services, we have authority to support the deployment of broadband networks used to provide such services.”<sup>29</sup>

The FCC also regulates broadband Internet access service providers and has since at least 2011. The FCC’s CAF and RDOF orders expanded the availability of High Cost Program support to interconnected VoIP and broadband Internet access service providers. In doing so, the FCC put them on notice that the terms contained in the FCC’s rules, relevant orders, and public notices are applicable to *all* bidders. Even the FCC’s *Restoring Internet Freedom Order* explicitly acknowledges the states’ authority to oversee all federal Universal Service ETCs.

**RDOF Auction Notice (FCC 20-77) (2020)** – “The terms contained in the [FCC]’s rules, relevant orders, and public notices are generally applicable to *all* bidders.”<sup>30</sup>

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<sup>25</sup> *Id.*, para. 61.

<sup>26</sup> *Id.* (emphasis added).

<sup>27</sup> *Id.* (emphasis added).

<sup>28</sup> FCC 11-161, para. 63.

<sup>29</sup> *Id.*, n.67.

<sup>30</sup> FCC 20-77, para. 8 (emphasis added).

**Restoring Internet Freedom Order (FCC 17-166) (2018)** – “Nor do we deprive the states of any functions expressly reserved to them under the Act, such as responsibility for designating eligible telecommunications carriers under section 214(e); . . . or authority to adopt state universal service policies not inconsistent with the [FCC]’s rules under section 254. We appreciate the many important functions served by our state and local partners, and we fully expect that the states will ‘continue to play their vital role in protecting consumers from fraud, enforcing fair business practices, for example, in advertising and billing, and generally responding to consumer inquiries and complaints’ within the framework of this order.”<sup>31</sup>

**2011 Transformation Order (FCC 11-161) (2011)** – “We recognize that [the federal Universal Service Fund] and ICC are both hybrid state-federal systems, and it is critical to our reforms’ success that states remain key partners even as these programs evolve and traditional roles shift. . . . We recognize the statutory role that Congress created for state commissions with respect to eligible telecommunications carrier designations, *and we do not disturb that framework*. . . . We will continue to rely upon states to help us determine whether universal service support is being used for its intended purposes, *including by monitoring compliance* with the new public interest obligations described in this Order.”<sup>32</sup>

“Section 254(b)(3) [of the Act] provides that consumers in rural, insular and high-cost areas should have access to ‘advanced telecommunications and information services . . . that are reasonably comparable to those services provided in urban areas.’ Section 254(b)(2) likewise provides that ‘Access to advanced telecommunications and information services should be provided in all regions of the Nation.’ Providing support for broadband networks will further all of these goals.”<sup>33</sup>

“Accordingly, we adopt ‘support for advanced services’ as an additional principle upon which we will base policies for the preservation and advancement of universal service.”<sup>34</sup>

“We further conclude that our authority under section 254 allows us to go beyond the ‘no barriers’ policy and require carriers receiving federal universal service support to invest in modern broadband-capable networks. . . . [W]e will exercise our authority under section 254 to require that carriers receiving support – both CAF support, including Mobility Fund support, and support under our existing high-cost support mechanisms – offer broadband capabilities to consumers.”<sup>35</sup>

However, the FCC does use a “light-touch” regulatory approach under Title I of the Communications Act of 1934, as amended (the “Act”) for broadband Internet Access service providers, instead of the utility-style (i.e., Title II) regulatory approach that applies to telecommunications carriers. As the language below reflects, the FCC’s “light-touch” regulatory approach includes state oversight of ETCs and maintains the federal-state partnership.

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<sup>31</sup> *In the Matter of Restoring Internet Freedom*, WC Docket No. 17-108, Declaratory Ruling, Report and Order, and Order, FCC 17-166, para. 196 (2018).

<sup>32</sup> FCC 11-161, para. 15 (emphasis added).

<sup>33</sup> *Id.*, para. 44.

<sup>34</sup> *Id.*, para. 45.

<sup>35</sup> *Id.*, para. 65.

**Restoring Internet Freedom Order (FCC 17-166) (2018)** – “We take several actions in this Order to restore Internet freedom. First, we end utility-style regulation of the Internet in favor of the market-based policies necessary to preserve the future of Internet freedom. . . . We determine that this light-touch information service framework will promote investment and innovation better than applying costly and restrictive laws of a bygone era to broadband Internet access service.”<sup>36</sup>

“In the 1996 Act, intended to ‘promote competition and reduce regulation,’ Congress drew a line between lightly regulated ‘information services’ and more heavily regulated ‘telecommunications services.’”<sup>37</sup>

*“Nor do we deprive the states of any functions expressly reserved to them under the Act, such as responsibility for designating eligible telecommunications carriers under section 214(e); . . . or authority to adopt state universal service policies not inconsistent with the [FCC]’s rules under section 254.”*<sup>38</sup>

**IP-Enabled Services Order (FCC 04-28)** – “[T]he [FCC] has exercised its ancillary authority under Title I of the Act to apply requirements to information services.”<sup>39</sup>

**F. The *Computer Inquiries* Line of Cases and the *Charter Order* Do Not Strip the Commission of its ETC Authority.**

The OAG previously provided approximately 10 pages of analysis rebutting the argument that providers of broadband Internet access and interconnected VoIP services are not subject to state ETC obligations, with extensive citation.<sup>40</sup> The OAG’s rebuttal arguments are included in Attachments A-1 and A-2 of these Comments.

Rather than repeat its prior analysis, the OAG provides below quotes from state and federal orders that affirm that the *Computer Inquiries* line of cases and the *Charter Order* do not apply in the federal Universal Service context.

**1. The *Computer Inquiries* line of cases addresses the day-to-day competitive regulation of telecommunications and information service providers and does not apply to federal Universal Service.**

The *Computer Inquiries* line of cases originated in 1966 and is a precursor to today’s net neutrality debate. The cases examine the difference between basic transmission (i.e., basic services/telecommunications services) and various forms of computer processing. The cases and their corresponding regulations were designed to regulate day-to-day competition between telecommunications providers and Internet service providers (“ISP”).

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<sup>36</sup> FCC 17-166, para. 2.

<sup>37</sup> *Id.*, para. 8.

<sup>38</sup> *Id.*, para 196 (emphasis added).

<sup>39</sup> *In the Matter of IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, FCC C 04-28, para. 27 (2004).

<sup>40</sup> Attachment A-1 - OAG Comments at 11-13; Attachment A-2 - OAG Reply Comments at 6-17.

**Restoring Internet Freedom Order (FCC 17-166) (2018)** – “Since long before the commercialization of the Internet, federal law has drawn a line between the more heavily-regulated common carrier services like traditional telephone service and more lightly-regulated services that offer more than mere transmission. More than fifty years ago, the [FCC] decided *Computer I*, the first of a series of decisions known as the *Computer Inquiries*, which, in combination, created a dichotomy between “basic” and “enhanced” services. In 1980’s *Second Computer Inquiry*, the [FCC] established that basic services offered ‘pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information’ and were ‘regulated under Title II of the [Communications] Act.’ Enhanced services, by contrast, were ‘any offering over the telecommunications network which is more than a basic transmission service.’”<sup>41</sup>

“In the 1996 Act, intended to ‘promote competition and reduce regulation,’ Congress drew a line between lightly regulated ‘information services’ and more heavily regulated ‘telecommunications services.’”<sup>42</sup>

“For the next 16 years, the [FCC] repeatedly adopted a light-touch approach to the Internet that favored discrete and targeted actions over pre-emptive, sweeping regulation of Internet service providers. In the 1998 *Stevens Report*, the [FCC] comprehensively reviewed the Act’s definitions as they applied to the emerging technology of the Internet and concluded that Internet access service was properly classified as an information service. The *Stevens Report* also found that subjecting Internet service providers and other information service providers to ‘the broad range of Title II constraints,’ would ‘seriously curtail the regulatory freedom that the [FCC] concluded in *Computer II* was important to the healthy and competitive development of the enhanced-services industry.’”<sup>43</sup>

The *Computer Inquiries* line of cases do not apply to federal Universal Service. The *Restoring Internet Freedom Order*, which came after the *Computer Inquiries* line of cases, makes clear that the Commission retains the federal Universal Service authority delegated to it by Congress and its ability to oversee the conduct of federal Universal Service ETCs.

