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State Commissions' Authority to Mandate Service Quality Standards When Designating Eligible Telecommunications Carriers

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Re: State commissions hearing ETC designation cases have authority to mandate service quality standards

A state commission with limited regulatory authority under state law recently asked whether, when acting to designate Eligible Telecommunications Carriers (ETCs), it could impose service quality performance standards on telecommunications companies as a condition of receiving federal universal service payments. Specifically, the commission asked whether federal law permits it to make compliance with state-defined quality performance standards a condition of designating a telecommunications carrier as an Eligible Telecommunications Carrier (ETC).

The state commission mentioned that delays by one or more of its companies had caused customers to go thirty days without service. The commission expressed interest in adopting uniform measurements for all ETCs that would cover such topics as response to outages, billing errors, advertisement of services, and length of time before service is restored.¹

The state commission said it wanted to impose this condition to ensure that ETCs continually evaluate their retail performance and to obtain some recourse if a carrier continually fails to perform adequately.² The state commission suggested that a service quality measurement system would help ensure that these federal USF dollars are spent in an effective and efficient manner.

In summary, I conclude that a state that has authority to hear ETC designation cases may condition those designations on compliance with state service quality standards. The state may also impose a similar condition on the annual certification that the FCC makes prerequisite to issuing federal high-cost funds to carriers. The state's remedies may be limited, however, to denying carriers their expected federal universal service support for one or more quarters.

¹ Retail service quality regulations traditionally address a dozen or more dimensions of service. These standards typically cover installation intervals for new service, operator-handled calls, dial tone availability, call blocking rates, unscheduled outage times, customer trouble occurrence rates, average response time for trouble calls, reporting of network downtime, and emergency service continuity plans. See Lilia Perez-Chavolla, *Survey of State Retail Telephone Quality of Service Regulations for Selected Categories of Service: Metrics, Penalties and Reports*, NRRI, 2004, available at <http://nrri.org/pubs/telecommunications/04-09.pdf>; see generally, Davis, Blank, Landsbergen, Zearfoss, Hoag, Lawton, *Telecommunications Service Quality*, NRRI 1996, available at <http://nrri.org/pubs/telecommunications/96-11.pdf>.

² Carriers in this particular state receive millions of dollars in high-cost support each year.

I. ETC designations

The Telecommunications Act of 1996 created the concept of ETCs, and it delegates to states the authority to designate ETCs.³ The statute gives states explicit guidance on some issues, such as how many ETCs must be designated in a single area. The following discussion assumes that a state has sufficient authority under state law to accept this delegation and to conduct such ETC hearings.⁴

The federal statute does not make service quality standards a prerequisite for support, but it does contain three relevant provisions. First, service quality is an important element of universal service goals. The statute says that "quality services should be available at just, reasonable and affordable rates."⁵ It is not sufficient under the federal Act that carriers just provide some sort of local service; the service should be "quality service."

Second, the federal statute requires ETCs to "offer" the services that are supported by Federal universal service support mechanisms.⁶ The FCC has identified nine services that are so supported, the first being "voice grade access to the public switched network."⁷ A state may

³ 47 U.S.C. § 214(e)(2) provides, in part: "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 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." Similar language is found in 47 U.S.C. § 214(e)(6) regarding areas where state commissions do not have jurisdiction to establish service areas.

⁴ A state commission created by state law cannot generally act under a federal delegation unless it also has authority under state law to do so. Depending on state law, a commission may derive that authority from express statutory provisions or it may be implied as a necessary and proper extension of a commission's other more general authority.

⁵ 47 U.S.C. § 254(b)(1).

⁶ 47 U.S.C. § 214(e)(1)(A). In areas served by a rural telephone company, the state commission must also find that the designation is "in the public interest."

⁷ 47 C.F.R. § 54.101(a). This is defined as "a functionality that enables a user of telecommunications services to transmit voice communications, including signalling [sic] the network that the caller wishes to place a call, and to receive voice communications, including receiving a signal indicating there is an incoming call. For the purposes of this part, bandwidth for voice grade access should be, at a minimum, 300 to 3,000 Hertz."

conclude that a carrier does not offer voice service if it cannot meet at least minimal service quality standards. For example, if a carrier has a long average delay between placement of a service order and delivery of service, a state commission might conclude that the delay effectively prevents the carrier from “offering” voice service to all interested subscribers. Similar conclusions might apply to unduly long repair times and unduly high rates for repeat troubles.

Third, the statute prescribes standards for designations. It allows state commissions to grant a designation only when doing so is “consistent with the public interest, convenience, and necessity.”⁸ This language gives state commissions broad discretion to withhold a designation if the commission concludes that service quality would be inadequate.⁹

The scope of state authority was litigated a decade ago. In 1997 the FCC issued guidance on state procedures for ETC designation. In the preliminary portions of that order, the FCC found that most states already had service quality standards in place and that states could continue to enforce those standards so long as they did not constitute a barrier to entry.¹⁰ For that reason the FCC concluded that it would not independently establish any federal service quality standards for ETCs. Instead, it decided that ETCs should be designated if they merely provided the nine services that the FCC described as “basic capabilities.”¹¹

In the same 1997 order, the FCC also considered whether states have discretion to adopt additional criteria for designation as an ETC. The FCC took a narrow view at the time, holding that states did not have any such discretion.¹² That FCC decision was reversed, however, by the Fifth Circuit Court of Appeals. The court held that the statute clearly allows states to impose additional eligibility requirements in ETC cases, and that the FCC cannot restrict that authority.¹³ Specifically regarding service quality, the court said that its ruling “makes sense in light of the states’ historical role in ensuring service quality standards for local service.”¹⁴

⁸ 47 U.S.C. § 214(e)(2).

