



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
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IN REPLY PLEASE
REFER TO OUR FILE

June 23, 2016

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: PETITION FOR CLARIFICATION OF THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION
WC Docket Nos. 11-42, 09-197, 10-90

Dear Secretary Dortch:

Enclosed with this transmittal letter is the Petition for Clarification of the Pennsylvania Public Utility Commission. The Petition concerns matters of the Federal Communications Commission's *Lifeline and Link Up Reform and Modernization, Third Report and Order*, released on April 27, 2016.

The Petition requests that the Federal Communications Commission (FCC) provide clarification on: (1) the role of states in enforcement and consumer protection as it pertains to Lifeline Broadband Providers; (2) notice requirements; (3) and outstanding compliance plans that were filed with the FCC pursuant to the 2012 Lifeline and Link Up Reform and Modernization Order that became effective on April 2, 2012.

Sincerely,

Colin W. Scott
Assistant Counsel

**Before the
Federal Communications Commission
Washington, D.C., 20544**

In the Matter of)	
)	
Lifeline and Link Up Reform and Modernization)	WC Docket No. 11-42
)	
Telecommunications Carriers Eligible for Universal Service Support)	WC Docket No. 09-197
)	
Connect America Fund)	WC Docket No. 10-90

**PETITION FOR CLARIFICATION
OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION**

The Pennsylvania Public Utility Commission (Pa. PUC) respectfully petitions the Federal Communications Commission (Commission or FCC) to clarify certain aspects of its *Lifeline and Link Up Reform and Modernization, Third Report and Order* (2016 Order), released on April 27, 2016. The Pa. PUC seeks clarification on: (1) enforcement and consumer protection; (2) notice requirements; and (3) outstanding compliance plans.

Specifically, the Pa. PUC seeks formal clarification regarding the states' roles with regulatory enforcement and consumer protections as they apply to Lifeline Broadband Providers (LBPs), particularly those who will be authorized by the FCC as LBPs under the *2016 Order*. The Pa. PUC petitions the Commission to recognize that state commissions have authority to enforce federal and state law pursuant to 47 U.S.C.

§ 214(e) and, consistent with the states' constitutional obligation to enforce federal law,¹ may engage in ordinary enforcement activities and consumer protections even when the eligible telecommunications carriers (ETCs) involved are FCC-designated LBPs.

Alternatively, if the FCC concludes that federal law does not support granting the states this enforcement authority, the Pa. PUC recommends that LBPs operating within a state must at a minimum be required to provide notification and register with appropriate state agencies, particularly commissions like the Pa. PUC. Individual states need to know the identities and locations of LBPs conducting business within their borders even when the respective state commission is not the regulatory body that granted ETC designation. These notice requirements could be prescribed in a manner similar to the ones that apply to Voice over Internet Protocol (VoIP) providers that seek direct access to numbering resources.

Additionally, the Pa. PUC seeks clarification and action on FCC approval or denial of pending compliance plans submitted for approval by voice-only ETC applicants seeking designation in Pennsylvania.² These compliance plans correspond with the Commission's 2012 Order, *Lifeline and Link Up Reform and Modernization*, that became effective on April 2, 2012 (2012 FCC Order), and have been pending before the Commission since 2011. While the Commission updates Section 54.202 of its rules to reflect targeted changes to its own designation process for LBP ETCs, it does not address

¹ *Illinois Public Telecommunications Association v. FCC*, 552 F.3d 1018 (DC 2014), cert denied 2015 U.S. Lexis 2047 (March 23, 2015)

² Pa. PUC Docket Nos. P-2011-2229393 (re: Conexion), P-2011-2239288 (re: Absolute), P-2011-2273320 (re: Cintex), and P-2011-2776795 (re: US Connect d/b/a US Connect Wireless)

previously submitted compliance plans for voice-only ETC applications. 2016 Order at ¶ 282 and fn. 739.

Because the states continue to have ETC designation authority over voice-only and mixed voice and broadband service providers under the *2016 Order*, FCC action on these pending compliance plans will assist the Pa. PUC in its ongoing ETC monitoring in Pennsylvania.