**Restoring Internet Freedom Order (FCC 17-166) (2018)** – “Although we preempt state and local laws that interfere with the federal deregulatory policy restored in this order, we do not disturb or displace the states’ traditional role in generally policing such matters as fraud, taxation, and general commercial dealings, so long as the administration of such general state laws does not interfere with federal regulatory objectives. . . . *Nor do we deprive the states of any functions expressly reserved to them under the Act, such as responsibility for designating eligible telecommunications carriers under section 214(e); . . . or authority to adopt state universal service policies not inconsistent with the [FCC]’s rules under section 254.*”<sup>44</sup>

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<sup>41</sup> FCC 17-166, para. 6.

<sup>42</sup> *Id.*, para. 8.

<sup>43</sup> *Id.*, para 9.

<sup>44</sup> *Id.*, para 196 (emphasis added).

2. **The *Charter Order* narrowly addresses whether Charter’s “Spectrum Voice” offering is an information service that is exempt from state-level utility-style telecommunications regulation and is inapplicable to federal Universal Service.**

The *Charter Order* narrowly held that fixed interconnected VoIP service is an information service at the *state* level and that *state* regulation of the service is preempted. That holding is distinguishable from this proceeding, which involves the explicit delegation of federal authority to a state enforcer.

**Charter Advanced Servs. v. Lange (2018)** – “Charter Communications is a provider of video, internet, and voice communications services. This case arose when Charter underwent a corporate reorganization in order to segregate its Voice over Internet Protocol (“VoIP”) services from its regulated wholesale telecommunications services.”<sup>45</sup>

“Charter moved its Spectrum Voice offerings from Charter Fiberlink to Charter Advanced for the purpose of decreasing its *state* regulatory burden.”<sup>46</sup>

“The FCC has so far declined to classify VoIP services as either information or telecommunications services, despite repeated opportunities to do so.”<sup>47</sup>

“We agree with the district court that Spectrum Voice is an ‘information service’ under the Act. Preemption of *state regulation* of Spectrum Voice is therefore warranted.”<sup>48</sup>

The OAG’s proposed RDOF Phase I ETC obligations are not tantamount to a state tariff or other state-level regulation. Rather, they are measures specifically designed to help the Commission carry out its duty to ensure that federal Universal Service support is used only for the provision, maintenance, and upgrading of the facilities and services for which the support is intended.<sup>49</sup>

The *Charter Order* does not prevent the Commission from requiring interconnected VoIP and broadband Internet access service providers to comply with ETC obligations that preserve and advance the FCC’s federal Universal Service goals and protect the Minnesota consumers who are meant to benefit from federal Universal Service support. In fact, the words “universal service” are only substantively used once in the *Charter Order*. Even then, they are only mentioned in the dissenting opinion of Judge Grasz, who directly questioned the *Charter Order*’s applicability to federal Universal Service.

**Charter Advanced Servs. v. Lange (2018) (Judge Grasz, dissenting)** – “I . . . reach no conclusions about whether the Communications Act or the FCC could preempt the MPUC’s

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<sup>45</sup> See *Charter Advanced Servs. v. Lange*, 903 F.3d 715, 717 (8th Cir. 2018).

<sup>46</sup> *Id.* at 718 (emphasis added).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 720 (emphasis added).

<sup>49</sup> 47 U.S.C. § 254(e).

regulations on *other* grounds. For example, the Communications Act requires that state regulation of *universal service* be consistent with FCC regulations.”<sup>50</sup>

The FCC *does* regulate interconnected VoIP providers. There is no “federal policy of nonregulation” when it comes to interconnected VoIP and federal Universal Service support. As previously discussed, and evident from the language below, the fact that the FCC *has not classified* interconnected VoIP as either a telecommunications service or an information service has not stopped it from regulating interconnected VoIP providers for federal Universal Services purposes under sections 214 and 254 of the Act.

**Fifth Report and Order (FCC 19-111) (2019)** - “[The FCC] note[s] that [its] reversal of the preemption decision in the *2016 Lifeline Order* in no way conflicts with the [FCC]’s determination in other contexts—such as in the *Restoring Internet Freedom Order*—that broadband Internet access service is jurisdictionally interstate and that inconsistent state and local regulation may be preempted on that ground. Several commenters argue otherwise, relying on the premise that states’ ETC designation authority under section 214(e)(2) can be preempted simply because of the interstate nature of broadband Internet access service. *This argument ignores the fact that section 214 itself expressly confers on state commissions the primary responsibility to designate carriers that are subject to state jurisdiction. It also ignores . . . the absence of a conflict justifying preemption.*”<sup>51</sup>

**Charter Advanced Servs. v. Lange (2018)** – “The FCC’s amicus brief in this case is illustrative. See Brief of the FCC as Amicus Curiae Supporting Appellees at 13-15 (‘[T]he agency has not yet resolved the overarching classification issue . . . the agency has not needed to definitively resolve the overarching regulatory classification of . . . VoIP service at this time.’).”<sup>52</sup>

**Universal Service Contribution Methodology NPRM (FCC 12-46) (2012)** – “Although the [FCC] *has not addressed the regulatory classification of interconnected VoIP services* under the Act, the [FCC] *has concluded that interconnected VoIP providers are ‘providers of interstate telecommunications’ for purposes of universal service.*”<sup>53</sup>

**2011 Transformation Order (FCC 11-161) (2011)** – “If interconnected VoIP services are telecommunications services, our authority under section 254 to define universal service after ‘taking into account advances in telecommunications and information technologies and services’ enables us to include interconnected VoIP services as a type of voice telephony service entitled to federal universal service support. And, . . . if interconnected VoIP services are information services, we have authority to support the deployment of broadband networks used to provide such services.”<sup>54</sup>

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<sup>50</sup> See *Charter Advanced Servs.*, 903 F.3d at 723 (Grasz, dissenting) (emphasis in original and added).

<sup>51</sup> FCC 19-111, para 53 (emphasis added).

<sup>52</sup> *Charter Advanced Servs.*, 903 F.3d at n.2.

<sup>53</sup> *In the Matter of Universal Service Contribution Methodology, A National Broadband Plan For Our Future*, WC Docket No. 06-122 et al., Further Notice of Proposed Rulemaking, FCC 12-46, n.19 (2012) (emphasis added).

<sup>54</sup> FCC 11-161, n.67.

