

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

In the Matter of

Application of Douglas Services, Inc. dba
Douglas Fastnet for Designation as an Eligible
Telecommunications Carrier and for
Designation as an Eligible
Telecommunications Provider in the State of
Oregon

Docket No. UM 1721

STAFF RESPONSE TO COMSPAN
PETITION TO INTERVENE

Staff of the Public Utility Commission of Oregon (Staff) hereby responds to the petition to intervene (Comspan Petition) filed in the above-referenced matter by Comspan Communications, Inc. (Comspan) on May 6, 2015. As a preliminary matter, the petition is premature. This docket has not been designated a contested case proceeding. Comspan may comment at the May 19, 2015 public meeting. If the petition were timely, Staff would still have concerns with Comspan's petition given the issues it outlines, and the potential for undue delay.

Background

On March 4, 2015, the FCC announced the provisional selection of Douglas Services, Inc. dba Douglas Fastnet (DFN) under the Rural Broadband Experiments Order. *In the Matter of Connect America Fund ETC Annual Reports and Certifications, Report and Order and Further Notice of Proposed Rulemaking*, WC Docket No. 10-90, 14-58, FCC 1498 (July 14, 2014); FCC Public Notice, DA 15-288 (filed with DFN's ETC application as Exhibit 1). DFN initiated this docket by filing an application for designation as an eligible telecommunications carrier (ETC) on March 20, 2015. The FCC has imposed a 90-day deadline, i.e. June 2, 2015, on DFN to obtain and file documentation of ETC designation in all areas for which it will receive support. FCC Public Notice, DA 15-288, at 2 (filed with DFN's ETC application as Exhibit 1). On May 6, 2015, Comspan filed its Petition to Intervene.

Discussion

I. Comspan's Petition to Intervene is Premature.

Comspan petitions to intervene in this matter as a party under OAR 860-001-0300, which sets forth procedures for participation in contested cases and declaratory ruling proceedings.

“Contested case” is defined in OAR 860-001-0010(4) as having “the meaning provided in ORS 183.310(2) and does not include rulemaking proceedings.” Under ORS 183.310(2):

- (a) “Contested case” means a proceeding before an agency:
 - (A) In which the individual legal rights, duties or privileges of specific parties are required by statute or Constitution to be determined only after an agency hearing at which such specific parties are entitled to appear and be heard;
 - (B) Where the agency has discretion to suspend or revoke a right or privilege of a person;
 - (C) For the suspension, revocation or refusal to renew or issue a license where the licensee or applicant for a license demands such hearing; or
 - (D) Where the agency by rule or order provides for hearings substantially of the character required by ORS 183.415, 183.417, 183.425, 183.450, 183.460 and 183.470.

Under this definition, the proceeding is not a contested case at this time. The Federal Communications Act of 1934, as amended (Act) provides that “only an eligible telecommunications carrier [ETC] designated under section 214(e) shall be eligible to receive specific Federal universal service support” for providing voice telephony services. 47 U.S.C. § 254(e). State commissions have primary responsibility for designating ETCs under section 214(e)(2) of the Act, consistent with the public interest, convenience and necessity. The Commission currently requires Oregon ETCs to comply with the application requirements set forth in Appendix A of Order 06-292 and as further described in the Order.

None of the foregoing authorities provide hearing rights to Comspan on DFN's application. The Commission has not proposed denying the application, which would implicate hearing rights for DFN and lead to a contested case.

DFN includes a petition for designation as an eligible telecommunications provider (ETP). An ETP may be certified by order of the Commission as eligible to participate in the Oregon Telephone Assistance Program (OTAP) for its qualifying customers throughout a designated service area if it meets the eligibility criteria in OAR 860-033-0005(7). Neither this rule nor the underlying statutory authority provide Comspan with hearing rights. *See* OR Laws 1987 c. 290, as amended. The Commission has not proposed denying the ETP application, which may lead to hearing rights for DFN.

At this point, the proceeding is investigatory in nature. Staff intends to present the matter for consideration at the Commission public meeting on May 19, 2015. This matter is on the regular public meeting agenda for that date. *See* Attachment 1. The Commission may grant DFN's application at that time. *See* Attachment 1. Or, the Commission may take action at the public meeting that would open a contested proceeding. Until then, Comspan's petition is premature.

II. If Timely, Staff also has Concerns Regarding Comspan's Petition.

Alternatively, even if the Petition were timely, Staff has concerns regarding its merits. A petitioner seeking to intervene must identify, among other things, the nature and extent of the petitioner's interest in the proceedings, the issues petitioner intends to raise, and any special knowledge or expertise of the petitioner that would assist the Commission in resolving the issues. OAR 860-001-0300(2)(d) – (f). The Commission or ALJ must grant the petition if the petitioner has a sufficient interest in the proceedings, the petitioner's appearance and participation will not unreasonably broaden the issues, burden the record, or delay the proceedings. OAR 860-001-0300(6). Here, Comspan's petition raises an issue that need not be addressed and granting the petition will delay the proceedings.

A. Addressing the Facilities requirement Unreasonably Broadens the Issues.

Comspan seeks to raise issues surrounding DFN's facilities that unreasonably broaden the issues. First, Comspan implies that an ETC applicant must currently have a network that

meets ETC requirements to be designated. Comspan Petition at 3. Actually, DFN must meet ETC designation requirements based on its proposed network, not its current one. Indeed, the funding was awarded by the FCC to build that proposed network. *In the Matter of Connect America Fund ETC Annual Reports and Certifications, Report and Order and Further Notice of Proposed Rulemaking*, WC Docket No. 10-90, 14-58, FCC 1498, ¶ 72 et seq (July 14, 2014).