⁹ In areas served by a rural telephone company, the state commission must also find that the designation is “in the public interest.” 47 U.S.C. § 214(e)(2). This additional language expands the commission’s discretion to withhold designation.

¹⁰ FCC, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, FCC 97-157, 12 FCC Rcd. 8776, ¶ 101 (1997) (*First USF Order*). Barriers to entry from the local exchange business are prohibited by 47 U.S.C. § 253(b).

¹¹ *First USF Order*, ¶ 98.

¹² *First USF Order*, ¶ 135.

¹³ *Texas Office of Pub. Util. Counsel v FCC*, 183 F3d 393, 418 (5th Cir. 1999), cert den (2000) 530 US 1210, and cert den (2000) 530 US 1223.

¹⁴ *Designation and Certification Order* at 418.

In 2005, the FCC greatly modified its earlier views. Some states do not or cannot conduct ETC proceedings, and for those states the FCC hears all ETC designation cases itself. In the 2005 *Designation and Certification Order* the FCC explained the analytical framework that it would henceforth use in its own ETC designation cases, and it encouraged states to adopt the same policies.¹⁵

In the *Designation and Certification Order*, the FCC said that a carrier should be designated as an ETC only where that designation serves the public interest.¹⁶ To evaluate this question, the FCC suggested that each carrier applying for an ETC designation should submit a five-year plan detailing how it would use universal service support to improve service within its proposed service areas. The FCC explained that while federal USF support does not require that carriers construct additional facilities, the carrier's plan must describe "how signal quality, coverage, or capacity will improve due to the receipt of high-cost support throughout the area."¹⁷

The FCC also required applicants for ETC status to demonstrate their "commitment to meeting consumer protection and service quality standards."¹⁸ The FCC gave an example of how a wireless applicant might comply with consumer protection requirements: the carrier could agree to comply with the Cellular Telecommunications and Internet Association's (CTIA) Consumer Code for Wireless Service.¹⁹ The FCC said it would "consider the sufficiency of other commitments on a case-by-case basis."²⁰

¹⁵ FCC, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, FCC 05-46, 20 FCC Rcd. 6371, ¶ 1, 3 (2005) (*Designation and Certification Order*).

¹⁶ *Designation and Certification Order* ¶ 3.

¹⁷ *Designation and Certification Order* ¶ 23.

¹⁸ *Designation and Certification Order* ¶ 28.

¹⁹ Under the CTIA Consumer Code, wireless carriers agree to: (1) disclose rates and terms of service to customers; (2) make available maps showing where service is generally available; (3) provide contract terms to customers and confirm changes in service; (4) allow a trial period for new service; (5) provide specific disclosures in advertising; (6) separately identify carrier charges from taxes on billing statements; (7) provide customers the right to terminate service for changes to contract terms; (8) provide ready access to customer service; (9) promptly respond to consumer inquiries and complaints received from government agencies; and (10) abide by policies for the protection of consumer privacy. *Designation and Certification Order* ¶ 28.

²⁰ *Designation and Certification Order* ¶ 28.

Although the FCC encouraged states to mirror its own standards, it did not limit the states to federally defined standards. On the contrary:

[States may] impose other requirements consistent with federal law to ensure that supported services are offered in a manner that protects consumers. . . . [We also] encourage states that impose requirements on an ETC to do so only to the extent necessary to further universal service goals²¹

As does the FCC itself, state commissions considering ETC applications may make case-by-case decisions regarding the public interest, including the sufficiency of a carrier's commitments to provide adequate service quality. As explained above, service quality concerns are intimately related to explicit statutory universal service goals.

Based on the statute, the Fifth Circuit decision, and the FCC's *Designation and Certification Order*, I conclude that states conducting ETC designation cases may require, as a condition of designation, that each ETC make a commitment to comply with the state's service quality standards.

II. Annual certifications

Many state commissions annually certify that the ETC will only use federal high-cost support "for the provision, maintenance, and upgrading of facilities and services for which support is intended."²² This certification is a condition precedent to the ETC receiving federal support. If the certification is submitted late, the carrier loses support for one or more calendar quarters.²³

Some states do not designate ETCs. In these states carriers file annual reports directly with the FCC. In the *Designation and Certification Order*, the FCC enlarged the requirements for these annual reports, for the first time requiring service quality information. An annual report to the FCC now must include the following items:

1. Progress updates on the carrier's five-year service quality improvement plan, including how universal service support was used to improve service quality in each wire center for which designation was obtained, and an explanation of why any network improvement targets have not been met.