“We determine that it is appropriate to describe the core functionalities of the supported services as ‘voice telephony 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 [FCC] to focus on the functionality offered, not the specific technology used to provide the supported service.”<sup>55</sup>

**G. The FCC Is Only Authorized to Designate and Recertify Federal Universal Service ETCs if a State Commission Does Not Have Jurisdiction.**

Federal Universal Service ETC designation and recertification authority is binary. Either the Commission has ETC jurisdiction or it doesn’t. The Minnesota ETCs must not be permitted to claim that the Commission has the authority to approve their ETC designations and recertifications on one hand, and then deny the Commission’s authority to oversee their High Cost and Lifeline conduct on the other. As the language below demonstrates, the FCC is only authorized to designate and recertify federal Universal Service ETCs if a state Commission does not have jurisdiction.<sup>56</sup>

**47 U.S.C. § 214(e)(6)** – “In the case of a common carrier providing telephone exchange service and exchange access that *is not subject to the jurisdiction of a State commission*, the [FCC] shall upon request designate such a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the [FCC] consistent with applicable Federal and State law.”<sup>57</sup>

**T-Mobile ETC Relinquishment Order (DA 21-660) (2021)** – “Section 214(e)(6) of the Communications Act of 1934, as amended (the Act) authorizes the FCC to designate a carrier as an ETC *when a state commission lacks jurisdiction*.”<sup>58</sup>

**RDOF Auction Notice (FCC 20-77) (2020)** – “[S]ection 214(e)(6) provides that the Commission is responsible for processing requests for ETC designation *when the service provider is not subject to the jurisdiction of any state commission*.”<sup>59</sup>

**RDOF Application Instructions (2020)** – “A long-form applicant must obtain a high-cost ETC designation from either a state public utility commission pursuant to section 214(e)(2) of the Act, *or, if the relevant state lacks jurisdiction over the entity, from the [FCC] pursuant to section 214(e)(6) of the Act*.”<sup>60</sup>

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<sup>55</sup> *Id.*, para. 77.

<sup>56</sup> Frankly, the OAG is surprised that companies that claim the Commission has no ETC jurisdiction would appear before the Commission to seek ETC designation and recertification in the first place.

<sup>57</sup> 47 U.S.C. § 214(e)(6) (emphasis added).

<sup>58</sup> *In the Matter of Telecommunications Carriers Eligible for Universal Service Support*, WC Docket No. 09-197, Order, DA 21-660, para. 2 (2021) (emphasis added).

<sup>59</sup> FCC 20-77, para. 135 (emphasis added).

<sup>60</sup> Attachment C, Instructions to FCC Form 683, Application for Rural Digital Opportunity Fund Phase I Support, Auction 904, at 19 (2020) (emphasis added).



## **II. THE COMMISSION SHOULD EXERCISE ITS ETC DESIGNATION AND RECERTIFICATION AUTHORITY TO ENSURE THAT MINNESOTA ETCs USE THEIR HIGH COST PROGRAM SUPPORT TO PRESERVE AND ADVANCE FEDERAL UNIVERSAL SERVICE.**

The Notice asks how the Commission should exercise its federal Universal Service ETC authority.<sup>61</sup> The OAG recommends that the Commission use its authority to ensure that Minnesota ETCs that receive High Cost Program support use the support to preserve and advance federal Universal service. This includes using its authority to adopt federal Universal Service ETC obligations that are necessary to address state-specific issues or trends that could result in non-compliance with the federal Universal Service statutes, rules, and/or orders. It also includes using Commission authority to ensure that the Minnesota ETCs use their federal Universal Service support to benefit rural Minnesotans.

## **III. MINNESOTA’S EXECUTIVE OFFICES AND REGULATORY AGENCIES HAVE VARYING ROLES WITH RESPECT TO ETC DESIGNATION AND RECERTIFICATION.**

The Notice seeks information regarding the roles of certain Minnesota executive offices and regulatory agencies with respect to federal Universal Service ETC designation and regulation, including the legal basis for those roles.<sup>62</sup> The 2020 State Organization Chart included in Attachment B of these Comments depicts the over-arching organizational structure of the various Minnesota executive offices and regulatory agencies specified in the Notice.<sup>63</sup> The roles of the Minnesota executive offices and regulatory agencies and their federal Universal Service ETC designation and regulation roles are discussed in more detail below.

### **A. The Minnesota Office of the Attorney General (“OAG”)**

The Attorney General is the chief legal officer of the State of Minnesota.<sup>64</sup> Among other things, the OAG enforces state consumer protection laws,<sup>65</sup> investigates violations of state laws governing unfair, discriminatory, and other unlawful practices in business, commerce, or trade,<sup>66</sup> and advocates for Minnesota citizens and small businesses in telecommunications and utilities matters.<sup>67</sup>

The OAG is not a department of the state or a state regulatory agency;<sup>68</sup> nor does the OAG report to the Governor or the Commission.<sup>69</sup> The OAG’s participation in Commission proceedings is voluntary (i.e., at the discretion of the Attorney General) and is a matter of right.<sup>70</sup>

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<sup>61</sup> Notice at 1.

<sup>62</sup> *Id.*

<sup>63</sup> See Attachment B, Ballotpedia 2020 State Organization Chart.

<sup>64</sup> Minn. Stat. §§ 8.01, 8.06.

<sup>65</sup> Minn. Stat. § 8.32.

<sup>66</sup> Minn. Stat. § 8.31, subd. 1.

<sup>67</sup> Minn. Stat. § 8.33, subd. 2.

<sup>68</sup> See Minn. Stat. § 15.01 (listing the agencies designated as departments of the state government).

<sup>69</sup> See Attachment B, Ballotpedia 2020 State Organization Chart.

<sup>70</sup> Minn. Stat. § 8.33, subd. 3; Minn. R. 7829.0800, subp. 3 (“The department and the Office of the Attorney General may intervene as of right in any proceeding before the commission.”).

The OAG’s participation in this docket does not conflict with its *permissive* Minnesota statutory telecommunications duty,<sup>71</sup> as asserted in the recent comments of the Minnesota Telecom Alliance (“MTA”).<sup>72</sup> Rather, by ensuring that the Minnesota High Cost ETCs use their federal Universal Service support only for the provision, maintenance, and upgrading of the facilities and services for which the support is intended, the OAG discharges its duties to:

- facilitate economically efficient investment in higher speed telecommunications services and greater capacity for voice, video, and data transmission;<sup>73</sup> and
- promote just and reasonable rates.<sup>74</sup>

By proposing federal Universal Service ETC obligations that prevent the potential waste, fraud, and abuse of federal High Cost support, the OAG effectuates the telecommunications goals enumerated by the Minnesota legislature.

## **B. The Minnesota Department of Commerce (“Department” or “DOC”)**

The Department is a state regulatory agency that is under the supervision and control of the Commissioner of Commerce.<sup>75</sup> Among other things, the Department protects the public interest, advocates for Minnesota consumers before the Commission, and oversees more than 20 regulated industries to support a strong, competitive, and fair marketplace.<sup>76</sup> The Department acts as the investigative arm of the Commission<sup>77</sup> and is charged with enforcing Commission orders.<sup>78</sup>

The Commissioner of Commerce is appointed by the Governor.<sup>79</sup> The Department participates in Commission proceedings as a matter of right.<sup>80</sup>

## **C. The Minnesota Department of Employment and Economic Development (“DEED”) – Office of Broadband Development (“OBD”)**

The Minnesota DEED is a department of the state government that is under the supervision and control of the Commissioner of Employment and Economic Development.<sup>81</sup> The OBD is an office established within DEED, whose director is appointed by the Governor.<sup>82</sup> The purpose of the DEED-OBD is to “encourage, foster, develop, and improve broadband within the state” in order to create jobs, promote innovation, expand markets, coordinate infrastructure development,

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<sup>71</sup> See Minn. Stat. § 8.33, subd. 2 (stating that “[w]hen participating in telecommunications matters that affect deployment of the infrastructure, the attorney general *may* apply” the enumerated statutory goals) (emphasis added).

<sup>72</sup> See Docket No. P-999/CI-21-86, Comments of Minnesota Telecom Alliance at 4 (Nov. 9, 2021) (“MTA Comments”).