FCC action on these compliance plans is also important because carriers that have submitted applications in Pennsylvania have indicated to the Pa. PUC their continued resolve to be designated as voice-only ETCs. The Pa. PUC encourages the Commission to act on these compliance plans so that the Pa. PUC may dispose of these open dockets. Should the FCC clarify that it does not intend to act on these compliance plans, the Pa. PUC requests guidance about how to treat these unresolved applications.

Background

By making broadband Internet access service (BIAS) a supported service, the FCC takes a critical step in reforming and modernizing the federal Universal Service Fund's Lifeline program.³ Although the Commission continues to require Lifeline providers to be designated as ETCs, the FCC in its *2016 Order* changes the processes and obligations necessary to obtain and maintain ETC status. 2016 Order at ¶¶ 217-218, 223-228. The Commission establishes its authority under 47 U.S.C. § 214(e)(6) to designate a new category of ETCs, the Lifeline Broadband Providers (LBPs), and preempts state commissions from being able to designate LBPs as ETCs. 2016 Order at ¶¶ 218, 249.

Pursuant to 47 U.S.C. § 214(e)(2)-(3), the Pa. PUC and other state commissions have traditionally designated ETCs except in limited circumstances. 47 U.S.C. § 214(e)(6). However, through this Order, the Commission interprets Section 214(e) to establish its exclusive jurisdiction to designate LBPs as ETCs solely for the purpose of receiving reimbursement through the Lifeline program for providing BIAS to eligible low-income subscribers.⁴ 2016 Order at ¶ 229. The FCC preempted the states' ability to designate LBP ETCs, reasoning that (1) allowing state commissions to designate LBPs would thwart universal service goals and broadband competition, and (2) permitting carriers to seek designation from the FCC for multiple states at once would serve targeted universal service principles. 2016 Order at ¶¶ 249-251.

³ See *Lifeline and Link Up Reform and Modernization, Third Report and Order, Further Notice of Proposed Rulemaking, and Order on Reconsideration*, ¶¶ 30-33 WC Docket No. 11-42, FCC 16-38 (rel. April 27, 2016) (2016 Order), *appeal pending NARUC v. FCC*, (DC Cir., Case No. 16-1170, filed June 3, 2016).

⁴ The Pa. PUC reserves its appropriate legal rights regarding this FCC action.

The Order does preserve states' authority to designate ETCs to receive Lifeline reimbursement for qualifying voice and/or comingled voice and broadband services. 2016 Order at ¶ 218. However, the Order is silent on whether the Commission intended for state commissions to engage in general enforcement activities and consumer protection issues involving broadband only LBPs, which may only be designated as ETCs by the FCC. Also, the Order does not address how the states are to comply with the constitutional obligation to enforce federal law. Consequently, the FCC should clarify how states are to apply and enforce federal and state law, pursuant to 47 U.S.C. § 214(e)(6), to prevent this burdensome responsibility from falling entirely on the Commission.

This new model has the potential to create a dichotomy where enforcement activities against state-designated voice and/or comingled voice and broadband ETCs are applied by state commissions and agencies, while enforcement activities against LBPs are only able to be administered by the FCC. This ambiguity will most likely confuse state consumers who are accustomed to contacting the state commissions in those instances where their federally-supported lifeline service is unreliable or when there are significant quality of service problems. Finally, a result which sends some consumers to the FCC and others to the states would be cumbersome, confusing, and a questionable use of scarce administrative resources.

Petition

This Petition is necessary because it is reasonable to anticipate that consumers will continue to contact state commissions and file complaints if disputes with LBP ETCs arise. Such action by consumers is likely to continue to occur, as it has in the past, regardless of whether the Commission grants the carrier its ETC designation. A lack of clarity on the states' abilities to address LBPs' compliance with federal requirements, if the states currently cannot designate such entities as ETCs, may and will lead to unnecessary litigation at the state and federal level.⁵ Without clarification from the FCC, there is an opening for LBP ETCs to challenge state commissions' authority to enforce and apply federal and state law, arguing that the FCC has preempted the states from regulating in these areas, or from bringing forth enforcement actions to address consumer complaints. Additionally, clarity from the Commission as to the states' role in enforcement will insulate the Commission from having to exert its own time and resources to the task.

