

**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 (RDOF) Grant Winners

DOCKET NOS. P-999/CI-21-86 et al.

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

INTRODUCTION

The Office of the Attorney General—Residential Utilities Division (“OAG”) respectfully submits to the Minnesota Public Utilities Commission (“Commission”) proposed obligations for companies that seek eligible telecommunications carrier (“ETC”) designations in Minnesota to obtain federal Universal Service Rural Digital Opportunity Fund Phase I (“RDOF” or “RDOF Phase I”) support.¹ With the proper protections, RDOF Phase I support has the potential to significantly decrease the broadband gap for rural Minnesotans. To help bridge Minnesota’s digital divide, the OAG proposes RDOF Phase I ETC obligations that advance federal Universal Service goals and protect rural Minnesotans. Assuming the Commission adopts the OAG’s proposed obligations, the OAG recommends ETC designation for most of the companies that seek it from the Commission.²

To provide context for the OAG’s proposed ETC obligations, the Background section of these Comments reviews the Commission’s role in the RDOF process, the purpose of the RDOF generally, and the RDOF auction structure. It also provides a summary of current federal and state ETC regulation. The Jurisdiction section examines the Commission’s ETC authority and concludes that the Commission may impose RDOF Phase I ETC obligations that are consistent

¹ The Commission established Docket No. P-999/CI-21-86 as the overarching docket for companies seeking RDOF Phase I ETC designations. To streamline the review process, the OAG makes broad ETC recommendations in the overarching docket, instead of tailored recommendations in each individual ETC docket. To ensure each company receives the proper notice, however, the OAG will file a copy of its Comments in each company-specific docket. A list of the companies seeking ETC status and their individual docket numbers is provided as Attachment A to this filing.

² The OAG does not recommend ETC designation for Consolidated Communications, Inc., Fond du Lac Communications, Inc., and Windstream Services, LLC. To the OAG’s knowledge, these companies did not file an ETC petition with the Commission. There is no need for the OAG to make an ETC recommendation for Aspire Networks 2, LLC (“Aspire”). This company withdrew its petition for ETC designation on March 1, 2021. *See generally In the Matter of Petition of Aspire Networks 2, LLC for Designation as an Eligible Telecommunications Carrier to Receive Rural Digital Opportunity Fund Support*, Docket No. P-7050/M-21-32, Letter (Mar. 1, 2021). Under delegated authority, the Commission’s Executive Secretary approved the withdrawal on March 17, 2021. Docket No. P-7050/M-21-32, NOTICE AND ORDER APPROVING PETITION TO WITHDRAW FILING at 1 (Mar. 17, 2021).

RDOF Phase I support.⁵³ Similarly, incumbent ETCs in areas with a new RDOF Phase I ETC must ensure that their voice telephony rates remain just and reasonable in their service areas and that they comply with the nondiscrimination obligations of sections 201 and 202 of the Act.⁵⁴

The Service Area Change does not preempt state-level regulations.⁵⁵ Price cap carriers must comply with state carrier of last resort obligations, even in service areas with a new RDOF Phase I ETC.⁵⁶ They must also comply with state regulations governing just and reasonable local rates, regardless of the presence of a new RDOF Phase I ETC.⁵⁷ Finally, in any service area that is not part of the Service Area Change, price cap carriers remain subject to their pre-existing ETC obligations unless or until they relinquish their ETC designations.⁵⁸

JURISDICTION

Having discussed the RDOF process and examined federal and state ETC regulation, this section of the OAG's Comments discusses the Commission's authority to impose obligations on companies seeking ETC designation in Minnesota.

IV. THE DESIGNATION AND OVERSIGHT OF FEDERAL UNIVERSAL SERVICE ETCs IS ACCOMPLISHED BY THE FEDERAL-STATE PARTNERSHIP.

Practically speaking, it would be impossible for the FCC to oversee the designation and federal Universal Service compliance of every ETC in every state. Accordingly, Congress has delegated ETC designation to the states, and the FCC has empowered states to monitor ETC compliance. An ETC-designating state may enact protections essential to advancing federal Universal Service goals and safeguarding consumer interests, as long as those protections do not conflict with the FCC's federal Universal Service rules. This is the federal-state ETC partnership.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*, para. 137 (“[P]rice cap carriers must continue to maintain existing voice service until they receive discontinuance authority under section 214(a) of the Act and section 63.71 of the [FCC’s] rules.”).

A. THE FEDERAL–STATE PARTNERSHIP EMPOWERS THE COMMISSION TO ADOPT ETC OBLIGATIONS NECESSARY TO PRESERVE AND ADVANCE THE GOALS OF FEDERAL UNIVERSAL SERVICE.

