

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

August 8, 2006

In Re: Rulemaking to Establish Criteria For)
Designating Eligible Telecommunications)
Carriers (ETCs) in Tennessee)

Docket No.: 05-00284

COMMENTS OF AT&T

AT&T Communications of the South Central States, LLC ("AT&T"), pursuant to the Tennessee Regulatory Authority's ("TRA" or the "Authority") Notice requesting comments from interested parties, hereby submits its Comments encouraging the Authority to adopt rules governing applications for designation of Eligible Telecommunications Carrier ("ETC") status that are consistent with the findings and guidelines adopted by the Federal Communications Commission ("FCC") in its Report and Order in CC Docket No. 96-45 released on May 17, 2005.¹

BACKGROUND

The *FCC ETC Order* established a public interest test the FCC uses in making determinations regarding ETC status and the requirements that a carrier must meet in order to qualify for ETC status under Title 47 USC §214(e). The FCC makes determinations regarding ETC status when a state does not have authority to review ETC applications. In the *FCC ETC Order*, the FCC strongly recommends that states adopt the same public interest test and requirements when reviewing ETC applications over which the state has authority.

¹ "In the Matter of Federal-State Joint Board on Universal Service" (*FCC ETC Order*).

The framework adopted in the *FCC ETC Order* is the result of the efforts of not just the FCC but also of the Federal-State Joint Board on Universal Service (“Joint Board”). The Joint Board and FCC have fashioned a “more rigorous”² framework for scrutinizing applications by providers for status as an ETC and, on an ongoing basis, for evaluating the performance of carriers already granted ETC status. The *FCC ETC Order* fosters three important policy objectives. These are: first, to “improve the long-term sustainability of the universal service fund;”³ second, to “allow for a more predictable ETC designation process;”⁴ and third, to “ensure designation of carriers that are financially viable, likely to remain in the market, willing and able to provide the supported services throughout the designated service area, and able to provide consumers an evolving level of universal service.”⁵ The TRA’s decisions regarding ETC status will “have *national implications* that affect the dynamics of competition, the national strategies of new entrants, and the *overall size* of the federal universal service fund.”⁶ Adoption of the *FCC ETC Order* guidelines in Tennessee is clearly in the public interest.

I. Statutory Authority

The federal statutory law germane to state commission involvement in universal service issues is found principally in two sections of the Communications Act of 1934, as amended by the Telecommunications Act of 1996. Those two provisions are section 254 (47 USC § 254) and section 214(e) (47 USC § 214(e)). Section 254 provides for a partnership between the FCC and the Joint Board in developing and implementing major changes to the informal universal service

² *FCC ETC Order* ¶ 2.

³ *Id.*

⁴ *Id.* ¶ 1.

⁵ *Id.* ¶ 60.

⁶ *FCC ETC Order*, para. 60 (emphasis added).

policy formerly employed at the federal level.⁷ Section 254 substituted a statutory definition for what had been a non-codified general policy regarding universal service,⁸ and it authorized ongoing alterations and modifications to the universal service program.⁹ The 1996 Act converted universal service from an inchoate policy into an explicit, defined, and soundly based program.¹⁰

Section 254(e) also provides that only an ETC "designated under section 214(e) shall be eligible to receive specific Federal universal service support."¹¹ Section 254(f) provides that state commissions "may adopt regulations not inconsistent with the [FCC]'s rules to preserve and advance universal service."¹²

A state commission's role in determining ETC eligibility, then, rests in Section 214(e).¹³ Additionally, Section 214(e) provides that a state commission is responsible, in concert with the Joint Board, for defining or redefining the service areas that an ETC applicant will serve.¹⁴ The specific text of these relevant provisions is as follows:

(2) Designation of eligible telecommunications carriers

A State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the State commission. Upon request and consistent with the public interest, convenience, and necessity, the State 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 eligible telecommunications carrier for a service area designated by the

⁷ See 47 USC § 254(a)-(b).

