Missouri Public Service Commission

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March 23, 2001

Mr. Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102

RE: Case No. TA-2001-251

Dear Mr. Roberts:

Enclosed for filing in the above-captioned case are an original and eight (8) conformed copies of the **INITIAL BRIEF OF THE STAFF OF THE MISSOURI PUBLIC SERVICE COMMISSION.**

This filing has been mailed or hand-delivered this date to all counsel of record.

Thank you for your attention to this matter.

Sincerely yours,

Marc D. Poston
Senior Counsel
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MP/lb
Enclosure
cc: Counsel of Record

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of ExOp of Missouri, Inc., for Designation as a Telecommunications Carrier Eligible for Federal Universal Service Support Pursuant to Section 254 of the Telecommunications Act of 1996.	))))))	Case No. TA-2001-251

INITIAL BRIEF OF THE STAFF OF THE MISSOURI PUBLIC SERVICE COMMISSION

I. INTRODUCTION.

The Staff of the Missouri Public Service Commission (Staff) respectfully submits this Initial Brief. This case represents a novel legal interpretation for the Commission since the Commission must decide for the first time whether a carrier must actually serve an area before it can be designated eligible to receive universal service funding for that area. The Staff supports the application of ExOp of Missouri, Inc. (ExOp) for designation as a carrier eligible for Federal Universal Service support pursuant to Section 254 of the Telecommunications Act of 1996 (the Act) for all of ExOp's certificated exchanges regardless of whether ExOp is actually providing service in that exchange. As explained below, this position is consistent with the purposes of the Act, the Federal Communications Commission's interpretation of the Act, and case law.

A. Procedural History

On October 17, 2000, ExOp filed its Application for Designation as Eligible Carrier Pursuant to § 254 of the Telecommunications Act of 1996. The Office of the Public Counsel (OPC) filed a Request for Hearing on November 13, 2000 and the Small Telephone Company Group (STCG) filed an Application to Intervene on the same day. On November 21, 2000,

ExOp filed its Response to Small Telephone Company Group's Application to Intervene and the Office of the Public Counsel's Request for an Evidentiary Hearing. In its Response, ExOp argued that it would be placed at a competitive disadvantage if not given eligible telecommunications carrier (ETC) status. ExOp also argued that designating ExOp ETC status throughout its service area will "avoid the unduly repetitious result of ExOp having to file an application for ETC status with the Commission each time it expands service into one of its certificated exchanges." On November 27, 2000 the Staff filed its Response to the Application to Intervene and the Request for Hearing. In its response, the Staff opposed the intervention and the need for an evidentiary hearing. The Commission granted the intervention request of the STCG on December 6, 2000. The parties' attempts to resolve this matter through a stipulation were unsuccessful. The Staff filed, on behalf of all parties, a Proposed Procedural Schedule and List of Issues on March 2, 2001. In the filing the parties recommended that the issues be presented to the Commission on the briefs alone and without an evidentiary hearing. The Commission adopted the procedural schedule recommended by the parties.

B. Stipulation of Facts

On March 6, 2001 the parties filed a Stipulation of Facts. The Stipulation was agreed upon by all parties and sets forth the following key facts. First, it establishes that ExOp is currently certificated as a competitive local exchange carrier (CLEC) in the exchanges served by incumbent local exchange carriers (ILECs) United Telephone Company of Missouri (Sprint) and GTE Midwest, Inc. (d/b/a Verizon). Second, ExOp's only basic local telecommunications service customers are served through ExOp's own facilities in the Kearny, Missouri exchange. Third, ExOp provides its customers in Kearny with the following services:

a. Voice grade access to the public switched network;

b. Local usage;

c. Dual tone multi-frequency signaling or its functional equivalent;

d. Single-party service or its functional equivalent;

e. Access to emergency services;

f. Access to operator services;

g. Access to interexchange service; and

h. Access to directory assistance.

Fourth, ExOp has asserted that it will comply with all the requirements, including the requirements to provide toll limitation, Lifeline and LinkUp service, that are necessary before a carrier designated as an ETC can receive universal service funding. These four facts are fundamental to the Commission's decision on the following issues.

II. ARGUMENT

A. Issue 1: Has ExOp sufficiently identified and defined the geographic area for which it seeks eligible telecommunications carrier (ETC) status in its Application? What is the company's service area for purposes of this designation?

This issue asks the basic question whether the Commission has sufficient information in the record to define ExOp's service area for purposes of its ETC designation. The answer to that question is yes; the record is sufficient for the Commission to identify a geographic area as ExOp's service area for ETC designation.

ExOp clarified its Application in its November 21, 2000 response to STCG's Application for Intervention and stated that it "intended to leave the determination of the geographic scope of its ETC status to the discretion of the Commission." ExOp clarified that it believes it should be designated an ETC throughout the exchanges in Missouri for which it has been certificated. The

Staff supports this position. Furthermore, the applicant is not required under the Act to specifically identify the geographic area for which it seeks ETC status.

