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.

REPLY COMMENTS OF THE OFFICE OF THE ATTORNEY GENERAL

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authority or that refuse to comply with its ETC requirements. This is true for *all ETCs*, not just broadband Internet access and interconnected VoIP ETCs. An overview of the Commission's ETC revocation authority and some options for the Commission to remedy ETC non-compliance are discussed in section I.C below.

The OAG is agnostic about which companies the FCC selects to receive RDOF Phase I support as long as they pass the FCC's detailed evaluation process and comply with the FCC's, and the Commission's, ETC obligations. In this case, however, claims that LTD cannot fulfill its RDOF Phase I requirements are speculative and based on incomplete information. The FCC has more technical and financial data about LTD than the OAG does, and the FCC is still reviewing LTD's RDOF Phase I long-form application. A denial of LTD's ETC expansion request at this time would prematurely delay the flow of broadband deployment dollars to Minnesota. Section I.D of the OAG's Reply Comments discuss in detail why the OAG continues to recommend approval of LTD's petition for ETC expansion, as long as the Commission adopts the same ETC obligations for LTD that it adopts for the other RDOF Phase I petitioners.

A. The Commission Evaluates Minnesota Non-Certificated ETC Designation Requests Pursuant to Federal Universal Service Statutes, Rules, Orders, Auction Materials, and Criteria Adopted in Its Own ETC Orders.

The OAG agrees with the MTA that the Commission evaluates ETC designation and expansion requests using, among other things, consumer protection, the Lifeline advertising, and public interest criteria.[14] However, the Minnesota Administrative Rules cited by the MTA do not apply to Minnesota non-certificated companies like LTD. Instead, the Commission evaluates the ETC designation and expansion requests of Minnesota non-certificated companies using the criteria set forth in sections 214 and 254 of the Communications Act of 1934, as amended (the "Act"), the FCC's federal Universal Service rules, codified at 47 C.F.R. 54, the FCC's orders, and the applicable FCC auction materials. At the state-level, the Commission evaluates ETC designation and expansion requests from Minnesota non-certificated companies using ETC criteria adopted in prior Commission orders, and proposed ETC criteria from the current proceeding. This ETC designation framework is discussed in more detail below.

1. The OAG and the MTA agree that the Commission's ETC evaluation framework for broadband Internet access and interconnected VoIP providers includes sections 214 and 254 of the Act.

Sections 214 and 254 of the Act govern the designation of ETCs by states. Section 214(e)(1) requires a common carrier to obtain an ETC designation as a prerequisite to the receipt of federal Universal Service support;[15] to offer the services that are supported by the federal Universal Service support mechanisms under section 254(c) of the Act, either using its own facilities or a combination of its own facilities and the resale of another carrier's services;[16] and to

[14] MTA Comments at 2.
[15] 47 U.S.C. § 214(e)(1).
[16] *Id.* § 214(e)(1)(A).

advertise the availability of the services and their corresponding charges using media of general distribution.[17]

Section 214(e)(2) of the Act gives a state commission the authority, on its own motion or upon request, to designate a common carrier as an ETC if the common carrier meets the requirements of Section 214(e)(1) discussed above.[18] In doing so, the state commission must consider whether the designation is in the public interest:

> Upon request and *consistent with the public interest, convenience, and necessity*, the State commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an [ETC] for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of [section 214(e)(1)]. Before designating an additional [ETC] for an area served by a rural telephone company, the State commission shall find that the designation is *in the public interest*.[19]

Section 254(b) of the Act articulates the principles the FCC must use to preserve and advance federal Universal Service, including providing access to information services like broadband Internet access services and technologically-neutral voice telephony services like interconnected VoIP services:

> Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and *information services*, including interexchange services and advanced telecommunications and *information services*, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.[20]

The FCC may adopt any other principles it determines are "necessary and appropriate for the *protection of the public interest, convenience, and necessity*" and that are consistent with Chapter 254 of the Act.[21]