<sup>73</sup> *Id.*, subd. 2(1).

<sup>74</sup> *Id.*, subd. 2(2).

<sup>75</sup> Minn. Stat. §§ 15.01, 45.012(a).

<sup>76</sup> See generally Department Website, About Us, <https://mn.gov/commerce/about/> (last visited Nov. 15, 2021).

<sup>77</sup> Minn. Stat. §§ 216A.05, subd. 1; 216A.095.

<sup>78</sup> Minn. Stat. § 216A.07, subd. 2 (charging the Department with the enforcement of chapters 216A, 216B, and 237 of the Minnesota statutes and the orders of the Commission issued pursuant to those chapters).

<sup>79</sup> Minn. Stat. § 45.012(a).

<sup>80</sup> Minn. Stat. § 216A.07, subd. 3; Minn. R. 7829.0800, subp. 3.

<sup>81</sup> Minn. Stat. § 116J.01, subd. 1.

<sup>82</sup> Minn. Stat. § 116J.39, subd. 2.

improve accessibility for underserved communities and populations, and update broadband deployment data and maps.<sup>83</sup>

*DEED-OB* is statutorily prohibited from regulating broadband.<sup>84</sup> *DEED-OB* cannot compel the actions of any broadband provider.<sup>85</sup> *DEED-OB*'s participation in Commission proceedings is voluntary but is *not* a matter of right.

#### **D. The Minnesota Department of Public Safety ("DPS")**

The Minnesota DPS is a department of the state government that is under the supervision and control of the Commissioner of Public Safety.<sup>86</sup> The DPS Emergency Communication Networks ("ECN") is responsible for the implementation of basic 911 and enhanced 911 services in Minnesota pursuant to the FCC's rules.<sup>87</sup> The DPS-ECN looks to verify that an ETC will not deduct minutes from or charge its customers to dial 911; will provide its customers with location and callback information; will allow customers that have no remaining monthly minutes to dial 911 and have access to 911 services; will remit 911 and Telecommunications Access Minnesota ("TAM") fees; will process their 911 calls in the same manner as their underlying carriers; and will provide handsets to ECN for testing.<sup>88</sup> At the request of the DPS, the OAG may commence proceedings in district court against any person or public or private body to enforce the Minnesota 911 rules.<sup>89</sup> Similarly, at the request of the Commission, the OAG may commence proceedings in district court against any wireline telecommunications provider that refuses to comply with the Minnesota 911 rules.<sup>90</sup>

The Commissioner of Public Safety is appointed by the Governor.<sup>91</sup> DPS-ECN's participation in Commission proceedings is voluntary but is *not* a matter of right.

#### **IV. THE OAG'S RECOMMENDED RDOF PHASE I ETC OBLIGATIONS ADVANCE AND PRESERVE FEDERAL UNIVERSAL SERVICE AND THE COMMISSION SHOULD ADOPT THEM IN FULL.**

The Notice seeks comment on whether the OAG's recommended RDOF Phase I ETC obligations should be adopted, how they can be adopted outside of a rulemaking proceeding, the scope of application for the obligations, how consumers can be informed of them, and the potential penalties for non-compliance.<sup>92</sup> Each of these inquiries is addressed in greater detail below.

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<sup>83</sup> Minn. Stat. §§ 116J.39, subds. 2 and 4; 116J.391, subd. 2; and 116J.397.

<sup>84</sup> Minn. Stat. § 116J.39, subd. 4(b) ("In carrying out its duties under this subdivision, the Office of Broadband Development shall have *no authority to regulate or compel action on the part of any provider of broadband service.*") (emphasis added).

<sup>85</sup> *Id.*

<sup>86</sup> Minn. Stat. § 299A.01, subd. 1.

<sup>87</sup> Minn. Stat. § 403.06. See also DPS-ECN Website, What We Do, <https://dps.mn.gov/divisions/ecn/about/Pages/default.aspx> (last visited Nov. 15, 2021).

<sup>88</sup> Email from D. Wahlberg, Director, DPS-ECN, to K. Blauvelt et al. (June 4, 2021).

<sup>89</sup> Minn. Stat. § 403.09, subd. 1.

<sup>90</sup> *Id.*, subd. 2.

<sup>91</sup> Minn. Stat. § 299A.01, subd. 1.

<sup>92</sup> Notice at 1-2.

**A. The OAG’s Recommended RDOF Phase I ETC Obligations Advance and Preserve Federal Universal Service and the Commission Should Adopt Them in Full.**

The federal Universal Service statutes, rules, and orders require an RDOF Phase I ETC to account for how it operates pursuant to its ETC designation and how it spends its RDOF Phase I High Cost support. The OAG’s recommended RDOF Phase I ETC obligations facilitate those requirements and preserve and advance federal Universal Service. The Commission should adopt the OAG’s RDOF Phase I ETC obligations in full.

The OAG’s proposed RDOF Phase I ETC obligations are not equivalent to the New York order referenced by the MTA in its recent comments.<sup>93</sup> Assuming the MTA refers to the New York order relied on by Commission staff in the prior briefing papers in docket, that order involves providers that sought *ETC designations from the FCC because the state did not have ETC jurisdiction*.<sup>94</sup> The order also involves flowing federal High Cost Program support through a state broadband program.<sup>95</sup> Neither of those situations applies here.

Assuming the MTA refers to the recent stipulated final judgment that preempted the New York Attorney General from setting broadband prices in violation of New York state law, that judgment is also inapplicable here.<sup>96</sup> Neither of the OAG’s recommended RDOF Phase I ETC obligations attempt to set prices for high-speed broadband, regardless of how it is provided.

Although the OAG initially recommended three RDOF Phase I ETC obligations in this docket, one of those obligations is now moot because it was addressed in the Commission’s *Lifeline Best Practices Order*. Each of the remaining OAG-proposed RDOF Phase I ETC obligations and the reasons the OAG recommends it is explained in greater detail in the table below.

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<sup>93</sup> MTA Comments at 5.

<sup>94</sup> *In the Matter of Petitions for Designation as an Eligible Telecommunications Carrier in the State of New York et al.*, WC Docket Nos. 09-197 and 10-90, Order, DA 19-354, paras. 3-7 (2019).

<sup>95</sup> *Id.*, paras. 1 (designating four petitioners as ETCs “conditioned on” and “limited to” their receipt of CAF Phase II support “awarded in coordination with New York’s New NY Broadband Program”), 2 (“In 2017, New York sought waiver of certain [CAF] Auction 903 rules and requirements so that, through its New York Program, it could allocate certain CAF support (that otherwise would have been included in Auction 903) to CAF-eligible areas.”).

<sup>96</sup> *New York State Telecommunications Ass’n, Inc. v. James*, Docket No. 21-CV-02389, Stipulated Final Judgment at 2, <https://www.neca.org/docs/default-source/wwwpdf/public/72621nyct.pdf> (July 23, 2021).