²¹ *Designation and Certification Order* ¶ 30.

²² See 47 C.F.R. §§ 54.313(a) (certifications required for non-rural carriers), 54.314(a) (certifications required for rural carriers).

²³ For example, support for the first calendar quarter is withheld if certification is not received by October 1, and support for the second calendar quarter is withheld if certification is not received by January 1. 47 C.F.R. § 54.314(d)(3).

2. Detailed information on network outages, including the services, number of customers, and geographic areas affected by the outage as well as steps taken to prevent a similar outage situation in the future.
3. The number of requests for service from potential customers that went unfulfilled in the past year.
4. The number of complaints per 1,000 handsets or lines.
5. Certification that the ETC is complying with applicable service quality standards and consumer protection rules (which, for wireless carriers, are the CTIA standards).
6. Certification that the ETC is able to function in emergency situations.²⁴

As is apparent from this list, several of the reporting points parallel traditional state service quality metrics.

For states that do file annual certifications of carrier eligibility, the FCC encouraged the state commissions to adopt the same annual reporting requirements for all ETCs, not merely competitive ETCs. The FCC also explicitly permitted states to require information not included on the FCC's list of requirements.²⁵ Therefore, the FCC has acknowledged that states that file annual reports certifying carriers for federal support may require compliance with state service quality standards.

III. Conclusion on authority

In sum, eligibility for federal support is initially determined in ETC designation cases. In most states, these cases are heard by state commissions. In such ETC proceedings, states may require compliance with state-specific service quality standards. In addition, state commissions may require annual reporting on compliance with those standards, and states may condition their annual certifications of carrier eligibility for federal support on carrier compliance with those standards.

These conclusions apply to all carriers, including competitive and wireless ETCs. Wireless carriers are protected under the Communications Act from direct state regulation of

²⁴ *Designation and Certification Order* ¶ 69.

²⁵ *Designation and Certification Order* ¶ 71 (“[S]tate commissions may require the submission of any other information that they believe is necessary to ensure that ETCs are operating in accordance with applicable state and federal requirements. . . . Individual state commissions are uniquely qualified to determine what information is necessary to ensure that ETCs are complying with all applicable requirements, including state-specific ETC eligibility requirements.”).

their “entry” or “rates.”²⁶ Notwithstanding this limitation, the FCC held that states may require wireless carriers to comply with:

generally applicable, competitively neutral requirements that do not regulate rates or entry and that are consistent with sections 214 and 254 of the Act to all ETCs in order to preserve and advance universal service.²⁷

As this quotation illustrates, the chief limitation on states exercising delegated authority is the requirement that its regulations be competitively neutral. If a state were to adopt a service quality standard that disqualified one class of carriers from ETC eligibility, its action might be challenged on any of several grounds. The state would more likely achieve a favorable outcome if its standard:

1. has a strong relation to the goals of federal and state universal service support mechanisms; and
2. recognizes inherent differences among technologies and makes reasonable adjustments for those differences.

In the end, a classification that is reasonably related to universal service goals and that makes reasonable adjustments for technological differences is likely to be sustained. The principle of competitive neutrality requires no more than that classifications avoid “unfair” favor or disfavor for a particular technology or provider.²⁸ The courts are unlikely to consider a classification unfair that reflects the capabilities of each technology and that is closely related to universal service goals.

The FCC’s holdings in the *Designation and Certification Order* also covered consumer protection standards. Specifically, in any applications for ETC designation filed directly with the FCC, a wireless applicant must commit to meeting the CTIA Consumer Code. The FCC encouraged states to do likewise in their own ETC cases. Thus the state commission could impose standards on wireless ETCs matching (or possibly exceeding) the CTIA code, and it could impose comparable consumer protection standards on wireline ETCs.

²⁶ Section 332(c)(3) of the Act preempts states from regulating the rates and entry of CMRS providers, but it specifically allows states to regulate the “other terms and conditions” of wireless services.

²⁷ *Designation and Certification Order* ¶ 31.

²⁸ FCC, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd. 8776, ¶ 47 (1997).

IV. Remedies

While states have adequate authority to establish standards, there are limits to the remedies they may impose. In many states, a violation of a service quality standard results in the carrier paying per-incident or periodic penalties based on average service quality metrics. This kind of penalty is possible only if it is independently authorized by state law. Federal law does not authorize a state commission, as a condition of ETC designation (or annual certification), to require the carrier to submit to liability for penalty payments to the state treasury or to any third party.

The only remedy for violations of service quality standards seems to be what amounts to the “nuclear option.” That is, the state commission may, consistent with procedures required by due process, rescind a carrier’s designation as an ETC for failure to comply with the requirements of section 214(e) of the Act or any other conditions imposed by the state.²⁹ Alternatively, the state may decline to certify a carrier for support in the upcoming year or—if it acts in October—for one or more upcoming quarters.³⁰

²⁹ *Designation and Certification Order* ¶ 72.

³⁰ State commissions might be able to work out voluntary arrangements with carriers that provide for other kinds of penalty payments that do not reduce federal support.