States play a critical role in the designation, recertification, and regulation of ETCs.⁵⁹ The FCC not only relies on,⁶⁰ but defers to,⁶¹ state commission expertise in the matter of ETC regulation. As long as a state’s ETC obligations advance federal Universal Service goals and do not conflict with the FCC’s ETC requirements, they constitute permissible regulation.⁶²

The FCC has explicitly recognized the state’s important role in advancing federal Universal Service goals through state adoption of ETC requirements that best reflect the circumstances at the local level:

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. . . . Consistent with our adoption of permissive federal guidelines for ETC designation, state commissions will continue to maintain the flexibility to impose

⁵⁹ See generally *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, FCC 05-46 (2005) (discussing in detail the state’s role in ETC designation and regulation) (“*2005 ETC Order*”); 47 C.F.R. § 54.314(a) (requiring states to file an annual ETC certification with USAC).

⁶⁰ See RDOF Auction Notice, para. 137 (“A high-cost ETC may also be subject to state-specific requirements imposed by the state that designates it as an ETC.”); *2005 ETC Order*, para. 25 (explaining that “[b]ecause most emergency situations are local in nature,” states may identify their own geographically-specific ETC requirements that are relevant for consideration).

⁶¹ See *RDOF Order*, n.26 (explaining that a state’s refusal to certify a company as an ETC made the company ineligible for High Cost Program support); *2011 Transformation Order*, paras. 15, 75, 82 (declining to preempt state carrier of last resort and voice requirements); *2005 ETC Order*, paras. 21 (deferring to states to determine what constitutes a “reasonable request” under state law), 30 (“As with the other requirements adopted in this Report and Order, state commissions that exercise jurisdiction over ETC designations may either follow the Commission’s framework or impose other requirements consistent with federal law to ensure that supported services are offered in a manner that protects consumers.”), 43 (acknowledging that the FCC and state public-interest analyses may diverge or reach different outcomes based on the area served).

⁶² See 47 U.S.C. § 254(f) (“A State may adopt regulations not inconsistent with the Commission’s rules to preserve and advance universal service.”).

additional eligibility requirements in state ETC proceedings, if they so choose.⁶³

States also play an important role in combating waste, fraud, and abuse in the federal Universal Service Programs. 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.”⁶⁴ The FCC’s ETC reporting and certification requirements reflect a “floor rather than a ceiling” for states and “state commissions may require the submission of additional information that they believe is necessary to ensure that ETCs are using support consistent with the [federal Universal Service] statute and [the] implementing regulations”⁶⁵

States have the authority to deny, revoke, or rescind an ETC designation.⁶⁶ “[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.”⁶⁷ Although a state has the power to revoke a company’s ETC status, such a remedy should not be invoked except in the most egregious circumstances and state commissions should first explore other alternatives to remedy concerns about an ETC’s performance.⁶⁸

B. THE COMMISSION’S AUTHORITY UNDER THE FEDERAL–STATE PARTNERSHIP EXTENDS TO RDOF PHASE I ETCs.

Both the FCC and RDOF applicants recognize that the Commission’s authority extends to RDOF Phase I ETCs.

The FCC explicitly adopted an ETC requirement for RDOF Phase I applicants.⁶⁹ It also renewed its commitment to the federal–state partnership.⁷⁰ Notably, the FCC upheld the “statutory role that Congress created for state commissions,” despite its awareness that “some interested parties may prefer not to become ETCs with all of the associated obligations.”⁷¹

⁶³ 2005 ETC Order, para. 61.

⁶⁴ 2011 Transformation Order, para. 568.

⁶⁵ *Id.*, paras. 31, 573–74 (explaining that the FCC’s certification and reporting framework does not “disturb the existing role of states in designating ETCs and in monitoring that ETCs within their jurisdiction are using universal service support for its intended purpose”).

⁶⁶ *Id.*, para. 1114 (seeking input on circumstances that have caused states to revoke ETC designations) & n.999 (citing the FCC’s 2005 ETC Order and affirming that “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*”) (emphasis added).

⁶⁷ 2005 ETC Order, para. 62. *See also* 2011 Transformation Order, para. 612 (“[I]f a state commission determines . . . 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.”).

⁶⁸ 2011 Transformation Order, para. 618.

⁶⁹ RDOF Order, para. 92.

⁷⁰ *See* RDOF Auction Notice, para. 135 & n.305 (acknowledging that states have the primary responsibility for ETC designation and directing applicants to paragraph 61 of the 2005 ETC Order).