Item No.	Proposed RDOF Phase I ETC Obligation	Reason for Proposed Obligation
1	<p><b><u>Provide a Brief Broadband Deployment Update for RDOF Years One and Two</u></b> – Require Minnesota RDOF Phase I ETCs to provide a <i>no more than one page</i> broadband deployment update with their first two annual Minnesota recertification filings.</p>	<p>The <i>RDOF Order</i> does not require an RDOF Phase I ETC to provide a broadband deployment update until three years after the ETC first receives RDOF Phase I support.<sup>97</sup></p> <p>Requiring RDOF Phase I ETCs to file a <i>no more than one page</i> broadband deployment update for the first two years they receive RDOF Phase I support will provide the Commission with visibility into how the ETCs spend their funding.</p>
2	<p><b><u>Provide a Brief Customer Service Summary for RDOF Year One</u></b> – Require RDOF Phase I ETCs to include a <i>no more than one page</i> summary with their first annual Minnesota ETC recertification filing describing:</p> <ul style="list-style-type: none"> <li>• How they will determine whether they offer RDOF Phase I-supported services at a particular consumer’s location; and</li> <li>• How they will convey that information to a consumer that asks about the availability of high-speed broadband at his/her location.</li> </ul>	<p>Confusion about whether High Cost Program-supported high-speed broadband is available at a particular consumer’s location is an issue that has arisen in Minnesota for CAF funding.<sup>98</sup></p> <p>Requiring RDOF Phase I ETCs to file a <i>no more than one page</i> customer service summary will help the ETCs and the Commission understand how the ETCs will communicate the availability of High Cost Program-supported high-speed broadband to customers.</p>

**B. A Rulemaking Is Not Necessary to Adopt Federal Universal Service Obligations for Minnesota ETCs.**

The purpose of a rulemaking is to implement *state* regulatory policy.<sup>99</sup> As previously discussed, this proceeding involves the explicit delegation of *federal* authority to a state enforcer. States impose ETC conditions to discharge their Congressionally-mandated duty to advance

<sup>97</sup> See *In the Matter of Rural Digital Opportunity Fund, Connect America Fund*, WC Docket Nos. 19-126 and 10-90, Report and Order, FCC 20-5, paras. 45, 99 (2020) (creating an optional 20% service milestone in year two and referencing the mandatory 40% service milestone in year three).

<sup>98</sup> *In the Matter of the Annual Certification Related to ETC Use of Federal Universal Service Support*, Docket No. P-999/PR-20-8, Comments of the Office of the Attorney General at 12 (Mar. 30, 2020) (discussing a Minnesota consumer’s difficulty obtaining accurate information about the availability of CAF-supported high-speed broadband at his home).

<sup>99</sup> Minn. Stat. § 14.002 (“The legislature recognizes the important and sensitive role for administrative rules in implementing policies and programs *created by the legislature*.”) (emphasis added).

federal Universal Service goals and protect the at-risk consumers who receive federal Universal Service benefits, not to impose *state* regulatory policy.

Moreover, the primary purposes of a rulemaking are already achieved as part of the Commission's notice and comment procedure ("Procedure"). For example, the Commission's Procedure increases its public accountability,<sup>100</sup> ensures a uniform minimum procedure,<sup>101</sup> provides public access to governmental information,<sup>102</sup> and creates a space for public participation to influence the outcome of the proceeding(s).<sup>103</sup>

Additionally, the Commission has already adopted federal Universal Service ETC obligations through its orders.<sup>104</sup> There is no reason to depart from that practice here.

For all of these reasons, a rulemaking is not necessary to adopt federal Universal Service obligations for Minnesota ETCs.

**C. The OAG's Recommended RDOF Phase I ETC Obligations Would Apply to the Census Block(s) for Which a Minnesota ETC Receives RDOF Phase I High Cost Support.**

The FCC has explained that High Cost support recipients are allowed to seek ETC designations that cover a larger geographic area than the census block(s) for which they receive High Cost support.<sup>105</sup> However, High Cost support recipients may only use their federal Universal Service support to offer the required voice and broadband Internet access services to locations in eligible census blocks.<sup>106</sup>

Thus, the OAG's recommended RDOF Phase I ETC obligations would apply to the census block(s) for which a Minnesota ETC receives RDOF Phase I High Cost support.

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<sup>100</sup> *Id.* at § 14.001(2).

<sup>101</sup> *Id.* at § 14.001(3).

<sup>102</sup> *Id.* at § 14.001(4).

<sup>103</sup> *Id.* at § 14.001(5).

<sup>104</sup> *See, e.g.*, Docket No. P-999/PR-21-8, ORDER CERTIFYING ELIGIBLE TELECOMMUNICATIONS CARRIERS' USE OF FEDERAL HIGH-COST SUBSIDY at 5 (Oct. 21, 2021) (requiring tribal ETCs to file detailed engagement plans); Docket No. P-999/PR-20-8, ORDER CERTIFYING ELIGIBLE TELECOMMUNICATIONS CARRIERS' USE OF FEDERAL HIGH-COST SUBSIDY at 5 (Nov. 25, 2020) (requiring Jaguar Communications to make a Lifeline Program compliance filing); Docket No. P-999/CI-20-747, ORDER ESTABLISHING BEST PRACTICES AND REQUIRING FILINGS at 8-9 (July 20, 2021) (adopting various Lifeline Program advertising and outreach requirements); and Docket No. P-999/CI-17-509, ORDER ESTABLISHING CUSTOMER NOTICE REQUIREMENT at 7-8 (Nov. 20, 2020) (adopting a notice requirement for mobile wireless Lifeline-only ETCs).

<sup>105</sup> FCC 20-77, para 137; *see also* Rural Digital Opportunity Fund Support Authorized for 469 Winning Bids, AU Docket No. 20-34 et al., Public Notice, DA 21-1287, 7-8 (2021).

<sup>106</sup> *Id.*

**D. Minnesota Consumers Do Not Need to Know Which Minnesota ETCs will be Subject to the OAG’s Recommended RDOF Phase I ETC Obligations or the Census Blocks to Which the Obligations Apply.**

The Notice asks for information on how consumers can be informed about which Minnesota ETCs would be subject to the OAG’s recommended RDOF Phase I ETC obligations and where the obligations would apply.<sup>107</sup> The Notice seeks this information in light of the fact that “other local, state[,] and federal funding for broadband deployment” may not require a voice offering or ETC designation.<sup>108</sup>

There is no need to inform consumers which Minnesota ETCs would be subject to the OAG’s recommended RDOF Phase I ETC obligations or the census block(s) to which the obligations would apply. Assuming the proposed obligations are adopted by the Commission, Commission staff, the OAG, and the Department will monitor RDOF Phase I ETC compliance. If the OAG’s recommended obligations are adopted by the Commission, they apply to the RDOF Phase I ETCs independent of any other local, state, and/or federal funding for broadband deployment regardless of what those other funds require.

**E. The Commission Should Adopt the OAG’s Proposed RDOF Phase I ETC Obligations Because They Facilitate the Federal-State ETC Partnership and Effectuate Federal Universal Service.**

The Notice asks why going beyond what the FCC requires when it designates ETCs should be ordered by the Commission.<sup>109</sup>

Federal Universal Service is based on the principle that communications and broadband Internet access services should be available to all Americans at just, affordable, and reasonable rates.<sup>110</sup> It would be impossible for the FCC to oversee the designation, recertification, and federal Universal Service compliance of every ETC in every state. Accordingly, Congress delegated ETC designation authority to the states and, through Congress and the federal-state ETC partnership, states are empowered to recertify and oversee the conduct of federal Universal Service ETCs.

The FCC knows that “[t]he billions of dollars that the Universal Service Fund disburses each year to support vital communications services comes from American consumers and businesses, and recipients must be held accountable for how they spend that money.”<sup>111</sup> Unfortunately, waste, fraud, and abuse persist in the federal Universal Service programs. As the previously provided language and the language below demonstrates, it is the Commission’s responsibility to ensure that the High Cost and Lifeline support received by the Minnesota ETCs is used to benefit Minnesota consumers.

**47 C.F.R. § 54.314(a)** – “States that desire [ETCs] to receive support pursuant to the high-cost program must file an annual certification with [USAC] and the [FCC] stating that all federal

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<sup>107</sup> Notice at 2.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> 47 U.S.C. § 254(b).

