

Concerned with the burgeoning growth in the support funds, in November of 2002 the FCC asked the Joint Board on Universal Service to consider whether the FCC should establish federal processing guidelines for federal universal service applications and if so, what those guidelines should be. Based on the Joint Board's recommendations, in March of 2005 the FCC formally adopted new requirements for determining eligibility of carriers for support funding. See FCC Order 05-46, Report and Order in CC Docket No. 96-45, *In the Matter of Federal-State Joint Board on Universal Service*, released March 17, 2005 (*March 17 Order*). The FCC will apply these new requirements to carriers that it designates for universal service support. However, since the FCC designates carriers only in cases where a state asserts that it lacks jurisdiction, generally over wireless carriers, the state commissions designate the majority of carriers that apply for support. Although the FCC does not require the states to adopt the requirements, it has requested that they do so, primarily for two reasons. First, the application of the same requirements by the federal and state commissions will allow for a more predictable designation process. Second, the long-term sustainability of the universal service fund will be improved because the requirements create a more rigorous ETC designation process and will aid in ensuring that only carriers that can adequately provide universal service will receive designation.

Staff recommends that the Commission take this opportunity to honor the FCC's request and consider adopting the recommended requirements. After carefully considering the individual FCC requirements, the Commission may determine that it would prefer to adopt none, some, or all of the FCC requirements, and/or other requirements that would meet the same objectives. Adoption of a specific set of requirements by the Commission would greatly aid applicants, carriers, Staff and other interested parties by making explicit the Commission's expectations and requirements for receiving federal universal service support in Oregon. The adoption of requirements will also facilitate speedier and more efficient processing of new applications for support and ensure that all carriers continue to meet their universal service responsibilities.

Carriers must go through two kinds of processes in order to receive federal universal service support. The first is the initial designation process, in which a carrier is first granted eligible telecommunications carrier (ETC) status. The second is the annual recertification process, which enables designated ETCs to continue receiving support each year. The following discussion briefly describes each process, the associated FCC requirements, and issues that Staff believes are likely to be raised in the investigation.

Initial Designation

The basic requirements for ETC designation are specified in Sections 214(e)(1) and 214(e)(2) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the Act). Generally, an ETC must be a common carrier that agrees to offer and advertise, throughout its designated service area, the services that are supported by the federal universal service support mechanisms, using either its own facilities or a combination of its own facilities and resale of another carrier's services. In addition, an ETC must offer, and advertise, Lifeline and Link Up services for eligible low-income consumers. The Act permits the designation of carriers in addition to the ILECs, sometimes referred to as Competitive Eligible Telecommunications Carriers (CETCs), if such designation is consistent with the public interest. State commissions may impose other requirements for designation in addition to those in the Act if they wish.

The FCC's new requirements are intended to supplement the basic requirements in the Act and to make the designation process more stringent by requiring an ETC applicant to make several specific demonstrations and commitments in its application. In addition, the FCC establishes an analytical framework to determine whether the designation of additional carriers (CETCs) in an ILEC's service area would be in the public interest. Since all ILECs have already received ETC status in their operating areas, these initial designation requirements will, in reality, apply only to non-ILEC carriers desiring to receive universal service funds in the specific areas of their choosing.

A. Basic Eligibility Requirements

The FCC's new rules require a carrier applying for ETC status to include specific information in its application. The application must contain demonstrations regarding the applicant's commitment and ability to: 1) provide supported services throughout the designated service area, including submission of a 5-year network improvement plan, 2) remain functional in emergency situations, 3) satisfy consumer protection and service quality standards, and 4) offer a local usage plan comparable to the ILEC's. In addition, the applicant must acknowledge that it may be required to provide equal access to long distance carriers in the event no other ETC is providing it in the area.

Staff believes that there are at least four major issues related to the basic requirements for initial ETC designation. Other parties are likely to suggest additional issues.

- 1) One issue is whether to establish uniform basic requirements for all applicants. The FCC's requirements are heavily targeted toward wireless carriers, since the FCC generally has only wireless applications referred to it for ETC designation. However,

the states process applications from not only wireless carriers, but wireline CLEC carriers as well. Some of the FCC requirements are redundant for wireline carriers (CLECs) as they must already meet these same requirements to comply with other rules governing local exchange carriers. For example, the FCC requires an applicant for ETC designation to commit to providing equal access if it ever becomes the sole ETC in a service area. This requirement is superfluous for landline CETCs applicants, since they are already required to offer equal access. Therefore, the Commission should consider whether it wants to adopt application requirements that are suitable for all possible ETC applicants, or requirements that vary between wireline and wireless applicants. Any differentiation should not result in varying requirements between types of carriers, but would merely reflect that some requirements are already met by other means in the case of wireline carriers.

