

Ensuring That ETC Designations Serve the Public Interest

**Remarks by Commissioner Kathleen Q. Abernathy
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(As prepared for delivery)

Thank you for asking me to speak with you today. It is always a pleasure to talk to this group about our shared policy goals. Today's topic — the process for designating ETCs — is a critical part of our universal service regime. I have had the pleasure of working with a terrific group of state and federal colleagues on the Joint Board, and I am proud of what we have accomplished. Although we could not reach consensus on every single issue, we were unanimous in supporting the issuance of voluntary guidelines regarding the designation of ETCs by state commissions and the FCC. And we succeeded in developing a broad consensus regarding the types of standards that should be imposed on ETCs. Since many of you will be reviewing ETC applications in coming months, I thought I would walk you through the Joint Board's recommendations in this area and flesh out the decisions we reached. After my presentation, I am hoping my Joint Board colleagues will join me in answering your questions, and then we will hear reactions from two industry representatives.

Before I discuss the Joint Board recommendations, I will provide a little background information.

Background

Under section 214(e)(2) of the Communications Act, state commissions play the primary role in reviewing applications to become an eligible telecommunications carrier, or ETC. Congress enacted section 214(e)(6) in 1997 to authorize the FCC to step in and

grant an ETC application when the state commission lacks jurisdiction to do so. This may occur when the applicant seeks designation to serve tribal land or when the applicant is a wireless carrier over which the state commission concludes that it has no jurisdiction.

With respect to the substantive requirements for ETC designation, the statute provides little concrete guidance. It states that, “consistent with the public interest, convenience, and necessity,” the relevant 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],” so long as each carrier provides all of the support services and advertises their availability throughout the designated service area. While this language indicates that all ETC designations must be consistent with the public interest, the statute further provides that “[b]efore designating an additional [ETC] for an area served by a rural telephone company,” the relevant commission “shall find that the designation is in the public interest.”

Against this backdrop, state commissions have taken a variety of approaches. Some states have conducted in-depth proceedings and attached substantive conditions to their grant of ETC status. At least one state has concluded that funding an additional ETC in a rural area would not serve the public interest. And several states have granted ETC applications without any rigorous examination of the carriers’ qualifications.

As a result of the uncertainty and unpredictability associated with the process, many state commissions and industry participants asked the FCC to consider issuing guidelines fleshing out the public interest standard. The Joint Board agreed that voluntary guidelines would promote a more rigorous and predictable application process that will benefit state commissioners, regulated entities, and consumers.

Under section 254, the FCC has up to one year to decide whether to adopt the Joint Board's recommendations. In the interim, the FCC has established a provisional approach. In a decision involving an application by Virginia Cellular, the Commission made clear that any carrier that wants to be an ETC must offer quality services at affordable rates throughout the designated service area. The ETC also must be ready, willing, and able to serve as a carrier of last resort and otherwise be prepared to fulfill the goals set forth in section 254 of the Act.

To this end, the FCC required Virginia Cellular to submit build-out plans to document its proposed use of federal universal service funding for infrastructure investment. The Commission also considered the carrier's commitment to provide high-quality service. Moreover, for the first time we considered the increasing demands on the universal service fund. While at one point the cost of granting ETC status to new entrants may have appeared minimal, the dramatic rate of growth in the flow of funds to competitive ETCs compels us to consider the overall impact of new ETC designations on the stability and sustainability of universal service. Finally, I am pleased that we improved our regulatory oversight by imposing reporting requirements on Virginia Cellular and by reserving the right to conduct audits and revoke this ETC designation in the event of a failure to fulfill the requirements of the statute and this Order. All of these requirements are consistent with the statutory framework, and while they arguably should have been imposed much earlier, they represent a strong step in the right direction.

As I will discuss in a moment, several of the Joint Board's recommendations overlap with the FCC's requirements in Virginia Cellular. But the Joint Board also recommended additional standards that go beyond the FCC's provisional framework.

Even though the recommendations have not yet been formally adopted by the FCC, I expect that they will be of immediate use to state commissions. They represent the best thinking of a diverse group of federal and state regulators, and, given the discretion afforded to states under section 214, nothing prevents state commissions from following these guidelines right away.

Joint Board Recommendations

So now that I have provided some background information, I'll walk through what the Joint Board recommended.