Section 254(c) of the Act gives the FCC the authority to redefine telecommunications services to "account for advances in telecommunications and *information technologies* and

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[17] *Id*. § 214(e)(1)(B).
[18] *Id*. § 214(e)(2).
[19] *Id*. (emphasis added).
[20] 47 U.S.C. § 254(b)(3) (emphasis added). In its *2011 Transformation Order*, the FCC included interconnected VoIP in its technology-neutral "voice telephony" definition. *See 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, paras. 77-78 (2011) (including voice services provided over broadband networks in the definition of voice telephony services) ("*2011 Transformation Order*").
[21] *Id*. § 254(b)(7) (emphasis added).

services."[22] When modifying the telecommunications services that are eligible for federal Universal Service support, the FCC considers, among other things "the extent to which such telecommunications services— . . . have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers; [and] . . . are *consistent with the public interest, convenience, and necessity*."[23]

Section 254(e) of the Act mandates that a carrier that receives federal Universal Service support use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended and to achieve federal Universal Service goals.[24] To ensure that the support is used properly and the federal Universal Service goals are achieved, "[a] State may adopt regulations not inconsistent with the [FCC]'s rules to preserve and advance universal service."[25]

2. The OAG and the MTA agree that the Commission's ETC evaluation framework for broadband Internet access and interconnected VoIP providers includes the FCC's federal Universal Service rules.

The FCC's federal Universal Service rules are codified at 47 C.F.R. § 54. The rules reiterate that a carrier that receives federal Universal Service support must use the support only for the provision, maintenance, and upgrading of the facilities and services for which the support is intended.[26] This includes use of the support for "investments in plant that can, either as built or with the addition of plant elements, when available, provide access to advanced telecommunications and *information services.*"[27]

The rules also require an ETC to provide the services for which it receives federal Universal Service support throughout its service area.[28] The rules further require that, with exceptions for certain price-cap carriers, an ETC must offer the supported services using either its own facilities, or a combination of its own facilities and the resale of another carrier's services.[29] An ETC may not offer federal Universal Service-supported services exclusively through the resale of another carrier's services.[30] An ETC must advertise the availability of the services and their corresponding charges using media of general distribution.[31]

The FCC's rules require an ETC that receives federal Universal Service High Cost Program ("High Cost Program" or "High Cost") support—like RDOF Phase I support—to provide voice telephony services that include:

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[22] *Id*. § 254(c)(1) (emphasis added). This section also gives the FCC the authority to modify the definition of the services that are eligible to receive federal Universal Service support based on recommendations from the Joint Board on Universal Service. *Id*. § 254(c)(2).
[23] *Id*. § 254(c)(1)(B), (D) (emphasis added).
[24] *Id*. § 254(e).
[25] *Id*. § 254(f).
[26] 47 C.F.R. § 54.7(a).
[27] *Id*. § 54.7(b) (emphasis added).
[28] *Id*. § 54.201(d).
[29] *Id*.
[30] *Id*. § 54.201(i).
[31] *Id*. § 54.201(d).

- Voice grade access to the public switched network *or its functional equivalent*;
- Minutes of use for local service provided at no additional charge;
- Access to emergency services provided by local government or other public safety organizations, such as 911 and enhanced 911, to the extent the local government has implemented such systems; and
- Toll limitation services to qualifying low-income consumers.[32]

Certain High Cost Program support recipients (those not receiving Connect America Fund Phase I frozen support) must offer broadband Internet access services in the areas where they receive High Cost support.[33] All High Cost Program support recipients must provide federal Universal Service Lifeline Program ("Lifeline Program" or "Lifeline") service.[34]

Additional federal Universal Service High Cost Program and Lifeline Program rules are set forth in subparts D (Universal Service Support for High Cost Areas) and E (Universal Service Support for Low-Income Consumers) of 47 C.F.R. 54.[35]

3. The Commission's ETC evaluation framework for broadband Internet access and interconnected VoIP providers includes FCC orders, and program- and auction- specific FCC materials.

