



December 20, 2021

Will Seuffert Executive Secretary  
Minnesota Public Utilities Commission  
121 7<sup>th</sup> Place E. Suite 350  
St. Paul, MN 55101-2147

RE: **Reply Comments of Comcast Phone of Minnesota, Inc. in response to PUC Notice of Comment Period, issued June 30, 2021, In the Matter of a Notice to Rural Digital Opportunity Fund Grant Winners**  
Docket No. P999/CI-21-86

Dear Mr. Seuffert:

Attached are the reply comments of the Minnesota Department of Commerce (Department) in response to

PUC Notice of Comment Period, issued June 30, 2021, In the Matter of a Notice to Rural Digital Opportunity Fund Grant Winners

I am available to answer any questions the Commission may have.

Sincerely,

Karly Baraga Werner  
Sr. Director, Government & Regulatory Affairs

KBW/l  
Attachment

**BEFORE THE MINNESOTA  
PUBLIC UTILITIES COMMISSION**

In the Matter of a Notice to Rural Digital                     )  
Opportunity Fund Grant Winners                                 )     Docket No. P-999/C1-21-86

**REPLY COMMENTS OF COMCAST PHONE OF MINNESOTA, INC.**

Comcast Phone of Minnesota, Inc. (“Comcast”) submits these reply comments concerning the Minnesota Public Utility Commission’s (“Commission”) jurisdiction over eligible telecommunications carriers (“ETCs”) and the appropriate regulatory treatment of the various services that they provide.<sup>1</sup>

**INTRODUCTION**

Comcast appreciates the Commission’s careful consideration of whether it may lawfully regulate broadband services that are offered by ETCs. Contrary to the assertions by the Department of Commerce and Office of Attorney General that the Commission has jurisdiction over ETCs’ broadband offerings in spite of their status as information services, the Commission may regulate only the intrastate telecommunications service(s), as well as any service that a provider elects to offer as an intrastate telecommunications service, that formed the basis for designating a provider as an ETC. Any contrary conclusion would run afoul of the Communications Act of 1934, as amended (the “Communications Act”), and binding precedent. In any event, it would be unwise as a policy matter for the Commission to depart from the light-touch regulatory approach established by the FCC with respect to broadband Internet access service (“BIAS”), which benefits Minnesota’s consumers by facilitating competition, investment, and innovation in the communications marketplace.

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<sup>1</sup> *A Notice to Rural Digital Opportunity Fund Grant Winners*, Docket No. P-999/C1-21-86, Notice of Comment Period (June 30, 2021).

Notwithstanding the jurisdictional limits that prevent state broadband regulation, Comcast acknowledges the state’s legitimate interest in monitoring the progress of the deployment efforts of Rural Digital Opportunity Fund (“RDOF”) participants. Accordingly, Comcast submits that the Commission consider voluntary commitments to the reporting requirements proposed by the Office of the Attorney General, obviating the need for any ruling that would invite needless litigation.

## **DISCUSSION**

### **I. THE COMMISSION IS FORECLOSED FROM EXTENDING COMMON CARRIER REGULATION TO ETCs’ BROADBAND OFFERINGS**

In their opening comments in this proceeding, the Department of Commerce and Office of the Attorney General argue that the Commission possesses authority to regulate any services offered by ETCs, including BIAS.<sup>2</sup> That is incorrect. Although the Commission may regulate the intrastate telecommunications service(s) that formed the basis for the service provider’s designation as an eligible telecommunications carrier,<sup>3</sup> it may not bootstrap such authority to

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<sup>2</sup> See *A Notice to Rural Digital Opportunity Fund Grant Winners*, Docket No. P-999/CI-21-86, Comments of the Minnesota Department of Commerce (Nov. 19, 2021); *A Notice to Rural Digital Opportunity Fund Grant Winners*, Docket No. P-999/CI-21-86, Comments of the Office of the Attorney General (Nov. 19, 2021) (“*OAG Comments*”).

<sup>3</sup> See *Federal-State Joint Board on Universal Service*, Report and Order, 20 FCC Rcd. 6371 ¶ 61 (2005) (“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 and other state law.”); see also 47 U.S.C. § 254(f) (“A State may adopt regulations *not inconsistent with the [FCC]’s rules* to preserve and advance universal service.” (emphasis added)).

regulate the provider’s non-common-carrier interstate services—including a broadband service that is classified as an interstate information service.<sup>4</sup>

Pursuant to Section 214(e)(2) of the Communications Act,<sup>5</sup> a state’s authority extends only to the “telecommunications carrier” seeking an ETC designation, and such an entity may be treated as a telecommunications carrier “*only to the extent that it is engaging in providing telecommunications services.*”<sup>6</sup> Therefore, where a carrier obtains an ETC designation on the basis of its voice service offering, as typically has been the case in the RDOF context, the Commission may regulate that service, but it may not regulate a separate broadband service that is classified as an interstate information service.

