

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Telecommunications Carriers Eligible for)	WC Docket No. 09-197
Universal Service Support)	

**COMMENTS OF
NTCA–THE RURAL BROADBAND ASSOCIATION**

NTCA–The Rural Broadband Association (“NTCA”)¹ hereby submits these comments in connection with the Public Notice released by the Wireline Competition Bureau on March 8, 2021 in the above-captioned proceeding.² The Public Notice seeks comment on a series of petitions for designation by the Federal Communications Commission (the “Commission”) of eligible telecommunications carriers (“ETCs”) for the purpose of receiving universal service fund (“USF”) support pursuant to the recent Rural Digital Opportunity Fund (“RDOF”) auction. In these comments, NTCA does not weigh in on any individual application, but rather observes a common thread appearing in many of them that highlights the need for more careful attention in the review of each such application. Specifically, NTCA submits these comments to urge and remind the Commission to apply faithfully the requirements of Sections 214 and 254 of the Communications Act of 1934, as amended (the “Act”), in determining that each applicant will in fact provide the supported services as defined by law.

¹ NTCA represents approximately 850 independent, community-based companies and cooperatives that provide advanced communications services in rural America and more than 400 other firms that support or are themselves engaged in the provision of such services.

² *Wireline Competition Bureau Seeks Comment on Rural Digital Opportunity Fund Petitions for Designation as an Eligible Telecommunications Carrier*, WC Docket No. 09-197, Public Notice, DA 21-279 (rel. March 8, 2021) (“Public Notice”).

Stepping back, distribution of USF must comport with statutory directives. As much as some may wish otherwise, there can be no “shortcuts.” Fundamental to the current *Public Notice*, Section 254(e) mandates that “only an [ETC] designated under section 214(e) of this title shall be eligible to receive [USF].”³ Section 214(e), in turn, indicates that an ETC must be a “common carrier” and must offer “the services that are supported by [USF] under section 254(e)” throughout the area for which it has sought and received such designation.⁴ This then requires a return to Section 254, which states that USF must be used “only for the provision, maintenance, and upgrading of facilities and services for which the support is intended”⁵ and further defines the supported services as “telecommunications services.”⁶ Moreover, any USF support is intended to be used only for serving locations within areas for which the support is provided – in this instance, the eligible census blocks established for the RDOF auction.⁷

³ 47 U.S.C. § 254(e).

⁴ *Id.* at § 214(e)(1).

⁵ *Id.* at § 254(e).

⁶ *Id.* at § 254(c)(1). (“Universal service is an evolving level of telecommunications services that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services.”) *See also id.* at § 153(53).

⁷ *See Wireline Competition Bureau and Office of Economics and Analytics Release Updated List and Map of Eligible Areas for the Rural Digital Opportunity Fund Phase I Auction*, Public Notice, WC Docket Nos. 19-126 and 10-90, AU Docket No. 20-34, DA 20-665 (rel. June 25, 2020), at 6. (“As the Commission made clear in the *Rural Digital Opportunity Fund Order*, eligible areas would include census blocks served by both price cap carriers and rate-of-return carriers to the extent that the census block is in the price cap carrier’s territory. That is, only the price cap portion of the census block is eligible.”)

In 2011, the Commission addressed the question of how to square this statutory tether of support for telecommunications services with a desire to promote broadband availability and affordability as part of an updated mission of universal service. Ultimately, the Commission determined that the supported service for purposes of Section 254 was *not* broadband Internet access service (because that was then and is now again classified as an information service), but rather “voice telephony service” – which can be provisioned via any means technically (including, but not limited, to via VoIP platforms) but must nonetheless be offered as a regulated telecommunications service to comport with the statute.⁸ Thus, instead of broadband itself being the supported service, the Commission made the delivery of broadband services meeting certain criteria a condition of receiving support to deliver the supported telecommunications service – voice telephony by any choice of technology.⁹ In short, both the Act and the Commission’s prior interpretation of it make unmistakably clear that: (1) to receive USF, an entity must be an ETC; (2) to be an ETC, an entity must be a telecommunications carrier (“TC”); and (3) to be a telecommunications carrier, an entity must offer a telecommunications service (“TS”), which may be voice telephony. Simplified, sweeping, and ambiguous references in ETC applications to the offering of voice or broadband without any details as to how those offerings in fact qualify as a TS, and thus how the applicant qualifies as a TC, do not and cannot satisfy this fundamental statutory construct as interpreted by the Commission’s own precedent.