As a threshold matter, the Joint Board parsed the language of section 214 and tried to make sense of the distinction between rural and non-rural areas. We concluded that since all ETC designations are supposed to be *consistent with the public interest*, it is appropriate for state commissions and the FCC to ensure that all applicants meet certain minimum standards, regardless of whether they seek to serve a rural or non-rural area. Based on the additional statutory language requiring an affirmative public interest showing before an applicant becomes an ETC in an area served by a rural telephone company, the Joint Board concluded that Congress intended state commissions and the FCC to apply somewhat heightened scrutiny in applying the public interest standard in such areas.

As for the minimum standards recommended by the Joint Board, we first reaffirmed that all ETCs must provide the nine supported services — local dial tone, access to 911, access to long distance, and so forth — throughout the designated service area. ETCs also must advertise the availability of these services. These two requirements come straight from section 214.

The Joint Board recommended that states consider imposing additional requirements, something the Fifth Circuit Court of Appeals ruled they have the authority to do.

First, the Joint Board concluded that states should examine whether ETC applicants have the financial resources to provide quality services. Basically, we want to make sure that carriers receiving ETC status will be financially viable entities with a track record demonstrating their ability to provide service over the long haul. Since incumbent LECs can withdraw from markets where additional ETCs have been designated, it is important to make sure every ETC is financially equipped to maintain a network that is capable of meeting consumers' needs.

Second, as the FCC stated in *Virginia Cellular*, ETCs should be required to demonstrate their capability and commitment to providing service throughout the designated service area. To this end, states may choose to require formal build-out commitments, backed by regular progress reports. This requirement is critical, because universal service support is designed to fund investment in networks; it should not be used to pad the bottom line. While some have faulted the Joint Board for failing to recommend imposing carrier-of-last-resort obligations on competitors, they should read the Recommended Decision more carefully. We *did* recommend that all ETCs be subject to equivalent carrier-of-last-resort obligations. In particular, we made clear that all ETCs (not just incumbent LECs) are required to serve all customers upon reasonable request. And we detailed a number of specific measures, such as line-extension policies, that states may choose to consider in this regard. We also made clear that a competitive ETC

must be prepared to provide equal access to long distance services if the incumbent carrier relinquishes its ETC designation.

Third, we recommended that states require ETCs to demonstrate their ability to remain functional during emergencies. We concluded that critical infrastructure considerations were a relevant part of the public interest analysis.

Fourth, the Joint Board concluded that states may properly impose consumer protection requirements as part of the ETC designation process, so long as they are in furtherance of universal service goals. We stated our view that, even if some carriers, such as wireless carriers, otherwise would not be subject to such requirements, states may extend generally applicable rules to all ETCs to ensure that universal service principles are fulfilled. USF support is not a free lunch. If a carrier wants the benefits, it has to accept the responsibilities. But I do want to caution, as the Joint Board did, that states should *not* impose regulatory parity for its own sake. Rather, requirements designed for monopoly providers should not be imposed on competitors unless they are necessary to promote universal service goals.

Fifth, consistent with the requirement that ETCs offer local usage, the Joint Board opined that states may consider how much local usage ETCs should offer. ETCs are not required to require unlimited local usage, but states may choose to impose some minimum amount to ensure affordability.

In addition to these five specific guidelines, the Joint Board discussed more generally the balancing of costs and benefits. The Joint Board did not specify any test or formula, but instead encouraged states to consider both the benefits and costs of entry. On the benefit side, states may choose to consider the extension of service to previously

unserved areas or the introduction of mobility. On the cost side, states may consider the impact of funding multiple ETCs on the long-term stability of the fund. We declined to endorse a proposal to set presumptive benchmarks under which a maximum number of ETCs would be designated depending on the level of high-cost support received in a study area. But the Joint Board did conclude that states may properly consider the level of per-line support to be received by ETCs. If that support level is high, a state may conclude that funding too many different ETCs will place unreasonable strains on the funding mechanism.

Finally, the Joint Board encouraged states to use the annual certification process to ensure accountability. Specifically, states should ensure that universal service support is used to provide the supported services and for the underlying infrastructure. The certification process also can be used to check compliance with build-out commitments. If states determine that an ETC is not meeting its obligations, they are authorized to revoke the ETC designation.

The Joint Board included a description of the Commission's rules on modifying service area boundaries and disaggregating support, but it did not recommend any changes. So I am going to refrain from discussing those issues, but if you need additional information, I recommend reviewing paragraphs 49-55 of the Recommended Decision.

That brings me to the end of my prepared remarks. I would be happy to answer any questions, and I hope that my Joint Board colleagues will join me in doing so.