The Department of Commerce and Office of the Attorney General encourage the Commission to ignore this fundamental jurisdictional limitation. Contrary to their suggestion that the designation of a service provider as an ETC somehow opens the door to regulation of *any* service provided by that entity, neither Section 214(e)(2) nor any other provision of the Communications Act or the FCC’s rules provides a basis for states to regulate ETCs’ service offerings over which they ordinarily lack jurisdiction.<sup>7</sup> Accordingly, the judicially confirmed

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<sup>4</sup> See *Restoring Internet Freedom*, Declaratory Ruling, Order, Report and Order, 33 FCC Rcd. 311 ¶ 2 (2018) (“*RIF Order*”) (classifying BIAS as an information service), *aff’d in pertinent part*, *Mozilla Corp. v. FCC*, 940 F.3d 1, 26, 72-73 (D.C. Cir. 2019).

<sup>5</sup> 47 U.S.C. § 214(e)(2).

<sup>6</sup> *Id.* § 153(51) (emphasis added); see also *Verizon v. FCC*, 740 F.3d 623, 650 (D.C. Cir. 2014) (deeming it “obvious” in light of broadband’s classification as an information service that “the Commission would violate the Communications Act were it to regulate broadband providers as common carriers”); *Sw. Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994) (“Whether an entity in a given case is to be considered a common carrier or a private carrier turns on the particular practice under surveillance.”).

<sup>7</sup> See 47 U.S.C. § 214 (e)(2) (authorizing state commissions to “designate a common carrier” that meets certain requirements “as an eligible telecommunications carrier”); *id.* § 153(51) (providing that “a telecommunications carrier shall be treated as a common carrier . . . only to the extent that

status of BIAS as an information service precludes the Commission from regulating it, irrespective of whether the provider separately offers telecommunications services and has been designated as an ETC on that basis.<sup>8</sup> In *Charter Advanced Services (MN), LLC v. Lange*, the Eighth Circuit held that this Commission is precluded from regulating information services.<sup>9</sup> The Office of the Attorney General attempts to distinguish this binding authority, asserting that the Commission may regulate ETCs' BIAS offerings because its authority over ETCs is grounded in federal law.<sup>10</sup> But that misconstrues both the court's analysis and the Communications Act. As shown above, Section 214 does not authorize the regulation of information services, even those provided by ETCs. And as the Eighth Circuit recognized, "the federal policy" with respect to information services is one of "nonregulation,"<sup>11</sup> and Section 254(f) further makes clear that any state universal service regulations must be consistent with federal law.<sup>12</sup> Thus, the fact that the Commission would be acting pursuant to Section 214(e)(2) in this context would not justify imposing common carrier duties on information services, because such obligations are substantively at odds with Section 214 itself and with the FCC's policy of non-regulation of information services.

In addition, BIAS's status as a "jurisdictionally interstate" service subject to plenary federal jurisdiction independently precludes the Commission from asserting jurisdiction over

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it is engaging in providing telecommunications services," i.e., not when providing information services).

<sup>8</sup> By the same token, an interstate voice service does not become subject to state regulation simply because the service provider that offers it has been designated as an ETC.

<sup>9</sup> See *Charter Advanced Services (MN), LLC v. Lange*, 903 F.3d 715, 717 (8th Cir. 2018).

<sup>10</sup> See *OAG Comments* at 14.

<sup>11</sup> *Charter Advanced Services (MN), LLC*, 903 F.3d at 719.

<sup>12</sup> 47 U.S.C. § 254(f).

ETCs' broadband offerings. Section 152(a) of the Communications Act bestows on the FCC "comprehensive authority" to "regulate all aspects of interstate communications by wire and radio."<sup>13</sup> It is well-settled "that [BIAS] is jurisdictionally interstate for regulatory purposes."<sup>14</sup> Indeed, even if some incidental Internet-based communications may be intrastate on an end-to-end basis, the Eighth Circuit has made clear that service providers are "not required to develop a mechanism for distinguishing between interstate and intrastate [broadband] communications merely to provide [states] with an intrastate communication they can then regulate."<sup>15</sup> Accordingly, any effort by the Commission to regulate BIAS in the manner proposed by the Department of Commerce and Office of the Attorney General would unlawfully intrude upon a field that is subject to exclusive federal jurisdiction.

## **II. PRESERVING THE LIGHT-TOUCH REGULATORY REGIME APPLICABLE TO BROADBAND WILL BENEFIT CONSUMERS**

Subjecting ETCs' broadband offerings to burdensome, utility-style regulation—particularly of the kind proposed by the Department of Commerce—would be inconsistent with the light-touch regulatory framework applicable to BIAS. Indeed, preserving this regime provides the most effective means of achieving one of the federal universal service programs' primary objectives—promoting access to advanced services.<sup>16</sup>

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<sup>13</sup> *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 700 (1984); *see also La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 360 (1986) (explaining that Section 152(a) of the Communications Act grants the FCC "plenary authority" over interstate service).