⁸ See, e.g., *TOPUC v FCC*, 183 F3d 393 (5th Cir. 1999).

⁹ 47 USC 254(c)(2).

¹⁰ See *TOPUC v FCC*, *supra*. Universal service policies had been based on the language found in 47 USC § 1 ("so as to make available, so far as possible, to all the people of the United States . . . a . . . Nation-wide . . . communication service").

¹¹ 47 USC § 254(e).

¹² 47 USC § 254(f).

¹³ 47 USC 214(e)(2).

¹⁴ 47 USC 214(e)(5).

State commission, so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest.

(5) "Service area" defined

The term "service area" means a geographic area established by a State commission (or the Commission under paragraph (6)) for the purpose of determining universal service obligations and support mechanisms. In the case of an area served by a rural telephone company, "service area" means such company's "study area" unless and until the Commission and the States, after taking into account recommendations of a Federal-State Joint Board instituted under section 410 (c) of this title, establish a different definition of service area for such company.

From these two provisions, it is clear that the role of the Authority is to:

1. designate a common carrier, if consistent with public interest requirements, and if it meets the requirements of Section 214(e)(1), as an Eligible Telecommunications Carrier; and
2. make the designation for a service area.

The FCC has made clear that "Section 214(e)(2) ... provides state commissions with the primary responsibility for performing ETC designations."¹⁵

II. FCC ETC Order

In its Report and Order, the FCC adopted many of the Joint Board's recommendations for revision and improvement in the ETC process. The requirements and public interest factors in the *FCC ETC Order* apply to ETC applications filed with the FCC.¹⁶ In addition, "as recommended by the Joint Board, [the FCC] encourage[d] states that exercise jurisdiction over ETC designations pursuant to section 214(e)(2) . . . to adopt these requirements when deciding

¹⁵ *FCC ETC Order* ¶ 8.

¹⁶ The FCC reviews ETC applications when the state relinquishes its authority to review ETC applications to the FCC or when the application is on tribal lands. See 47 USC § 214(e)(6).

whether a common carrier should be designated as an ETC."¹⁷ The *FCC ETC Order* provides that a carrier requesting ETC status must:

- (1) commit to provide service throughout its proposed designated service area to all customers by submitting a five-year plan that describes with specificity proposed improvements or upgrades to the applicant's network on a wire center-by-wire center basis throughout its proposed designated service area;
- (2) demonstrate its ability to remain functional in emergency situations;
- (3) demonstrate that it will satisfy appropriate consumer protection and service quality standards;
- (4) demonstrate that it offers a local usage plan comparable to the one offered by the incumbent LEC in the service areas for which it seeks designation; and
- (5) certify that the carrier acknowledges that the FCC may require it to provide equal access to long distance carriers if all other ETCs withdraw from the market.¹⁸

Additionally, the Report and Order requires that, once approved by the FCC, an ETC must provide annually a progress report on its five-year service quality improvement plan, detailed information on any outage, the number of requests for service from potential customers within the carrier's service areas that were unfulfilled during the past year, the number of complaints per 1,000 handsets or lines, certification that it is complying with applicable service quality standards and consumer protection rules, certification that the carrier is able to function in emergency situations, certification that the carrier is offering a local usage plan comparable to that offered by the ILEC, and certification that the carrier acknowledges that the FCC may require it to provide equal access.¹⁹ The FCC urged states to require ETCs under state

¹⁷ *FCC ETC Order* ¶ 1.

¹⁸ *See, e.g.*, ¶ 2.

¹⁹ *Id.*

jurisdiction to provide these additional reports to the states: “We encourage states to require these reports to be filed by all ETCs over which they possess jurisdiction.”²⁰

The analytical framework of the *FCC ETC Order* also provides for certain consumer protections and a review, on a case-by-case basis, of the factors necessary to ensure that each ETC provides a local usage component in its universal service offerings that is comparable to the plan offered by the incumbent local exchange carrier in the area. The requirements obligate the ETC to be able to remain operational in case of an emergency so that consumers will have service when they need it most. The new approach creates an annual review of the actions of an ETC so that the qualification process is ongoing, and it provides clear planning and reporting requirements to prove that the use of federal universal service funding support complies with Section 254 of the federal Act.