Although the Act and the FCC's federal Universal Service rules reference telecommunications carriers, the FCC has extended federal Universal Service support to other types of service providers through its orders, and program- and auction-specific materials. For example, in 2011, the FCC expanded federal Universal Service support to include broadband networks capable of providing both voice and advanced services.[36] In doing so, it made clear that interconnected VoIP providers, and other providers of voice services over broadband networks, are subject to the FCC's authority, regardless of their regulatory classification.[37]

The same holds true for RDOF. From the start of the RDOF process, the FCC was clear that the auction was open to any applicant who could meet its short-form legal, technical, and financial requirements.[38] This includes applicants with less than two years of operational

[32] *Id*. § 54.101(a), (b) (emphasis added).
[33] *Id*. § 54.101(c).
[34] *See id*. § 54.101(d) (requiring all ETCs to comply with the Lifeline portion of the FCC's rules).
[35] *See generally id*. §§ 54.302-54.321 (High Cost) and §§ 54.400-54.423 (Lifeline).
[36] *2011 Transformation Order*, paras. 1, 15-16, 45.
[37] *See id.*, para. 63 (explaining that the FCC's federal Universal Service authority does not depend on whether interconnected VoIP services are telecommunications services or information services), n.67 (explaining that section 254 of the Act gives the FCC authority over interconnected VoIP services regardless of whether they are telecommunications services or information services), paras. 66-73 (establishing the FCC's authority to fund the deployment of broadband networks and citing the Notice of Inquiry in the *National Broadband Plan for Our Future* for the proposition that 'advanced telecommunications capability' *includes broadband Internet access*).
[38] Rural Digital Opportunity Fund Phase I Auction Scheduled for October 29, 2020, Notice and Filing Requirements and Other Procedures for Auction 904, AU Docket Nos. 20-34 et al., Public Notice, FCC 20-77, paras. 14, 27 (2020) ("Auction Notice").

experience in the provision of voice, broadband, and/or electric distribution or transmission services,[39] and providers of nascent technologies.[40] However, the FCC explicitly notified *all* RDOF participants that they are subject to its authority and governed by its federal Universal Service orders, rules, and other materials,

> The terms contained in the [FCC]'s rules, relevant orders, and public notices are generally applicable to all bidders. The [FCC] may amend or supplement the information contained in its public notices at any time and will issue public notices to convey any new or supplemental information to interested parties. . . . It is the responsibility of all applicants to remain current with all [FCC] rules and with all public notices pertaining to [the RDOF] auction.[41]

4. The Commission's ETC evaluation framework for broadband Internet access and interconnected VoIP providers includes the criteria from its prior orders and recommended criteria from the current proceeding.

The Minnesota Administrative Rules discussed by the MTA are *not* used to evaluate the ETC designation requests of Minnesota non-certified companies like LTD.[42] Instead, the ETC designation requests of Minnesota non-certificated companies are evaluated using the criteria set forth in the Commission's prior ETC orders, and recommended criteria in the current proceeding.[43] If the Commission wishes to adopt consumer protection and service quality standards for a Minnesota non-certificated company, it must do so explicitly, as part of the company's ETC designation or expansion order.[44] This is because Minnesota non-certified companies are not otherwise subject to the Commission's consumer protection and service quality rules.[45]

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[39] *Id.* at paras., 49, 55.

[40] *See id.*, para. 117 (rejecting arguments that nascent technologies should be categorically banned from receiving RDOF support).

[41] *Id.*, para. 8. *See also id.*, paras. 7 (directing RDOF applicants to familiarize themselves with the FCC's general, High Cost, and RDOF rules), 14 (requiring auction participants to comply with the provisions of the public notice and applicable FCC rules), 117 (citing 47 C.F.R. § 54.7, noting that all ETCs are required to use support for its intended purpose, and explaining that all applicants are required to build and operate facilities in accordance with RDOF auction obligations and the FCC's rules generally), 137 (directing all RDOF applicants to familiarize themselves with the FCC's ETC requirements and to conduct due diligence to ensure they can meet the requirements).