<sup>14</sup> *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601 ¶ 431 (2015); *see also RIF Order* ¶ 199.

<sup>15</sup> *Minn. Pub. Utils. Comm'n v. FCC*, 483 F.3d 570, 578 (8th Cir. 2007).

<sup>16</sup> *See* 47 U.S.C. § 254(b)(2).

When the FCC reclassified BIAS as an information service in 2018,<sup>17</sup> it explained that restoring a light-touch regulatory framework “is more likely to encourage broadband investment and innovation,” thereby “furthering [its] goal of making broadband available to all Americans and benefitting the entire Internet ecosystem.”<sup>18</sup> And indeed, investment in this country’s broadband networks has remained strong since 2018, resulting in increases in speeds, falling prices, and accelerated deployment—all of which has benefitted consumers.<sup>19</sup> Apart from being unlawful, the Commission’s subjecting ETCs’ BIAS offerings to common carrier regulation would harm consumers by impeding the investment and innovation responsible for this progress.

Comcast understands the DOC and OAG’s desire to ensure that broadband deployment benefits consumers;<sup>20</sup> the agencies cannot, however, mischaracterize the Commission’s authority over ETC’s broadband services to do so. If the Commission determines that it must monitor the progress of broadband deployment in Minnesota, it could consider achieving its goals by asking

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<sup>17</sup> See *RIF Order* ¶ 2.

<sup>18</sup> *Id.* ¶ 86.

<sup>19</sup> See, e.g. USTelecom, 2021 Broadband Pricing Index Report (May 2021), <https://www.ustelecom.org/wp-content/uploads/2021/05/2021-Broadband-Pricing-Index-Report.pdf>; USTelecom, 2021 Broadband Pricing Index, Entry-Level Pricing Data (July 2021), [https://www.ustelecom.org/wp-content/uploads/2021/07/USTelecom\\_BPI\\_entry-level.pdf](https://www.ustelecom.org/wp-content/uploads/2021/07/USTelecom_BPI_entry-level.pdf).

<sup>20</sup> Indeed, Comcast has committed to adhere to consensus Internet openness principles for this very reason. See Open Internet, Comcast, <https://corporate.comcast.com/openinternet> (last visited Dec. 18, 2021). These commitments are legally enforceable by the Federal Trade Commission as well as state attorneys general under existing consumer protection laws. See, e.g., Restoring Internet Freedom FCC-FTC Memorandum of Understanding 2 (Dec. 14, 2017), [https://www.ftc.gov/system/files/documents/cooperation\\_agreements/fcc\\_fcc\\_mou\\_internet\\_freedom\\_order\\_1214\\_final\\_0.pdf](https://www.ftc.gov/system/files/documents/cooperation_agreements/fcc_fcc_mou_internet_freedom_order_1214_final_0.pdf) (“Consistent with its jurisdiction, the FTC will investigate and take enforcement action as appropriate against [ISPs] for unfair, deceptive, or otherwise unlawful acts or practices, including but not limited to, actions pertaining to the accuracy of the disclosures such providers make pursuant to the [*RIF Order*]’s requirements, as well as their marketing, advertising, and promotional activities.”).

RDOF program participants to voluntarily commit to implement the two reporting requirements proposed by the Office of the Attorney General.

### **CONCLUSION**

For the foregoing reasons, the Commission lacks authority to regulate ETCs' broadband offerings, and doing so also would be unwise as a policy matter. Accordingly, Comcast respectfully urges the Commission not to adopt the regulatory proposals advanced by the Department of Commerce or Office of the Attorney General. Instead, the Commission should consider voluntary commitments from RDOF program participants as contemplated by the Office of the Attorney General.

Respectfully submitted,



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Karly Baraga Werner  
*Senior Director, Government and  
Regulatory Affairs*  
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10 River Park Plaza  
St. Paul, MN 55107  
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December 20, 2021



### **CERTIFICATE OF SERVICE**

I, Karly Baraga Werner, hereby certify that I have this day served copies of the following document on the attached list of persons by electronic filing, e-mail, or by depositing a true and correct copy thereof properly enveloped with postage paid in the United States Mail at St. Paul, Minnesota.

### **COMCAST PHONE OF MINNESOTA, INC. – REPLY COMMENTS**

Docket Nos.    **P999/CI-21-86**

Dated this **20th** day of **December 2021**.

A handwritten signature in black ink, appearing to read 'KB', followed by a horizontal line extending to the right.

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