⁷¹ RDOF Order, para. 92.

At least two companies in Minnesota have expressly acknowledged the state's RDOF Phase I ETC authority. In the federal RDOF proceeding, Frontier Communications argued that “the ETC designation process is the states’ opportunity to vet auction bidders and their service proposals.”⁷² And, Windstream Services, Inc. argued that the ETC requirement “ensure[s] that states . . . have authority to monitor a provider’s use of high-cost support and enforce the obligation to provide supported service.”⁷³

C. THE COMMISSION’S AUTHORITY UNDER THE FEDERAL–STATE PARTNERSHIP EXTENDS TO INTERCONNECTED VOIP ETCs.

Interconnected VoIP providers are subject to the Commission’s ETC authority, even if some applicants argue that the Commission may not impose conditions on them. As technology has evolved, so has the federal–state ETC partnership:

We recognize that [the] USF [is] . . . [a] hybrid state-federal system[], and it is critical to our reforms’ success that states remain key partners even as these programs evolve and traditional roles shift. Over the years, we have engaged in ongoing dialogue with state commissions on a host of issues, including universal service. 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 know that states share our interest in extending voice and broadband service, both fixed and mobile, where it is lacking to better meet the needs of their consumers. . . . 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. We also recognize that federal and state regulators must reconsider how legacy regulatory obligations should evolve as service providers accelerate their transition from the Public Switched Telephone Network (PSTN) to an all IP world.⁷⁴

While the states’ regulatory powers over interconnected VoIP providers have recently been restricted,⁷⁵ these restrictions do not apply to the role that states were explicitly delegated in designating and monitoring ETCs. 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.⁷⁶ That holding is distinguishable from this proceeding, which involves the explicit delegation of federal regulatory authority to a state enforcer.

⁷² *Id.*, n.228 (citing and quoting Frontier Comments at 12–13).

⁷³ *Id.*, n.263 (citing and quoting Windstream Reply at 18).

⁷⁴ 2011 *Transformation Order*, para. 15.

⁷⁵ See generally *Charter Advanced Servs. v. Lange*, 903 F.3d 715 (8th Cir. 2018) (“*Charter Order*”).

⁷⁶ *Id.* at 717 (explaining that the Minnesota Department of Commerce filed a complaint alleging the violation of various state laws when Charter sought to move its interconnected VoIP customers to separate company to avoid state regulation).

State oversight of interconnected VoIP ETCs in the federal Universal Service context is not a matter of state regulation. Rather, it is authority delegated to the states by *Congress* and the *FCC* to monitor the receipt and use of *federal* money.⁷⁷ States impose ETC conditions to discharge their FCC-mandated duty to advance *federal* Universal Service goals and protect the at-risk consumers who receive *federal* Universal Service benefits.⁷⁸ This is the state performing a regulatory function on behalf of the *federal* government; this is not state regulation *per se*.

Moreover, there is no “federal policy of nonregulation” when it comes to interconnected VoIP and federal Universal Service support.⁷⁹ Even though the FCC has declined to classify interconnected VoIP as either a telecommunications service or an information service,⁸⁰ it has made clear that, as recipients of federal Universal Service support, interconnected VoIP providers are governed by sections 214 and 254 of the Act regardless of their regulatory classification.⁸¹

In addition, the FCC actively regulates interconnected VoIP providers in the federal Universal Service space.⁸² In its *2011 Transformation Order*, the FCC included interconnected VoIP in its technology-neutral “voice telephony” definition.⁸³ Additionally, the use of interconnected VoIP by broadband providers to meet their federal Universal Service voice telephony requirements was contemplated in both the CAF and RDOF orders.⁸⁴ Through it all,

⁷⁷ 47 U.S.C. § 214(e)(2); 47 U.S.C. § 254(f). The *Charter Order* would not gain precedential value in the federal Universal Service context even if the federal policy of nonregulation applied. As Supreme Court Justice Thomas reasoned, “[i]t is doubtful whether a federal policy—let alone a policy of nonregulation—is ‘Law’ for purposes of the Supremacy Clause. Under our precedent, such a policy likely is not final agency action because it does not mark ‘the consummation of the agency’s decisionmaking process’ or determine Charter’s ‘rights or obligations.’ . . . Giving pre-emptive effect to a federal agency policy of nonregulation thus expands the power of both the Executive and the Judiciary. It authorizes the Executive to make ‘Law’ by declining to act, and it authorizes the courts to conduct ‘a freewheeling judicial inquiry’ into the facts of federal nonregulation, rather than the constitutionally proper ‘inquiry into whether the ordinary meanings of state and federal law conflict[.]’” (internal citations omitted). *Lipschultz v. Charter Advanced Servs.*, 205 L. Ed. 2d 262, **7–8 (2019) (Thomas, J., dissenting) (petition for cert. denied).