The FCC also revised the public interest analysis it will use in making ETC designations. The *FCC ETC Order* “set[s] forth our public interest analysis for ETC designations, which includes an examination of (1) the benefits of increased consumer choice, (2) the impact of the designation on the universal service fund (“USF”), and (3) the unique advantages and disadvantages of the competitor’s service offering.”²¹ The FCC’s public interest examination also includes an analysis of the potential for creamskimming when an ETC seeks designation below the study area level of a regional LEC.²² The discussion of creamskimming is found in the context of considering a rural carrier’s application, but the analysis holds true for non-rural carrier applications as well. The FCC stated:

²⁰ *Id.* ¶ 4
²¹ *Id.* ¶ 18.
²² *Id.*

By serving a disproportionate share of the high-density portion of a service area, an ETC may receive more support than is reflective of the rural incumbent LEC's costs of serving that wire center because support for each line is based on the rural telephone company's average costs for serving the entire service area unless the incumbent LEC has disaggregated its support.²³

In other words, the FCC found that creamskimming occurs when a carrier serves only low cost customers while recovering the USF support on the basis of providing service to all customers. This stratagem is achieved by serving the wire center(s) with high population density and not serving the wire center(s) with low population density, when the USF support is average across all wire centers. The improved analysis now will look at the population density of the wire centers in a carrier's service area to determine if an ETC application could result, even unintentionally, in creamskimming.

The same analysis is appropriate for non-rural carriers, particularly if an applicant seeks ETC status in order to provide service supported by the USF to a partial wire center that is receiving USF high cost support. The USF support for the wire center is based on the average cost per loop across the entire wire center, yet the ETC might request to serve only, or primarily, the lower cost, high density portion of the wire center. The ETC would receive support based on the average loop cost while serving only the low cost customers, and it would receive a financial windfall while draining away the implicit support intended to protect and enable service to the high cost, low density portion of the wire center. The FCC "strongly encouraged state commissions to consider the same factors in their public interest reviews."²⁴ These, then, are considerations for the TRA, as well.

²³ *Id.* ¶ 49 (cite omitted).

²⁴ *Id.* ¶ 41.

III. Recommendations

It is particularly appropriate that the TRA conform its administration of the ETC process to the regime created by the *FCC ETC Order*. This approach has its basis in the recommendations of the Joint Board, whose membership includes state and federal regulators. The FCC's requirements and public interest factors will apply to ETC applications filed with the FCC; there is no policy rationale for why they should not also apply to intrastate scenarios in Tennessee. Thus, AT&T strongly supports that the *FCC ETC Order's* requirements and policies be applied to all ETC applications filed with the Authority.

Tennessee's adherence to these principles will contribute to a rational, comprehensive, coordinated national policy that promotes the advancement and preservation of universal service. The FCC found that, collectively, state decisions regarding ETC status "have national implications that affect the dynamics of competition, the national strategies of new entrants, and the overall size of the federal universal service fund."²⁵ The requirements embodied in the FCC ETC Order (1) will result in a rigorous ETC designation process,²⁶ (2) will "improve the long-term sustainability of the universal service fund,"²⁷ (3) will "allow for a more predictable ETC designation process,"²⁸ and (4) will "ensure designation of carriers that are financially viable, likely to remain in the market, willing and able to provide the supported services throughout the designated service area, and able to provide consumers an evolving level of universal service."²⁹ The Joint Board obviously felt, and the FCC concurred, that these are considerations deserving

²⁵ *Id.* ¶ 60.

²⁶ *Id.* ¶ 2.

²⁷ *Id.*

²⁸ *Id.* ¶ 1.

²⁹ *Id.* ¶ 60.

of national, uniform application. Consequently they are certainly deserving of application in Tennessee.