States, especially Pennsylvania, are well-equipped with the resources and expertise to handle compliance and enforcement as they have been primarily responsible for designating ETCs and ensuring that such carriers provide reliable service and to ensure compliance with applicable federal and state laws and regulation.

⁵ Compare *AT&T Corp., et al. v. Core Communications Inc.*, 806 F.3d 715 (3d Cir. 2015), with *In re Petition of the Pennsylvania Public Utility Commission for Declaratory Order On Whether State Public Utility Commissions Are Entitled to Adjudicate Intercarrier Compensation Disputes Involving the Exchange of Local Dial-Up Internet Traffic Between Carriers with Indirect Interconnection*, WC Docket No. 14-70, filed April 29, 2014 petition to dismiss filed December 23, 2015.

For example, states like Pennsylvania can ensure that carriers are not engaged in any fraud and abuse of the federal USF Low Income program. The Pa. PUC advocates that an explicit directive from the Commission, along with specific guidelines, better prevents waste, fraud, and abuse in the Lifeline program, while also ensuring the reliability and continued quality of Lifeline services when broadband-only providers are designated as ETCs through the separate federal designation process. 2016 Order at ¶ 237. As Commissioner Pai stated in his dissent to the 2016 Order, “it was the state commissioners on the Federal-State Joint Board – not the FCC – that identified the growing waste, fraud, and abuse in the Lifeline program in 2010” and “states are still the best cops on the beat.” 2016 Order at p. 207.

It is against this backdrop that the Pa. PUC petitions the Commission to clarify whether states have explicit authority to: (1) apply and enforce federal and state law under 47 U.S.C. § 214(e)(6); and (2) conduct regular enforcement activities where LBPs, designated as ETCs exclusively by the Commission, are involved. Thus, the Pa. PUC first seeks clarification as to whether or not the FCC intends for state commissions to enforce federal and state law and to engage in enforcement activities as well as address consumer protections when the carrier involved is a designated LBP.

If, the Commission agrees with the position of the Pa. PUC that state commissions are best-equipped to handle enforcement activities and consumer protection issues involving federally-designated LBP ETCs, then the Pa. PUC encourages the FCC to explicitly state that and to provide the states with guidance and support for their role regarding LBP ETCs.

In the alternative, should the Commission determine that states are preempted from such activities, the Pa. PUC requests the FCC to specify the procedures for state commissions to direct all future consumer inquiries, complaints, and new matters to the FCC for future disposition. This would assist state commissions' staffs to educate consumers on the process in place that will be used to address their concerns about enforcement, service quality, and reliability through a referral and general consumer protection correspondence that can quickly and efficiently allow the Commission to resolve those matters.

Enforcement and Consumer Protection

While the Pa. PUC certainly cannot construct a comprehensive list of permutations that addresses every conceivable enforcement activity that could occur, we offer the following scenarios for the Commission to consider and advise of the states' role in addressing them:

- A carrier that receives its LBP ETC designation from the FCC begins to advertise the availability of BIAS to Pennsylvania residents pursuant to its responsibilities in 47 U.S.C. 214(e)(1)(B). The Pennsylvania Office of Attorney General-Bureau of Consumer Protection (Pa. OAG-BCP) receives a complaint that the LBP is falsely advertising these BIAS services and is not actually delivering them under applicable federal standards. Under the new paradigm, may the Pa. OAG-BCP initiate an enforcement action against the LBP to protect Pennsylvania consumers? Or, is the Pa. OAG-BCP preempted from initiating and pursuing an enforcement

action because the LBP was designated as an ETC by the FCC rather than the Pa. PUC? Similarly, is any form of collaboration between the Pa. OAG-BCP and the Pa. PUC relating to allegations of this nature prohibited by the FCC's ETC designation of LBPs and the related federal preemption?