<sup>111</sup> FCC 11-161, para. 568.

high-cost support provided to such carriers within that State was used in the preceding calendar year and will be used in the coming calendar year only for the provision, maintenance, and upgrading of facilities and services for which the support is intended. High-cost support shall only be provided to the extent that the State has filed the requisite certification pursuant to this section.”<sup>112</sup>

**Fifth Report and Order (FCC 19-111) (2019)** – “Congress made states—not the [FCC]—primarily responsible for designating ETCs. And States have vigorously exercised their oversight authority to combat waste, fraud, and abuse in the Lifeline program. . . . States have also conducted *further investigations* of ETCs for which the FCC first identified compliance issues. . . . States have also filtered out ineligible carriers by *refusing designations* to those with substandard services and weeded out bad actors by *revoking designations* for unlawful practices. . . . States have also *performed audits*, [and] *addressed consumer complaints* . . . . In doing all this, states have brought to bear personnel and resources far greater than the [FCC] alone could offer.”<sup>113</sup>

“By contrast, Congress cast the [FCC] in a supporting role. For its part, the [FCC] merely designates carriers where states are ill suited to do so—for example, where states lack jurisdiction . . . . For the two decades since Congress passed the Telecommunications Act of 1996, this is how the [FCC] understood its role.”<sup>114</sup>

**2011 Transformation Order (FCC 11-161) (2011)** – “[I]f a state commission determines . . . that an ETC did not meet its [high-cost] speed or build-out requirements for the prior year, a state commission should *refuse to certify* that support is being used for the intended purposes.”<sup>115</sup>

**2005 ETC Order (FCC 05-46) (2005)** – “We decline to mandate that state commissions adopt our requirements for ETC designations. Section 214(e)(2) of the Act gives states the primary responsibility to designate ETCs and prescribes that all state designation decisions must be consistent with the public interest, convenience, and necessity. We believe that section 214(e)(2) demonstrates Congress’s intent that *state commissions evaluate local factual situations in ETC cases and exercise discretion in reaching their conclusions regarding the public interest, convenience and necessity, as long as such determinations are consistent with federal or other state law*. States that exercise jurisdiction over ETCs should apply these requirements in a manner that is consistent with section 214(e)(2) of the Act. Furthermore, *state commissions*, as the entities most familiar with the service area for which ETC designation is sought, *are particularly well-equipped to determine their own ETC eligibility requirements*. . . . *[S]tate commissions will continue to maintain the flexibility to impose additional eligibility requirements in state ETC proceedings, if they so choose.*<sup>116</sup>

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<sup>112</sup> 47 C.F.R. § 54.314(a).

<sup>113</sup> FCC 19-111, para. 28 (emphasis added).

<sup>114</sup> *Id.*, para. 29.

<sup>115</sup> FCC 11-161, para. 612 (emphasis added).

<sup>116</sup> *Id.*, para. 61 (emphasis added).



**F. Adoption of the OAG’s Recommended RDOF Phase I ETC Obligations Is Not a Barrier to Broadband Development.**

The OAG supports increased broadband deployment and wants broadband to reach all of Minnesota’s rural areas. However, High Cost Program support exists for the benefit of rural consumers, not to solidify a company’s market position or increase its ability to compete in the broadband market generally. If the Commission adopts an obligation to ensure that an RDOF Phase I ETC is using its High Cost Program support only for the provision, maintenance, and upgrading of the facilities and services for which the support is intended,<sup>117</sup> the impact of that condition on broadband development is irrelevant. If an ETC feels the obligations adopted by the Commission are too onerous, it has a simple solution; it can forgo High Cost Program support.

The obligations proposed by the OAG in this docket amount to two pages or less of information per year for the next two years. The OAG’s recommended RDOF Phase I ETC obligations cannot credibly be characterized as a barrier to broadband deployment in Minnesota.

Moreover, the “barrier to broadband deployment” argument has been rejected by the FCC and the Commission should reject it here.

**Fifth Report and Order (FCC 19-111) (2019)** – “[T]he 2016 Lifeline Order’s decision to preempt states from designating Lifeline Broadband Provider ETCs was unlawful. *This preemption rested largely on the ground that allowing state commissions to designate those ETCs would hinder the goals of federal universal service and dampen broadband competition. [The FCC] disagree[s] with both justifications and find[s] that this preemption analysis was otherwise flawed in several respects.*”<sup>118</sup>

“As an initial matter, no conflict with federal law justifies preemption. . . . [W]hile Congress established the goal of promoting broadband deployment in section 254(b), it also placed the primary responsibility for designating ETCs on state commissions in section 214(e)(2). *Read together, these provisions establish that section 254(b) seeks to promote broadband deployment to the extent possible within the state-focused designation process set forth in section 214.* Disregarding section 214(e)(2), the 2016 Lifeline Order found a purported ‘conflict[]’ between state designation of Lifeline Broadband Providers and the [FCC]’s implementation of the goals of section 254(b). *But this ‘conflict’ assumes, without explanation, that the relevant goal under section 254(b) is promoting broadband deployment in the abstract, unconstrained by the state-focused designation process mandated by section 214. [The FCC] find[s] that no such conflict exists, and that the principles listed in section 254(b) may not lawfully be construed in a manner that would ignore or override other statutory provisions, including the state-focused framework of section 214(e).*”<sup>119</sup>

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<sup>117</sup> 47 U.S.C. § 254(e); 47 C.F.R. § 54.314(a).

<sup>118</sup> FCC 19-111, para 47 (emphasis added).

<sup>119</sup> *Id.*, para. 48 (emphasis added).

**Restoring Internet Freedom Order (FCC 17-166) (2018)** – “[W]e conclude that reclassification of broadband Internet access service from Title II to Title I is likely to increase ISP investment and output.”<sup>120</sup>

“We anticipate that the beneficial effects of our decision today to restore the classification of broadband Internet access service to an information service will be particularly felt in rural and/or lower-income communities, giving smaller ISPs a stronger business case to expand into currently unserved areas. . . . We anticipate that returning broadband Internet access service to a light-touch regulatory framework will help further the [FCC]’s statutory imperative to ‘encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans’ by helping to incentivize ISPs to expand coverage to underserved areas.”<sup>121</sup>

“We conclude that a return to Title I classification will facilitate critical broadband investment and innovation by removing regulatory uncertainty and lowering compliance costs.”<sup>122</sup>

**2011 Transformation Order (FCC 11-161) (2011)** – “The ‘telecommunications market’ – *which includes interconnected VoIP and by statutory definition is broader than just telecommunications services* – will be more competitive, and thus will provide greater benefits to consumers, as a result of our decision to support broadband networks, regardless of regulatory classification.”<sup>123</sup>

“Under our approach, federal support will not turn on whether interconnected VoIP services or the underlying broadband service falls within traditional regulatory classifications under the Communications Act. Rather, our approach focuses on accelerating broadband deployment to unserved and underserved areas, and allows providers to make their own judgments as to how best to structure their service offerings in order to make such deployment a reality.”<sup>124</sup>

**G. An ETC Could Face A Variety of Penalties for Non-compliance If the Commission Adopts the OAG’s Recommended RDOF Phase I ETC Obligations in This Proceeding.**

An ETC could face a variety of penalties for non-compliance if the Commission adopts the OAG’s recommended RDOF Phase I ETC obligations in this proceeding.