⁷⁸ See generally section IV, subsections A and B of these Comments.

⁷⁹ *Charter Order* at 718–19.

⁸⁰ See *id.* at 718 & nn.2–4 (acknowledging that the FCC has not yet resolved the overarching classification issue of interconnected VoIP); see also *In the Matter of Universal Service Contribution Methodology et al.*, WC Docket No. 06-122 et al., Further Notice of Proposed Rulemaking, FCC 12-46, n.19 (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.”).

⁸¹ *2011 Transformation Order*, para. 63 (“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.”) & n.67 (“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.”).

⁸² See *id.*, paras. 61–69 (discussing the interplay between federal Universal Service regulation and interconnected VoIP).

⁸³ See *id.*, paras. 77–78 (including voice services provided over broadband networks in the definition of voice telephony services).

⁸⁴ See *RDOF Order*, para. 43 (“Section 254 of the [Act] gives the Commission the authority to support telecommunications services, which the Commission has defined as ‘voice telephony service.’ The Commission made clear when it adopted the standalone voice requirement as a condition of receiving [CAF] support in 2011 that the

the FCC has upheld the authority of states to designate and regulate federal Universal Service ETCs.⁸⁵

The delegation of authority from Congress, as well as the FCC's continued utilization of the federal-state partnership, demonstrates that Commission-mandated ETC requirements are not only permissible, they are compulsory. Any other outcome would compel the Commission to grant ETC status while stripping it of any enforcement power or ability to redress federal Universal Service violations. For the limited purpose of discharging its duty under the federal-state partnership, the Commission may require RDOF Phase I interconnected VoIP providers to comply with Commission-mandated ETC requirements.

ANALYSIS

The Commission's desire to maximize broadband support for Minnesotans is laudable. The State should move as quickly as possible to connect all its citizens and communities to fast, reliable broadband. With this goal in mind, it is vital for the Commission to adopt strong ETC obligations to ensure that rural Minnesotans experience the full benefits of RDOF Phase I support.

The final sections of the OAG's Comments focus on existing and proposed ETC obligations for RDOF Phase I applicants seeking an ETC designation in Minnesota. Sections V and VI discuss the current FCC and Commission ETC requirements for High Cost Program ETCs that are applicable to RDOF Phase I applicants. Section VII contains OAG-proposed obligations for Minnesota RDOF Phase I ETCs based on its experiences in recent Commission ETC-related dockets. Section VIII concludes with a summary of the obligations that the Commission should require for RDOF Phase I applicants seeking an ETC designation in Minnesota.

V. AN ETC MUST COMPLY WITH CERTAIN FEDERAL UNIVERSAL SERVICE OBLIGATIONS TO RECEIVE RDOF PHASE I SUPPORT.

The FCC has established mandatory obligations that an ETC must comply with to receive, and continue receiving, federal Universal Service support. These obligations advance federal Universal Service goals and safeguard consumer interests. Lack of knowledge of the FCC's ETC requirements does not excuse noncompliance; ETCs are expected to familiarize themselves with the FCC rules and orders that apply to their federal Universal Service participation.⁸⁶

definition of the supported service, voice telephony service, is technologically neutral, allowing ETCs to provision voice service over many platforms. . . . The record does not show that these facts have changed, and voice telephony is still the supported service. Therefore, we require all ETCs receiving Rural Digital Opportunity Fund support to provide standalone voice service meeting the reasonable comparability requirements in the areas in which they receive support.”); *2011 Transformation Order*, para. 80 (“As a condition of receiving [CAF] support, we require ETCs to offer voice telephony as a standalone service throughout their designated service area. . . . ETCs may use any technology in the provision of voice telephony service.”).

⁸⁵ See, e.g., RDOF Auction Notice, para. 135 (acknowledging that states have the primary responsibility for ETC designation) & n.305 (directing RDOF Phase I applicants to the *2005 ETC Order*).

⁸⁶ See 47 C.F.R. § 0.406 (“Persons having business with the Commission should familiarize themselves with those portions of its rules and regulations pertinent to such business.”); see also RDOF Auction Notice, para. 137 & n.313 (requiring applicants to familiarize themselves with applicable ETC requirements and conduct the due diligence necessary to comply with ETC obligations).