⁸ See *Connect America Fund, et al.*, WC Docket No. 10-90, *et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17693-94 (2011), at ¶¶ 77-79.

⁹ See *id.* at 17696, ¶ 86 (“As a condition of receiving federal high-cost universal service support, all ETCs, whether designated by a state commission or the Commission, will be required to offer broadband service in their supported area that meets certain basic performance requirements and to report regularly on associated performance measures.”)

This legal construct has been upheld upon appeal. Specifically, in considering challenges to the use of USF support to advance broadband availability and affordability despite broadband Internet access not being a telecommunications service, the United States Court of Appeals for the Tenth Circuit upheld the Commission’s 2011 order premised expressly upon the fact that such goals were ultimately attached to a requirement that ETCs offer “voice telephony” on a standalone basis *as a telecommunications service*.¹⁰ Indeed, the Commission made this very point in its own brief to the Tenth Circuit defending the order, stating that “[s]o long as a provider offers some service on a common carrier basis, it may be eligible for universal service support as an ETC under sections 214(e) and 254(e), even if it offers other services – including ‘information services’ like broadband Internet access – on a noncommon carrier basis.”¹¹

Thus, if and when presented with a proposed offering of “voice telephony” as the supported service in an ETC designation application, the Commission or any reviewing state commission must scrutinize the proposal to confirm that operator will in fact be a telecommunications carrier and that the offering in fact meets the criteria for classification as a telecommunications service as such terms are defined in the Act. To reiterate, there is no technology restriction under this framework – nothing requires a provider to use particular technologies to provide such a telecommunications service. To the contrary, it is quite clear from the Commission’s precedent that a provider can use IP technology, for example, to offer the supported telecommunications service. But it is not enough for the statute that any given ETC application may recite a mere incantation of some imprecise intent to offer “voice telephony service on a common carrier basis.” Indeed, the fact that some state commissions have found a lack of jurisdiction over these specific

¹⁰ *In Re: FCC 11-161*, 753 F.3d 1015, 1048-49 (10th Cir. 2014).

¹¹ *Id.* at 1095.

applications may indicate that the offerings of voice telephony as put forward by these entities have *not* been positioned as telecommunications services and that these entities thus are *not* telecommunications carriers.

Whatever the facts that brought these ETC designation applications to the federal level in lieu of their consideration before a state commission, it is imperative as a matter of law that the Commission not simply take at face value a claim that any given voice telephony service is being offered as a telecommunications service based upon nothing more than a vague, throwaway, high-level pledge to offer some kind of voice service “on a common carrier basis.” Nor can the Commission issue cursory findings that an offering is a telecommunications service without articulating the bases for concluding such. Rather, by law, the Commission must undertake a fact-specific, evidence-backed analysis to confirm that: (1) the entity in question is or will be a telecommunications carrier (holding some certification or authorization as such under Section 214 or from a state) and; (2) what it offers is in fact a telecommunications service (regardless of technology choice), with detailed findings as to the parameters (*e.g.*, tariffing or other indicators of public offering on a common carrier basis) that would make it such.¹² Only such an analysis is sufficient for the Commission to discharge its duties under the Act and to ensure that USF is indeed used in furtherance of the offering a supported service as defined by the statute – and, in the absence of such a more detailed showing from any given petitioner regarding the specifics of its offering, that petition for ETC designation must be denied as a matter of law.

¹² See, *e.g.*, *Business Data Services in an Internet Protocol Environment*, WC Docket No. 16-143, et al., Report and Order 32 FCC Rcd 3459, 3567-3589 (2017), at ¶¶ 267-285 (discussing determinations of common carriage pursuant to fact-specific determinations with respect to the offering under consideration).

For the foregoing reasons, NTCA urges the Commission to require every provider seeking ETC designation to provide actual evidence and explanations, in lieu of mere assertions and cursory statements, establishing affirmatively that: (1) it is a telecommunications carrier as defined by the Act; and (2) it will offer a telecommunications service as defined by the Act. The Commission should deny ETC designation to any petitioner that has failed to provide such evidence and explanations, and should articulate the bases by which it concludes that any given offering is a telecommunications service such that the entity offering it is indeed a telecommunications carrier.

Respectfully submitted,

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