States have the authority to deny, revoke, or rescind an ETC designation. However, ETC designation denial and revocation are not the only options available to the Commission and, for good reason (i.e., encouraging the flow of federal Universal Service support into the state), they may not be the Commission’s first choice. The Commission could also consider non-compliance actions that include requiring compliance filings, directly addressing consumer complaints,

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<sup>120</sup> FCC 17-166, para 98.

<sup>121</sup> *Id.*, para 106.

<sup>122</sup> *Id.*, para. 20.

<sup>123</sup> *Id.*, para. 68 (emphasis added).

<sup>124</sup> *Id.*, para. 69.

conducting its own audits and investigations, notifying the FCC of rule violations, and/or recommending High Cost Program support reductions.

**2011 Transformation Order (FCC 11-161) (2011)** – “[A]s the Joint Board noted, *state commissions possess the authority to rescind ETC designations for failure of an ETC to comply with the requirements of section 214(e) of the Act or any other conditions imposed by the state.*”<sup>125</sup>

“Consistent with this federal framework, *state commissions may require the submission of additional information* that they believe is necessary to ensure that ETCs are using support consistent with the statute and our implementing regulations, so long as those additional reporting requirements do not create burdens that thwart achievement of the universal service reforms set forth in this Order.”<sup>126</sup> (Ability to require compliance filings)

“[C]onsistent with the *partnership between the [FCC] and the states* to preserve and enhance universal service, and our recognition that states will continue to be the first place that consumers may contact regarding consumer protection issues, *we encourage states to bring to our attention issues and concerns about all carriers operating within their boundaries . . . . Through such collaborative efforts, we will work together to ensure that consumer interests are appropriately protected.*”<sup>127</sup> (Notify the FCC of rule violations)

“[W]e expect a rigorous examination of the factual information provided in the annual section 54.313 reports prior to issuance of the annual section 254(e) certifications. . . . We expect that states . . . will use the information reported in April of each year for the prior calendar year in determining whether they can certify that carriers’ support has been used and will be used for the intended purposes. In light of the public interest obligations we adopt in this Order, a key component of this certification will now be that support is being used to maintain and extend modern networks capable of providing voice and broadband service. Thus, for example, if a state commission determines, after reviewing the annual section 54.313 report, that an ETC did not meet its speed or build-out requirements for the prior year, *a state commission should refuse to certify that support is being used for the intended purposes.* In conjunction with such review, to the extent the state has a concern about ETC performance, *we welcome a recommendation from the state regarding prospective support adjustments or whether to recover past support amounts.*”<sup>128</sup>

**Fifth Report and Order (FCC 19-111) (2019)** – “Congress made states—not the [FCC]—primarily responsible for designating ETCs. And States have vigorously exercised their oversight authority to combat waste, fraud, and abuse in the Lifeline program. In some cases, states have been the first to identify waste, fraud, and abuse by ETCs—the Hawaii Public Utilities Commission first identified the issues with Blue Jay’s overclaims of Tribal subscribers, and the Oklahoma Corporation Commission ‘first identified fraudulent funding requests from Icon Telecom.’ More recently, an apparent violation of the [FCC]’s

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<sup>125</sup> FCC 11-161, n.999 (emphasis added).

<sup>126</sup> *Id.*, para. 574 (emphasis added).

<sup>127</sup> *Id.*, para 611 (emphasis added).

<sup>128</sup> *Id.*, para 612 (emphasis added).

non-usage rule was initially uncovered by an *investigation* by the Oregon Public Utility Commission. *States have also conducted further investigations of ETCs for which the FCC first identified compliance issues.* For example, in 2013, following the consent decree resolving the [FCC]’s investigation of Lifeline reseller TerraCom regarding intracompany duplicate subscribers, the Indiana Utility Regulatory Commission *conducted its own investigation* of TerraCom and identified instances of waste and abuse. *States have also filtered out ineligible carriers by refusing designations to those with substandard services and weeded out bad actors by revoking designations for unlawful practices.* Most recently, in May 2019, the Illinois Commerce Commission (ICC) *denied wireless reseller Q Link LLC’s request for a Lifeline-only ETC designation.* The ICC cited Q Link’s ‘inability to provide accurate, consistent and reliable information’ as ‘reason enough for it to deny Q Link’s request for ETC designation,’ and found that Q Link ‘failed to demonstrate it has the financial and technical capability to provide service in its requested service areas.’ *States have also performed audits [and] addressed consumer complaints . . . . In doing all this, states have brought to bear personnel and resources far greater than the [FCC] alone could offer.”*<sup>129</sup>

**2005 ETC Order (FCC 05-46) (2005)** – “[I]f a state commission believes that high-cost support is being used by an ETC in a manner that is inconsistent with Section 254 of the Act, the state commission *may decline to file an annual certification or may withdraw an ETC’s designation, which would ensure that [federal Universal Service] funds are no longer distributed to the ETC.*”<sup>130</sup>

## V. OTHER STATES ADOPT STATE-SPECIFIC OBLIGATIONS FOR FEDERAL UNIVERSAL SERVICE ETCs.

The Notice asks for information on other states’ approaches to the ETC regulation. As illustrated in the non-exhaustive list below, other states adopt state-specific obligations for federal Universal Service ETCs. At least one of the states discussed below has actively declined to recertify a provider’s ETC status.

California – requires the submission of an application for a Certificate of Convenience and Necessity.<sup>131</sup>

Hawaii – the Hawaiian Public Utilities Commission has declined to recertify Sandwich Isles Communications as an ETC since 2015, making it ineligible for RDOF High Cost support.<sup>132</sup>

Oklahoma – holds hearings before Administrative Law Judges on the merits of ETC applications.<sup>133</sup>

<sup>129</sup> FCC 19-111, para 28 (emphasis added).

<sup>130</sup> FCC 05-46, para 62 (emphasis added).

<sup>131</sup> *In re the Rural Digital Opportunity Fund Auction (Auction 904)*, AU Docket No. 20-34 et al., Letter Response at 1, <https://www.neca.org/docs/default-source/wwpdf/public/62321capuc.pdf> (June 22, 2021).

<sup>132</sup> FCC 20-5, n.26.

<sup>133</sup> *In the Matter of LTD Broadband, LLC*, AU Docket No. 20-34 et al., Response of the Public Utility Division of the Oklahoma Corporation Commission to the Petition of LTD Broadband, LLC for Waiver of Section 54.804(B)(5) of the Commission’s Rules at 3, <https://www.neca.org/docs/default-source/wwpdf/public/62221ltd.pdf> (June 21, 2021).

Mississippi – requires interconnected VoIP and broadband providers to submit an informational tariff at least 30 days before an ETC offers service within its ETC-designated areas. The tariff must outline the ETC’s regulatory contact information, customer service contact, terms and conditions, and Lifeline programs. Changes to the tariff must be filed at least seven days before the changes take effect.<sup>134</sup>

Wisconsin – requires interconnected VoIP providers to register with the Wisconsin Public Service Commission, explain whether the provider relies primarily or exclusively on Lifeline customers, and provide a description, and the status of, any FCC enforcement action involving the provider.<sup>135</sup>

In addition, NARUC actively advocates to preserve the federal-state ETC partnership. In a June 2020 letter that it filed in an FCC oversight hearing, NARUC explained why continuation of the federal-state partnership remains efficient and necessary, stating that:

Anyone can certainly understand why a carrier seeking a subsidy to provide service would want to limit and constrain oversight of (1) how that taxpayers subsidy is expended to rollout infrastructure, as well as (2) the quality of service provided using that subsidy (as by definition, the areas receiving subsidies will not support any competing services/competition to discipline the provider). . . . *Congress has always recognized that universal service is a shared obligation between states and the federal government. That federal-state partnership is vital to assure efficient expenditures of state and federal tax payer dollars to subsidize both carriers and consumers.*<sup>136</sup>