Issues outside the application requirements are outside the scope of this proceeding and unreasonably broaden the issues.

Second, Comspan seeks to “address specific ETC obligations” under 47 CFR §§ - 54.201(b), (d), and 54.202(a)(2). Comspan Petition at 3. To the extent these regulations set forth application requirements when the FCC is the entity responsible for ETC designation, they are not relevant. The Commission has adopted ETC application requirements in Order No. 06-292, Docket No. UM 1217. To the extent Comspan seeks to advocate for changes to the Commission’s requirements, this docket is also not the appropriate forum to address that issue, particularly given the public interest in avoiding delay, which is discussed below.

Third, Comspan appears to challenge DFN’s fitness for designation because it currently uses out-of-state Internet-based (VoIP) switching services. Comspan Petition at 3. As this Commission has previously noted, “The ETC can offer services, either using its own facilities or through a combination of its own facilities and resale of another carrier's services. *See* 47 USC § 214(e)(1).” Order No. 06-292 at 1-2. The FCC has defined “own facilities” and other relevant terms in 47 CFR § 54.201:

- (e) For the purposes of this section, the term *facilities* means any physical components of the telecommunications network that are used in the transmission or routing of the services that are designated for support pursuant to subpart B of this part.
- (f) For the purposes of this section, the term “own facilities” includes, but is not limited to, facilities obtained as unbundled network elements pursuant to part 51 of this chapter, provided that such facilities meet the definition of the term “facilities” under this subpart.
- (g) A state commission shall not require a common carrier, in order to satisfy the requirements of paragraph (d)(1) of this section, to use facilities that are

- located within the relevant service area, as long as the carrier uses facilities to provide the services designated for support pursuant to subpart B of this part within the service area.
- (h) A state commission shall not designate a common carrier as an eligible telecommunications carrier for purposes of receiving support only under subpart E of this part unless the carrier seeking such designation has demonstrated that it is financially and technically capable of providing the supported Lifeline service in compliance with subpart E of this part.
 - (i) A state commission shall not designate as an eligible telecommunications carrier a telecommunications carrier that offers the services supported by federal universal service support mechanisms exclusively through the resale of another carrier's services.

Thus, an ETC may use out-of-state facilities and can use re-sold facilities in combination with its own. In any event, the Commission does not have to address the issue of how DFN currently provides voice services; it is simply not relevant to an assessment of whether DFN meets ETC requirements. ETC designation depends on how an applicant will provide services after its designation. DFN's application includes a diagram on page 42 of Exhibit 3 that shows that DFN will provide services with its own local switching facilities in Oregon. *See* DFN Application at 8-9, 42 (March 20, 2015). DFN has clarified with Staff that with the proposed switching arrangement, the company will have direct trunks to the PSAP for emergency services. *See* Attachment 1. In the proposed network configuration – the one for which DFN is to receive funding - there are no issues regarding the nature of the facilities or access to emergency services.

B. Granting the petition would delay the proceedings.

DFN filed its application on March 20, 2015, following the FCC's announcement that funding was available on March 4, 2014. DFN contacted Staff shortly after that announcement to discuss application requirements. *See* Attachment 1. The FCC has imposed a 90-day deadline on DFN to obtain and file documentation of ETC designation in all areas for which it will receive support. FCC Public Notice, DA 15-288, at 2 (filed with DFN's ETC application as Exhibit 1). DFN must be designated by midnight on June 2, 2015. Failure to meet the deadline could result in loss of \$2.375 million in funding intended for construction of rural broadband

facilities in Oregon. FCC Public Notice, DA 15-288, at 3 (filed with DFN's ETC application as Exhibit 1). Losing those funds would mean that customers in rural Douglas County may be deprived of vital access to broadband service. The funding is intended to support new or improved services to nearly 2500 locations that include residences, businesses and six anchor institutions in Douglas County. DFN Petition at 4. Staff has conducted a thorough review of DFN's ETC application in a limited amount of time and is preparing to make a recommendation to the Commission for the May 19, 2015 public meeting. See Attachment 1. Any delay will jeopardize Staff's work and DFN's ability to meet the June 2, 2015 deadline if it is designated.


Conclusion

For the foregoing reasons, Staff respectfully requests that Comspan's petition be denied at this time.

DATED this 8 day of May 2015.

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General



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Assistant Attorney General
Of Attorneys for Staff of the Public Utility
Commission of Oregon

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DECLARATION OF KAY MARINOS

I, Kay Marinos, hereby declare:

1. I am employed by the Public Utility Commission of Oregon (Commission) as a Manager in the Telecommunications and Water Division.
2. I have been assigned to review the application of Douglas Services, Inc. for designation as an eligible telecommunications carrier (ETC), which was filed March 20, 2015. A company representative contacted me shortly after Douglas was awarded a grant from the FCC for rural broadband conditioned on ETC designation within 90 days, March 4, 2015, to discuss the application requirements.
3. For the past ten years, I have reviewed ETC applications and worked on the annual re-authorization of ETCs.
4. I have reviewed the Douglas application and gathered additional information. For example, Douglas has clarified with Staff that the diagram on page 42 of Exhibit 3 to the ETC application represents the proposed switching network, and the company will have direct trunks to the PSAP for emergency services.

5. Staff, at this time, intends to recommend to the Commission that it grant the Application. The matter is on the regular agenda for the Commission's May 19, 2015 public meeting.

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 8 day of May 2015.



Kay Marinos