- 2) A second issue relates to 5-year build-out plans, the heart of the FCC's new requirements. There are several specific elements of the FCC's 5-year plan that Staff believes are controversial. Wireless carriers have already gone on the record as opposing the length of the plan, arguing that a five-year planning horizon is unreasonably long, as well as the wire-center orientation of the plans which they argue are irrelevant to wireless carriers. Other parties may favor requiring more detail in the plans than the FCC has specified. In addition, the Commission will have an opportunity to clarify the types of universal service support that should be included in the build-out plans. The new FCC rules require that the plans detail how the applicant plans to use the "high-cost" universal service support that it expects to receive. However, it is not clear whether "high-cost" support in this context is limited to the traditional use of the term (e.g., local loop and local switching support received by rural carriers in Oregon) or also includes the interstate access universal service support funding (IAS for price cap carriers and ICLS for rate-of-return carriers) that USAC includes with its "high cost" funds. The amount of interstate access support that ETCs and CETCs are receiving in Oregon is just as large in dollar terms as traditional high-cost support, and both types of funds are intended to support the provision of universal service in high cost areas.
- 3) A third issue is whether to adopt requirements in addition to those proposed by the FCC. For instance, the Commission may wish to encourage certain service offerings, such as those for internet service, as it did when designating United States Cellular Corp (USCC) and RCC Minnesota, Inc. (RCC) as ETCs. Also, to bolster the Lifeline and OTAP programs, the Commission may wish to consider whether an ETC should be required to offer a specific affordable, basic local calling plan suitable for low-income consumers. The Commission is empowered to adopt other requirements as it deems fit.

- 4) A fourth issue is whether CETCs should be constrained as to exactly where the support money is spent. Each CETC generally receives the same amount of support per line/handset as the ILEC that serves the same area. These amounts vary by ILEC region or wire center. The FCC has required only that a CETC explain if it does not plan to use support money in any wire center in which it expects to receive support. While this indicates an expectation that support money be distributed across the wire centers from which it was generated, it does not require a dollar-for-dollar reinvestment by wire center or even by underlying ILEC service area. The Oregon Telecommunications Association (OTA) has expressed the view that support money received for customers in one ILEC's service area should not be used by the CETC to make improvements in another ILEC's service area. Otherwise, in OTA's view there would be a subsidy shift of sorts between ILEC areas. OTA will likely raise this issue in the docket.

B. Public interest determinations

Section 214(e)(2) of the Act requires that designation of a CETC be consistent with the public interest. If the CETC requests designation in areas served by non-rural ILECs, (Qwest and Verizon in Oregon), the Act directs states to designate CETCs "[u]pon request and consistent with the public interest, convenience, and necessity." In areas served by rural ILECs, the Act requires states to "find that the designation is in the public interest" before granting ETC status to any carriers in addition to the rural ILEC.

The Act does not include specific criteria to be used in the determination of public interest. The FCC has varied its public interest tests over time, particularly in relation to non-rural ILEC areas. While earlier the FCC focused on public interest issues primarily in rural ILEC areas, in the *March 17 Order*, the FCC decided that the same two public interest factors should be considered in CETC designations in both rural and non-rural ILEC areas. These two factors are: 1) the benefits of increased consumer choice, and 2) the advantages and disadvantages of a particular service offering. Although both are to be considered, the two factors may be given different weight, depending upon whether the public interest determination is being made for a rural or non-rural ILEC service area. In addition, the FCC affirmed the continued use of a cream-skimming test in cases where a CETC proposes to include within its designated service area only some, and not all, of the wire centers of a rural ILEC.

Staff believes there are at least three important issues related to public interest determinations.

- 1) One issue is whether the FCC's proposed public interest guidelines are sufficient or require modification. Two particular aspects that may require further discussion are

the application of the same two public interest factors to both rural and non-rural ILEC areas, and extension of the cream-skimming test to non-rural ILEC areas.

- 2) A second issue relates to the acceptable geographic boundaries of a CETC's designated service area. This is generally an issue in the case of wireless ETC applicants because wireless carriers operate within the confines of a licensed area established by the FCC. In many cases, the wireless licensed area boundaries do not coincide neatly with ILEC wire center boundaries. The FCC had previously determined that, as a matter of public interest, a CETC must include an entire wire center of a rural ILEC within its designated service area, regardless of the boundaries of its wireless license. However, the FCC has been silent regarding whether a CETC must include an entire wire center of a non-rural ILEC within its designated service area. The investigation provides the Commission an opportunity to decide whether it is in the public interest to require CETCs to include entire non-rural ILEC wire centers in their service areas, just as they are required to include entire rural ILEC wire centers. If the Commission decides that partial inclusion of a non-rural ILEC wire center may be acceptable, it should clarify the circumstances under which it would be acceptable.
- 3) The third issue is whether it would be in the public interest to adopt an upper limit on the number of CETCs that can be designated in any given area. Some parties have argued there are several reasons why a limit to the number of ETCs is needed; these are related to impacts on the size of the fund, impacts on the financial stability of the ILECs, and the potentially uneconomic use of support funds. On the other hand, if the Commission were to adopt a limit, it would need to address how to set that limit and establish the basis upon which to deny support to otherwise eligible carriers. Some parties have suggested, but the FCC has not adopted, the use of some sort of benchmark level of per line support. The concept underlying this idea is that if an area has a per-line support amount above the benchmark level, it would indicate that the costs are so high that it may not be economic to subsidize two carriers in the same area, and that more carriers in that area would disproportionately strain the fund. Alternatively, the Commission may decide to not adopt limits at this time, but to consider the number of ETCs already designated in the requested area as a public interest factor to be addressed in each new application.