- In a similar scenario, even if the Commission determines that state agencies may not initiate enforcement actions against LBPs that receive ETC designations from the FCC, is a state commission foreclosed from adjudicating a formal complaint filed with the state commission brought by a consumer that allegedly is harmed by an LBP? For example, what if the complaint involves a consumer that is experiencing a significant reliability or service quality problem with his or her broadband Lifeline service? If a consumer contacted the Pa. PUC's Bureau of Consumer Services (BCS) and sought to institute an informal complaint against the LBP because he or she relied on a Lifeline service offering from the LBP that was not properly delivered or otherwise has a significant reliability or service quality problem, does the Pa. PUC have jurisdiction to adjudicate the proceeding? Or, does the FCC anticipate being the exclusive regulatory agency that can adjudicate and dispose of consumer complaints filed against LBPs with or otherwise referred to state agencies?
- The LBP in the example above again has the attention of the Pa OAG-BCP for falsely advertising the availability of Lifeline BIAS as a supported service and does not deliver the service in accordance with applicable federal standards. The LBP also happens to be an existing ETC under a Pa. PUC issued designation or for

whatever reason voluntarily seeks a parallel ETC designation from the Pa. PUC.

When the state commission becomes aware of the conduct of the LBP, may it institute an enforcement action that could potentially remove the state-issued ETC designation? Or, will the conduct of the LBP be subject to enforcement activity only by the FCC?

As stated earlier in this Petition, the amended framework identified in the Order has the potential to create a bifurcated and convoluted regulatory enforcement scheme. State commissions have traditionally engaged in enforcement activities to protect consumers where ETCs are involved and should be authorized to operate in that capacity with respect to LBPs consistent with applicable federal standards. States are often entrusted with enforcing and applying federal and state law, and the Pa. PUC has specific state statutory authority to enforce federal law and standards.⁶ Moreover, preemption from being able to designate this new classification of ETCs should not extend to enforcement because states maintain the requisite resources and expertise to handle these activities.

Notice Requirements

The Pa. PUC recommends that irrespective of whether or not state commissions are granted enforcement authority, LBPs operating within a state be required to provide notification and register with appropriate state agencies. The notice and registration

⁶ *AT&T Corp., et al. v. Core Communications Inc.*, 806 F.3d 715 (3d Cir. 2015).

requirement should be structured so that the states know who the service providers are and how the service providers can be contacted by the states or consumers with specific issues about the LBPs' service. Individual states should be aware of the carriers conducting business within their borders even when the respective state commission is not the regulatory body that granted ETC designation.

One option is to set out notice requirements prescribed in manner similar to the ones that apply to VoIP providers that seek direct access to numbering resources. ¹ *See In the Matter of Numbering Policies for Modern Communications*, 28 F.C.C. Rcd. 5842, 5878, ¶¶ 87-89, 105-108 (2013) (2013 FCC Order). Per the 2013 FCC Order, VoIP providers are required to comply with the Commission's number utilization and optimization requirements and industry guidelines and practices, including providing advance notice of its numbering requests to states. *Id.* at ¶ 88. In addition, conditions such as providing the relevant state commission with regulatory and numbering contacts when numbers were requested in the state were placed on VoIP providers. *Id.* at ¶ 105. Similar notice and reporting could be required of LBPs to aid in the entry into and identification of such entities in various states.

Outstanding Compliance Plans

Separately, the Pa. PUC seeks clarification as to whether or not the Commission intends to approve pending compliance plans for voice-only ETC applicants that were submitted to the FCC in accordance with the Commission's 2012 Lifeline and Link Up Order that became effective on April 2, 2012. Pursuant to the 2012 Order, the FCC

stated that it would forbear from applying the facilities requirement of Section 214(e)(1)(A) to all telecommunications carriers seeking limited ETC designation to participate in the Lifeline program if, *inter alia*, the carrier filed a compliance plan that provided specific information regarding the carrier's service offerings and outlining the measures the carrier would take to implement the obligations of that order. *See* 2012 FCC Order at ¶ 28.