[42] MTA lists Minn. R. 7811.1400 (for "Small Local Providers") and Minn. R. 7812.1400 (for "Large Local Providers") as the applicable rules to evaluate LTD's ETC designation petition. MTA Comments at 2-3. These rules only apply to companies that are regulated pursuant to a Commission-issued certificate of authority. *See* Minn. R. 7811.0500 (listing the general certification requirements for small local providers); Minn. R. 7812.0500 (listing the general certification requirements for large local providers).

[43] *See, e.g., In the Matter of Assist Wireless's Petition for ETC Designation in Minnesota*, Docket No. P-6978/M-17-213, ORDER GRANTING PETITION FOR ETC WITH CONDITIONS at 4-7 (Nov. 15, 2017) ("*Assist Order*"); Docket No. P-6978/M-17-213, Comments of the Minnesota Department of Commerce at 1 (Aug. 14, 2017).

[44] *See, e.g., Assist Order* at 4-7.

[45] For example, Minn. Stat. § 237 (Telecommunications) and the Commission's consumer protection-related rules in Minn. R. 7810 (Telephone Utilities) do not apply to mobile wireless service providers. Instead, mobile wireless service providers commit to comply with the consumer protection and service quality standards in the Cellular Telecommunications and Internet Association's ("CTIA") Consumer Code for Wireless Service. *See Assist Order* at 6 (explicitly requiring the company to include a commitment to follow the CTIA'a Consumer Code for Wireless Service in its informational tariff).

Similarly, the statutory burden of proof discussed by the MTA does not apply to Minnesota non-certificated companies.[46] In fact, the statute cited by the MTA does not apply in this situation at all. Rather, it is only applicable in complaint proceedings specifically brought under Minn. Stat. § 237.74 (Regulation of Telecommunications Carrier) "[u]pon a complaint made against a *telecommunications carrier* by a *telephone company*, by another *telecommunications carrier*, by the governing body of a political subdivision, or by no fewer than five percent or 100, whichever is the lesser number, of the subscribers or spouses of subscribers of the particular *telecommunications carrier*, that any of the rates, tolls, tariffs or price lists, charges, or schedules is in any respect unjustly discriminatory, or that any service is inadequate or cannot be obtained . . . ."[47]

Any ETC evaluation criteria the Commission adopts should be transparent and as consistent as possible across all ETCs.[48]

B. The Commission has the Authority to Impose ETC Obligations on Broadband Internet Access and Interconnected VoIP Providers Like LTD.

The OAG agrees with the PBRTC that the Commission should, "at a minimum, condition any expansion of LTD's ETC designation on LTD's commitment to specific and enforceable consumer protection and service-level standards."[49] As discussed in the OAG's Initial Comments, the Commission has the authority to impose ETC obligations on broadband Internet access and interconnected VoIP providers like LTD.[50] Although the OAG's Initial Comments focused on interconnected VoIP providers, its federal-state ETC partnership reasoning extends to broadband Internet access providers as well.[51] To reiterate the main points from the OAG's Initial Comments:

- Federal Universal Service support is *federal* money;[52]
- Interconnected VoIP has not been classified as either a telecommunications service or an information service by the FCC;[53]
- The FCC has made clear that broadband Internet access and Interconnected VoIP providers are governed by the FCC's ETC regulations regardless of whether they provide telecommunications services or information services;[54]

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[46] *See* Minn. Stat. § 237.74, subd. 4(d) (referencing the burden of proof that applies to telecommunications carriers).
[47] *See id.*, subd. 4(a), (b) (emphasis added).
[48] Minn. Stat. § 237.435 ("In determining whether to provide the annual certification of any eligible telecommunications carrier for continued receipt of federal universal service funding, the commission shall apply the same standards and criteria to all eligible telecommunications carriers.").
[49] PBRTC Comments at 10. *See also id.* at 8 (explaining that the Commission has the authority and responsibility to determine whether LTD's ETC designation is in the public interest), 12 (proposing that LTD's expansion be conditioned on compliance with "specific and enforceable consumer protection and service quality standards, and the provision of service to low-income consumers").
[50] OAG Comments at 8-13.
[51] *See supra* at section I, subsection A.3.
[52] OAG Comments at 2-3, 12.
[53] *Id.* at 12 & n.80.
[54] *Id.* at 12 & n.81.