Recertification

Section 254(e) of the Act requires that a carrier receiving universal service report "shall use that support only for the provision, maintenance, and upgrading of facilities for

which the support is intended.” The FCC has implemented this requirement by mandating that all previously-designated ETCs make annual certifications in order to continue receiving universal service support for the following year. This certification is in the form of an affidavit that certifies that the carrier will use universal service support “only for the provision, maintenance, and upgrading of facilities and services for which the support is intended.”

This periodic certification process varies depending upon the type of support received. ETCs receiving the traditional high-cost fund support (high cost loop, local switching, or forward-looking support) certify annually to the state commissions, who then must certify annually to the FCC for all such carriers in the state by October 1 of each year. In contrast, ETCs receiving federal interstate access universal service support (IAS or ICLS) certify themselves directly to the FCC by submitting an affidavit on, or before, June 30 of each year. Because the ETCs first certify when they receive ETC designation, the process of certifying for each following year is commonly referred to as “recertification.”

In the *March 17 Order*, the FCC adopted new mandatory reporting requirements for recertification of the ETCs that it has designated. These new reporting requirements are intended to make the recertification process more stringent by ensuring that ETCs comply with the conditions of their designation and that they have used support funds for their intended purposes. The new reports are to be filed along with signed affidavits by October 1 of each year, beginning in 2006. The FCC recommends that state commissions also adopt these reporting requirements, as well as any others they deem appropriate, for the ETCs that they have designated. In addition, the FCC recommends that the states apply the annual reporting requirements not just to CETCs, but to all ETCs including the ILECs. If a review of an ETC’s annual reports indicates that it is not in compliance with the criteria for ETC designation, the Commission can refrain from recertifying that ETC, or rescind the ETC’s designation for failure to comply.

Staff believes there are at least five issues related to the recertification process that should be addressed.

- 1) One issue is whether to adopt all, some or none of the FCC reporting requirements. Reporting requirements will, in part, arise out of the Commission’s requirements for initial designation. For instance, if the Commission decides to require submission of a 5-year plan for initial designation, then it will probably also require that the carrier report progress made on the 5-year plan in the past year. Similarly, if the Commission decides that it should adopt different requirements for initial designation of wireless versus wireline CETCs, then it will likely adopt different wireless and wireline reporting requirements.

- 2) A second issue is whether to apply any new reporting requirements to previously designated CETCs. The Commission has already required a few CETCs, e.g., USCC and RCC, as conditions of their designations, to file certain reports as part of the annual recertification process. The new reporting requirements adopted by the FCC are similar to, but still different from, those the Commission has employed. The Commission will need to consider whether to change the reporting requirements for CETCs such as USCC and RCC to be consistent with any new reporting requirements it adopts. For example, if the Commission adopts the FCC's 5-year plan requirement and associated annual progress reports, it may wish to do as the FCC did, and require that current CETCs submit a 5-year plan for recertification and reporting purposes.
- 3) A third issue is whether to require the ILEC ETCs to file the same reports as the CLECs, as recommended by the FCC. The CETCs, particularly wireless carriers, are likely to argue that all carriers must be treated the same and subject to the same requirements. ILECs will argue that there are reasons why they cannot, and should not, file the same reports as the CETCs. For instance, ILECs are already subject to many state regulations and related reporting requirements that wireless carriers are not.
- 4) A fourth issue will arise if the Commission decides not to impose the reporting requirements it adopts for CETCs on the ILEC ETCs. The question will be whether to establish any new reporting requirements specifically for ILEC ETCs for use in the recertification process. Currently, the ILECs are required to submit only a sworn affidavit from a company representative that the high-cost universal service funds will be used for the purposes intended. The investigation provides the Commission an opportunity to consider whether to adopt other means, in addition to the affidavit, to ensure that the ILEC ETCs are fulfilling their commitments regarding the use of universal service funds.
- 5) A fifth issue is whether to take any role in monitoring the ETCs that do not currently require annual recertification from the Commission in order to receive universal service support funds. The Commission only recertifies ETCs that receive traditional high-cost support funds, those specifically associated with Section 54.314 of the FCC rules. It does not recertify ETCs that receive only interstate access support, such as Qwest and Verizon. These carriers recertify themselves each June 30 to the FCC by submitting an affidavit. CETCs, such as VCI Company (formerly known as Vilaire), that receive only Lifeline support, also continue receiving such support without periodic Commission review. The Commission can consider whether it

wishes to adopt a review process that would include all ETCs, regardless of the type of federal universal service funding that they receive.

PROPOSED COMMISSION MOTION:

An investigation be opened to establish requirements for initial designation and recertification of telecommunications carriers eligible to receive federal universal service support.

ETC Investigation