Currently, there are four applications of carriers seeking ETC designation in Pennsylvania that are still pending before the Commission.⁷ Each carrier has recently indicated to the Pa. PUC that it still wishes to have its voice-only ETC designation granted; however, designation is reliant on approval of their compliance plans by the Commission.

Considering the changes being made to supported modes of service by the *2016 Order*, the Pa. PUC seeks confirmation that the FCC plans to act on the outstanding compliance plans. The Pa. PUC recognizes that the Commission plans to phase out voice-only Lifeline support as a standalone option in favor of requiring voice service to also include broadband service. *2016 Order* at ¶ 48. In the transition away from voice-only supported service, it is possible that these pending compliance plan filings may be overlooked; however, the Pa. PUC seeks instruction for how to handle these outstanding ETC designation applications if the Commission does not plan to review and approve them. States need to be authorized to complete their individual reviews of the

⁷ Pa. PUC Docket Nos. P-2011-2229393 (re: Conexion), P-2011-2239288 (re: Absolute), P-2011-2273320 (re: Cintex), and P-2011-2776795 (re: US Connect d/b/a US Connect Wireless)

applications and either grant or deny ETC designation as long as voice-only services remain supported, until December 1, 2021.

Relief Requested

The Commission should remove the current uncertainty surrounding states' abilities to apply and enforce federal and state law against Lifeline Broadband Providers even though such ETCs can only be designated by the Commission. The Pa. PUC recommends that the FCC authorize state commissions to apply and enforce federal and state laws as required by federal precedent because the states are constitutionally required to enforce federal law and are also currently responsible for adjudicating similar disputes when voice and/or mixed voice and broadband ETCs are involved.⁸ States, especially Pennsylvania, have the requisite state statutory authority, resources and expertise to handle these disputes and can ensure that these adjudications do not consume the Commission's time and resources.

The Commission should clarify the states' roles with respect to regulatory enforcement and consumer protections as such roles may apply to LBPs. The Pa. PUC advocates the Commission to rule that state commissions have authority to engage in ordinary enforcement activities and consumer protections when the ETCs involved are federally-designated LBPs. Again, states are best positioned to complete this charge.

⁸ The Pa. PUC notes, for example, that Connect America Fund (CAF) recipients are required, as condition of federal support, to construct and operate networks capable of providing voice and broadband at predetermined speeds and to provide consumers voice and broadband service at predetermined speeds. Conditions of getting federal support are state ETC designations and annual certifications by the states that the recipients are using the support for the intended purposes. Moreover, future LBPs may decide to provide voice and broadband service as opposed to broadband only as addressed in the *2016 Order*.

Clarity by the Commission in favor of such an authorization for the states will avoid unnecessary and administratively burdensome litigation at the state and federal level.

If the Commission decides not to carve out the aforementioned enforcement roles for state commissions, the Pa. PUC seeks guidance from the FCC as to the procedures states should use to direct all consumer inquiries, complaints, and new matters to the Commission for disposition. In either event, the Pa. PUC recommends that the Commission institute notice and registration requirements on LBPs, and provide the requisite framework to the states and to LBPs, so that each are fully aware of their obligations and states are informed about the providers of Lifeline-supported BIAS conducting business within their borders.

The Pa. PUC recommends that irrespective of whether or not state commissions are granted enforcement authority, LBPs operating within a state should be obligated to provide notification and register with appropriate state agencies. Individual states should be aware of the carriers conducting business within their borders even when the respective state commission is not the regulatory body that granted ETC designation. These notice requirements could be prescribed in manner similar to the ones that apply to Voice over Internet Protocol (VoIP) providers that seek direct access to numbering resources.

Finally, the Pa. PUC requests that the Commission act on outstanding compliance plans that have been filed in accordance with the 2012 FCC Order to allow the Pa. PUC to dispose of voice-only ETC designation applications that have been pending since 2011. If the Commission declines to either approve or deny such compliance plans because it is phasing out standalone voice service as a supported Lifeline service, the Pa. PUC seeks clarification and guidance from the FCC regarding how to proceed with these ETC applications.

Respectfully submitted,

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