- The FCC has expressly maintained the federal-state ETC partnership even as the services supported by the federal High Cost Program—i.e., the Connect America Fund ("CAF") and the RDOF—have evolved to include broadband Internet access and interconnected VoIP services;[55]

- The Eighth Circuit *Charter Order* is inapplicable in the federal Universal Service context because Congress explicitly delegated ETC designation, monitoring, and enforcement authority to the Commission as a state enforcer, and the Commission's exercise of that authority is not state regulation;[56] and

- There is no federal policy of nonregulation when it comes to the designation and oversight of ETCs.[57]

1. The federal *Computer Inquiries* line of cases does not divest the Commission of its authority to impose ETC designation and expansion obligations.

Starlink's reply comments attempt to divest the Commission of its authority to impose ETC designation and expansion obligations, but its arguments fail.

To start, the proceedings and cases cited by Starlink to support its claim that broadband Internet access providers are exempt from ETC regulation are cases from another regulatory context altogether. Specifically, the *Computer Inquiries* line of cases cited by Starlink determined that, to spur competition and innovation, broadband Internet access services should be classified as information services and should not be subject to mandatory Title II regulation under the Act.[58] Instead, they should enjoy "light touch" Title I regulation because they offer "more than mere transmission."[59]

These cases, which resolved the question of Title I versus Title II regulation for broadband Internet access services, have nothing to do with the federal Universal Service ETC authority that is at issue here. In fact, the *In the Matter of Restoring Internet Freedom* order relied on by Starlink clarifies as much, explaining that the federal-state partnership still governs federal Universal Service ETCs:

> 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. Indeed, the continued

[55] *Id.* at 12-13.
[56] *Id.* at 11-12.
[57] *Id.* at 12.
[58] *In the Matter of Restoring Internet Freedom*, WC Docket No. 17-108, Declaratory Ruling, Report and Order, and Order, FCC 17-166, paras. 2, 6-20 (2018).
[59] *Id*.

> applicability of these general state laws is one of the considerations that persuade us that [Internet Service Provider] conduct regulation is unnecessary here. *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.*[60]

2. The *Charter Order* does not divest the Commission of its authority to impose ETC designation and expansion obligations.

Starlink's state line of cases suffers from the same fatal flaw as its federal ones; they have nothing to do with federal Universal Service. Instead, these cases address the question of whether the "Spectrum Voice" service offered by a Charter Communications Services, Inc. Minnesota subsidiary is an information service exempt from Title II-style state-level telecommunications regulation.[61]

As with the *Computer Inquiries* cases, the Eighth Circuit classified interconnected VoIP as an information service to remove it from broader state telecommunications regulation;[62] not to determine a state's federal Universal Service ETC authority.[63] The *Charter Order* is inapplicable here and does not restrict the Commission's ability to establish consumer protection and service quality standards for broadband Internet access and interconnected VoIP ETCs.[64] Rather, these functions have been explicitly delegated to the Commission by Congress and reinforced through the FCC's reliance on the federal-state partnership to preserve and advance federal Universal Service.

Even if the *Charter Order* could be read to extend to federal Universal Service ETC designation and expansion, the FCC's *Fifth Report and Order*, issued *after* the *Charter Order*, rejected the precise preemption and jurisdiction arguments Starlink raises here. Specifically, the

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[60] *Id*., para. 196.