In the same letter, NARUC advocated for the preservation of the federal-state partnership, asserting that “[t]he current procedures for possible designation and dual oversight of carriers that can receive federal subsidies is crucial to protect both taxpayer expenditures and the constituents served by those expenditures.”<sup>137</sup>

The press release accompanying the letter emphasized the importance of the states’ role in ferreting out waste, fraud, and abuse in federal Universal Service. Specifically, it asserted that one “benefit in maintaining state watchdogs is that *responses to consumer complaints and performing audits are better managed at the state level.*”<sup>138</sup> The press release also addressed the states’ role

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<sup>134</sup> *In the Matter of First Light Fiber, LLC*, Docket No. 2021-UA-012, Recommended Order at 13, para. 3, [https://www.psc.state.ms.us/InSiteConnect/InSiteView.aspx?model=INSITE\\_CONNECT&queue=CTS\\_ARCHIVE\\_Q&docid=658497](https://www.psc.state.ms.us/InSiteConnect/InSiteView.aspx?model=INSITE_CONNECT&queue=CTS_ARCHIVE_Q&docid=658497) (Apr. 5, 2021).

<sup>135</sup> Wisconsin PSC Website, Eligible Telecommunications Carriers (ETCs), <https://psc.wi.gov/Pages/ForUtilities/Telecom/AnnualFilingRequirementETCs.aspx> (last visited Nov. 16, 2021).

<sup>136</sup> Letter from B. Presley, NARUC President, to the Honorable Roger Wicker, Chairman, Senate Committee on Commerce, Science & Transportation et al. re Continuing the State-Federal Universal Service Partnership – Keeping State Cops on the Beat at 3, <https://pubs.naruc.org/pub/3C6A4241-155D-0A36-3135-BE1D0CA0BED1> (June 30, 2020) (emphasis in original and added).

<sup>137</sup> *Id.* at 4.

<sup>138</sup> Press Release, *NARUC Addresses FCC Commissioner O’Rielly’s Comments on State Oversight of ETCs in Letter to Congress*, <https://www.naruc.org/about-naruc/press-releases/naruc-addresses-fcc-commissioner-o-rielly-s-comments-on-state-oversight-of-etcs-in-letter-to-congress/> (June 30, 2020) (emphasis added).

in monitoring interconnected VoIP and broadband providers noting that for ETC-designated providers, “such as [VoIP] telephone service (and often broadband), states will, likewise, oversee those carriers’ expenditures to ensure that they actually meet RDOF broadband deployment commitments.”<sup>139</sup>

A NARUC Lifeline letter *signed by each member of this Commission* similarly emphasizes the critical nature of the federal-state ETC partnership, explaining that:

Neither Congress nor the FCC is going to hand out billions and eschew any carrier accountability. But, by targeting the ETC designation process, the carriers hope to eliminate the current default State role in that procedure. That in turn will eliminate any state oversight of the service provided – oversight which heretofore, has assured expenditures that benefit the intended recipients and not carriers’ bottom lines.<sup>140</sup>

## **VI. A HIGH COST PROGRAM ETC DOES NOT NEED TO SUBMIT LIFELINE PLAN INFORMATION TO USAC AT THE TIME OF DESIGNATION.**

During one of the RDOF Phase I ETC designation agenda meetings, Commissioner Tuma asked whether the Commission should require an RDOF Phase I ETC to submit information to USAC at the time of ETC designation demonstrating that it has a Lifeline plan that meets the criteria set forth in FCC Rule 54.401(d). The OAG reviewed FCC materials pertinent to Commissioner Tuma’s question that included the *RDOF Order* and auction materials, the USAC RDOF webpage, the Lifeline waiver orders, and the Lifeline orders generally. The OAG’s review of the FCC’s materials revealed inconsistent FCC guidance on the question, as described below:

- The *RDOF Order* and auction materials contain no specific reference to the rule but the order states that RDOF recipients must comply with all relevant Lifeline rules and cites FCC Rules 54.400 *et seq.*<sup>141</sup>
- USAC’s RDOF Page does not discuss the rule.<sup>142</sup>
- The rule has not been waived; the Lifeline waiver orders do not reference the rule.<sup>143</sup>
- There are two Lifeline orders that specifically reference the rule.
  - The first is a 2000 order that did not require provision of a Lifeline plan at the time of designation.<sup>144</sup>

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<sup>139</sup> *Id.*

<sup>140</sup> Letter from various NARUC Members to Various U.S. Senators and Representatives re Congress Must Protect Low-Income Americans at 2, <https://pubs.naruc.org/pub/5F8CABFA-1866-DAAC-99FB-BB3F016126BF> (Apr. 19, 2021).

<sup>141</sup> FCC 20-5, n.134.

<sup>142</sup> USAC Website, Rural Digital Opportunity Fund, <https://www.usac.org/high-cost/funds/rural-digital-opportunity-fund/> (last visited Nov. 16, 2021).

<sup>143</sup> USAC Website, COVID-19 Response, <https://www.usac.org/lifeline/resources/covid-19-response/> (last visited Nov. 16, 2021) (providing links to Lifeline waiver orders).

<sup>144</sup> *In the Matters of Federal-State Joint Board on Universal Service et al.*, CC Docket No. 96-45, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, FCC 00-208, n.228 (2000).

- The second is a 2012 order that says a Lifeline plan must be submitted *prior to receiving Lifeline reimbursement*<sup>145</sup> but contains an amended rule that requires the *provision of the Lifeline plan at the time of designation*.<sup>146</sup>

Because the FCC's orders, rules, and other materials provided seemingly conflicting guidance, the OAG contacted the FCC on an informal, non-binding basis to obtain an answer to Commissioner Tuma's question. Per the FCC, in practice, the Lifeline plan required by FCC Rule 54.401(d) must be provided to USAC prior to the *receipt* of Lifeline reimbursement but *does not* need to be submitted to USAC at the time of ETC *designation*.<sup>147</sup> USAC confirmed that it administers the Lifeline Program consistent with the FCC's "in-practice" guidance.<sup>148</sup>

Thus, the Lifeline plan required by FCC Rule 54.401(d) must be provided to USAC prior to the receipt of Lifeline reimbursement but does not need to be submitted to USAC at the time of ETC designation.

## CONCLUSION

The OAG concludes that the Commission has the authority to impose obligations on all RDOF Phase I ETCs as long as the obligations preserve and advance federal Universal Service and do not conflict with the FCC's federal Universal Service rules. Because the OAG's proposed

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<sup>145</sup> *In the Matter of Lifeline and Link Up Reform and Modernization et al.*, WC Docket No. 11-42 et al., Report and Order and Further Notice of Proposed Rulemaking, FCC 12-11, n.134 (2012).

<sup>146</sup> *Id.* at Appendix A, para. 8.

<sup>147</sup> Telephone conference between K. Berkland, Minnesota Assistant Attorney General, J. Gullikson, Public Utility Rates Analyst, Minnesota Department of Commerce, and various FCC personnel (May 13, 2021); Email from K. Berkland, Minnesota Assistant Attorney General to N. Laughner, Attorney Advisor, FCC (May 13, 2021) (memorializing May 13, 2021 telephone conference).

<sup>148</sup> Email from E. Pertsevoi, Senior Program Manager, High Cost Program, USAC, to K. Berkland, Minnesota Assistant Attorney General (May 12, 2021).

RDOF Phase I ETC obligations will preserve and advance federal Universal Service and protect rural Minnesotans, the Commission should adopt them in full.

Dated: November 19, 2021

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