A major reason for adopting the FCC guidelines is set forth in a cogent summary statement found in the *FCC ETC Order*:

We agree with the Joint Board's recommendation that a rigorous ETC designation process ensures that only fully qualified applicants receive designation as ETCs and that all ETC designees are prepared to serve all customers within the designated service area.³⁰

In other words, it is the interest of consumers that is at the heart of the new, revised application process. The consumer protections embodied in the new regime certainly justify implementation in Tennessee. As but one example, the ETC is to prove itself able to remain operational in case of an emergency so that consumers will have service when they need it most. This critical showing – made even more important in a post-9/11 world – is certainly as apropos in Tennessee as in the rest of the nation.

The *FCC ETC Order* also acknowledges that a public interest showing is required in all ETC proceedings, both rural and non-rural. A carrier that seeks USF high cost support should be required to meet all of the criteria to prove the public interest is advanced, regardless of whether the filing is made at the federal or state level. This Authority should employ the public interest analysis embodied in the *FCC ETC Order*.

AT&T believes the Authority's proposed rules generally are in accord with the *FCC ETC Order* and should be approved with one slight modification regarding proposed rule 1220-4-14-.03(3)(c). That proposed rule requires applicants to file a two-year improvement plan. The *FCC ETC Order* requires a five-year improvement plan. The purpose of the FCC's five year plan is

³⁰ *Id.* ¶ 58.

often misconstrued; i.e., it is not simply to show the Authority how the carrier will use the high cost support, it is also to show an ETC applicant's "commitment and ability to provide supported services throughout the designated service area." (*FCC ETC Order*, para 21) In its ETC Order, the FCC noted that the requirement for an ETC applicant to demonstrate its commitment to provide service throughout its service area was first used in its Virginia Cellular Order (*FCC ETC Order*, Para 22), where the FCC stated, "in determining whether designation of a competitive ETC ... is in the public interest, we weigh numerous factors, including ... the competitive ETC's ability to provide the supported services throughout the designated service area within a reasonable time frame." The FCC determined that a reasonable time frame for a competitive ETC to provide ubiquitous service in its designated service area is within five years. A two year plan, absent a commitment to provide ubiquitous service during the two year period, fails to demonstrate the carrier's commitment to provide service throughout its designated service area. Two important facts to remember are: (1) High cost support is to be "used to improve coverage, signal strength, or capacity that would not otherwise occur absent the receipt of high-cost support", and (2) an ETC applicant chooses, with some limitations, the size of the designated service area to which it will be required to provide ubiquitous service within a reasonable time frame, the five years set out by the FCC's ETC Order. Therefore, a more reasonable requirement would be for the TRA to adopt an improvement plan that covers a five-year period as determined by the Federal-State Joint Board and adopted by the FCC.


Conclusion

The *FCC ETC Order* summarizes the states' role as follows:

Section 214(e)(2) of the Act gives states the primary responsibility to designate ETCs and prescribes that all state designation decisions must be consistent with the public interest, convenience, and necessity.³¹

In order that this "primary responsibility" might be exercised appropriately, AT&T recommends that the Authority adopt rules consistent with the *FCC ETC Order*. Such a course would best enable the Authority to comply with the Joint Board's recommendation and the FCC's decision to achieve "a rigorous ETC designation process" and a "predictable application process."³² It will also improve the long-term sustainability of the USF fund³³, thus safeguarding customer interests in the long run. For the reasons stated, AT&T respectfully urges the TRA to adopt the recommendations contained in these comments.

Respectfully submitted:


Henry Walker
Boult Cummings Conners & Berry, PLC
1600 Division Street, Ste. 700
Nashville, TN 37203
Phone: (615) 252-2363

Gene V. Coker
1230 Peachtree Street NE
4th Floor
Atlanta, Georgia 30309
(404)-810-8700

³¹ *Id.* ¶ 61 (emphasis added).

³² *FCC ETC Order* ¶ 58.

³³ *Id.*