[61] *See Charter Advanced Servs. v. Lange*, 259 F. Supp. 3d 980, 985-86 (D. Minn. 2017) ("The fount of regulatory authority, in this matter, is the Telecommunications Act of 1996. By its enactment, Congress 'unquestionably' took 'the regulation of *local telecommunications competition* away from the States' with respect to matters covered by the Act.") (emphasis added) (citation omitted), 991 ("[T]he Court concludes that Charter Advanced's Spectrum Voice offering [is] an 'information service' . . . . Accordingly, *state regulation of Spectrum Voice* is preempted and impermissible.") (emphasis added).

[62] *See generally Charter Advanced Servs. v. Lange,* 903 F.3d 715 (8th Cir. 2018) ("*Charter Order*"). *See also* OAG Comments at 11-13.

[63] *See generally Charter Order* (containing no discussion of federal Universal Service or the regulation of ETCs).

[64] Starlink Reply Comments at 5-7 (arguing that the Commission should reject RDOF Phase I ETC conditions for broadband Internet access and interconnected VoIP providers because of the Commission's order regarding LTD's CAF Phase II support).

Fifth Report and Order rejects Starlink's assertion that the states' role in the federal-state ETC partnership has been preempted for broadband Internet access providers because of the *Restoring Internet Freedom Order*. The *Fifth Report and Order*, which eliminated a Lifeline Broadband Provider ETC type and restored the states' traditional role in the ETC process,[65] explains at length that the Commission's role in the federal-state partnership remains intact:

- ". . . . 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.'"[66]

- "[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."[67]

- "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).*"[68]

- "Section 706 does not furnish a basis for the preemption of states' designation authority. . . . In contrast to sections 214(e)(2) and 214(e)(6), which expressly confer

[65] *See generally In the Matter of Bridging the Digital Divide for Low-Income Consumers* et al., WC Docket Nos. 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 (2019) ("*Fifth Report and Order*").
[66] *Id.*, para. 36 (citations omitted).
[67] *Id.*, para. 47 (emphasis added and citations omitted).
[68] *Id.*, para. 48 (emphasis added and citations omitted).

designation authority, section 706 merely directs the [FCC] and states to encourage the deployment of broadband services and generally instructs the [FCC] to take action to accelerate deployment if it finds advanced telecommunications capability is not being deployed in a reasonable and timely fashion. *The specific grant of designation authority to states prevails over section 706's general language regarding broadband deployment.*"[69]

- "[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."[70]

- "[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.* [The FCC] therefore find[s] no inconsistency between [its] *reversal of the unlawful preemption* in the *2016 Lifeline Order* and the [FCC]'s preemption of inconsistent state and local regulation of broadband Internet access services *in other contexts*."[71]

- "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 NARUC has noted, states have been 'crucial' in 'policing the federal fund to eliminate bad actors*.'"[72]

[69] *Id.*, para. 50 (emphasis added and citations omitted).
[70] *Id.*, para. 52 (emphasis added and citations omitted).
[71] *Id.*, para. 53 (emphasis added and citations omitted).
[72] *Id.*, para. 58 (emphasis added and citations omitted).

The FCC could not be clearer. Broadband Internet access providers are subject to federal Universal Service regulations, including those that govern the federal-state ETC partnership and confer ETC designation, monitoring, and enforcement authority on state commissions.

3. The Commission is authorized to adopt the OAG's proposed ETC obligations and apply them to Minnesota non-certificated broadband Internet access and interconnected VoIP providers because the proposed obligations preserve and advance federal Universal Service.

With its clear regulatory authority, the Commission is authorized to adopt ETC obligations for Minnesota non-certificated broadband Internet access and interconnected VoIP providers that will preserve and advance federal Universal Service. One broadband Internet access and interconnected VoIP provider, Starlink, suggests that the OAG's proposed ETC obligations would be "burdensome and unnecessary legacy state telecommunications regulation[]."[73] This is not true. While some of the ETC obligations proposed by the Department and supported by the OAG are codified in the consumer protection and service quality regulations for Minnesota telecommunications providers, the proposed obligations are still appropriate in the ETC context. It is absurd to suggest that the Commission create an entirely new consumer protection and service quality framework specifically for Minnesota non-certificated broadband Internet access and interconnected VoIP ETCs when the requirements it would impose already exist in Minnesota statutes and rules and can be incorporated through Commission orders.

Moreover, most of the OAG's recommended RDOF Phase I ETC obligations simply require petitioners to acknowledge the existence of, and agree to comply with, existing FCC regulations that are applicable to their receipt of RDOF Phase I support.[74] It is surprising and discouraging to see Starlink push back on these basic requirements. Outside of supporting the Department's proposed consumer protection and service quality recommendations,[75] the OAG proposed only three additional ETC obligations for RDOF Phase I support recipients: 1) develop a consumer service inquiry process; 2) provide network buildout updates for the first two years of RDOF Phase I support; and 3) monitor open Commission ETC-related proceedings for additional obligations that may arise after the receipt of an RDOF Phase I ETC designation.[76] This hardly amounts to the imposition of "burdensome and unnecessary legacy state telecommunications regulations" as argued by Starlink.[77]

C. The Commission Must be Prepared to Deny and Revoke ETC Designations for Companies That Will Not Recognize its Authority or that Refuse to Comply with its ETC Requirements.

Having established that the Commission has the authority to require *all* ETCs to comply with the ETC requirements it establishes to preserve and advance federal Universal Service,[78] the

[73] Starlink Reply Comments at 1.
[74] OAG Comments at 22.
[75] *Id.* at 21.
[76] *Id.* at 20-22.
[77] Starlink Reply Comments at 1.
[78] 47 U.S.C. § 254(f) ("A State may adopt regulations not inconsistent with the [FCC]'s rules to preserve and advance universal service.").

Commission must be prepared to deny and/or revoke ETC designations for companies that will not recognize its authority or that refuse to comply with its ETC requirements.

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 to deploy broadband to the state's rural and low-income populations), they may not be the Commission's first choice.[79] For example, the Commission could take any of the following actions:

- Require compliance filings;[80]
- Directly address consumer complaints;[81]
- Conduct its own audits and investigations;[82] and/or
- Notify the FCC of rule violations and provide recommendations for federal Universal Service support reductions.[83]

Other states have utilized these, or similar, actions to fulfill their roles as state ETC enforcers in the federal-state ETC partnership.[84]

In the end, however, the Commission's ETC choice is binary. It can either grant an ETC designation/expansion request (albeit with conditions) or deny/revoke it. If a company refuses to recognize the Commission's authority and/or refuses to comply with the federal Universal Service protections the Commission carefully selects to advance federal Universal Service goals, it calls into question whether the company will actually use its federal Universal Service support for its intended purpose. In these situations, and provided there is sufficient evidentiary support, the Commission must be prepared to deny and/or revoke ETC designations for companies that will not recognize its authority or that refuse to comply with its ETC requirements.

This is not the situation for LTD's RDOF Phase I ETC expansion request. Therefore, subject to the ETC conditions that the Commission establishes for all the RDOF Phase I petitioners, the Commission should grant LTD's ETC expansion request.

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[79] Although the Commission has the power to revoke a company's ETC status, such a remedy should not be invoked except in the most egregious circumstances and the Commission should first explore other alternatives to remedy concerns about an ETC's performance. *See* OAG Comments at 10 (citing the *2011 Transformation Order*, para. 618).
[80] *See 2011 Transformation Order*, paras. 573-74 (explaining that 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 [Act] and [the FCC's] implementing regulations . . . .").
[81] *Fifth Report and Order*, para. 28.
[82] *Id*. (discussing state-initiated ETC investigations that led to states being "the first to identify waste, fraud, and abuse in the Lifeline program").
[83] *2011 Transformation Order*, para. 611 (encouraging states to bring to the FCC's attention issues and concerns about all ETCs operating within their boundaries).
[84] *Fifth Report and Order*, para. 28.