The Staff suggests that designating ExOp as an ETC in its entire certificated area will not only hasten ExOp's entry into new areas, it will also avoid a new ETC application each time ExOp is ready to serve a new area.

B. Issue 2: Must ExOp provide all of the services required by Section 254 of the Telecommunications Act of 1996 throughout each exchange in its service area and advertise the availability of those services using media of general distribution throughout each exchange in its service area before the Commission can determine that ExOp is an eligible telecommunications carrier for purposes of receiving Federal Universal Service support for all of its certificated area, or can the Commission grant ETC designation to ExOp for all of its certificated area prior to its actual provisioning and advertising of services throughout each exchange in its certificated area?

This lengthy issue simply asks the Commission whether ExOp has to be currently serving an area before getting ETC designation for that area. The answer is no, ExOp should not be required to be currently serving an area before the Commission designates it an ETC for that area. To require otherwise would be contrary to the Act's goal of promoting competition and universal service, contrary to the interpretation of the Act by the FCC, and contrary to case law that addressed this very subject. The Staff will address each of these separately and explain why ExOp meets the requirements to receive ETC status throughout its certificated area.

1. The Telecommunications Act of 1996

The Telecommunications Act establishes the requirements for ETC designation. Section 254(e) provides that "only an eligible telecommunications carrier designated under section 214(e) shall be eligible to receive specific Federal universal service support." Section 214

furthers the requirements and states that a "carrier *designated* as an eligible telecommunications carrier... shall, throughout the service area for which the designation is *received*--

(a) *Offer* the services that are supported by Federal universal service support mechanisms under section 254(c), either using its own facilities or a combination of its own facilities and resale of another carrier's services; and

(b) *Advertise* the availability of and charges for such services using media of general distribution."[1] (emphasis added).

This is the controlling language for the Commission's designation of an ETC. Unfortunately, it is ambiguous. The Act creates an ambiguity over whether a carrier must be providing service in an area before it can be designated an ETC for that area – the very issue before the Commission. The present tense use of the words "offer" and "advertise" appear to indicate that a carrier must first provide service in an area before it can be designated an ETC for that area. The Act also uses the words "designated" and "received" in the past tense before listing what is required of the ETC before becoming eligible to receive universal service support.[2]

Due to the two interpretations, it is hard to determine from this language which is required to come first, the service or the designation. Three principal sources provide us with the answers for resolving ambiguities in the Act. First, any FCC interpretations of the Act are controlling authorities due to the FCC's responsibility in administering the Act. Second, the Commission should turn to court interpretations of the Act that provide controlling or persuasive

[1] *See also* 47 C.F.R. § 54.201.
[2] A thorough explanation of the ambiguity in Section 214 is found in the decision of the Supreme Court of South Dakota cited and discussed below.

authority. Lastly, the Commission can turn to the purpose of the Act. Fortunately, the Commission has all three available for guidance.

2. The Staff's Position is Consistent with the FCC's Declaratory Ruling.

On August 10, 2000, the Federal Communications Commission (FCC) issued a *Declaratory Ruling* in CC Docket No. 96-45 that provides guidance to state commissions trying to interpret the meaning of Section 214. In the *Declaratory Ruling,* the FCC stated in reference to Section 214:

> The language of the statute does not require the actual provision of service prior to designation. We believe that this interpretation is consistent with the underlying congressional goal of promoting competition and access to telecommunications services in high-cost areas. In addition, this interpretation is consistent with the Commission's conclusion that a carrier must meet the section 214(e) criteria as a condition of its being designated an eligible carrier "and *then* must provide the designated services to customers pursuant to the terms of section 214(e) in order to receive support."[3]

Throughout it's *Declaratory Ruling* the FCC repeated its conclusion with statements such as: "Consistent with the guidelines provided above, we find a requirement that a carrier provide service prior to designation as an ETC inconsistent with the underlying principles and intent of section 254."[4] And "[w]e believe that interpreting section 214(e)(1) to require the provision of service throughout the service area prior to ETC designation prohibits or has the effect of prohibiting the ability of competitive carriers to provide telecommunications service."[5] The FCC appeared to purposely make certain there would be no ambiguity concerns in its own conclusions.

The Staff has attached the *Declaratory Ruling,* attached and labeled "Appendix A," and notes that the FCC's ruling favors the Staff's position in this case. Carriers such as ExOp are not

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[3] In the Matter of Federal-State Joint Board on Universal Service, *Declaratory Ruling,* CC Docket No. 96-45, August 10, 2000, at paragraph 14.
[4] *Declaratory Ruling,* at paragraph 30.

required to provide service prior to designation as an ETC. The Commission should also note that denials of ETC applications "must be based on the application of competitively neutral criteria that are not so onerous as to effectively preclude a prospective entrant from providing service."[6]

3. The Staff's Position Is Consistent With Case Law.

One court has addressed this specific issue and its findings are consistent with the Staff's position in this case. The Supreme Court of South Dakota, in reviewing a decision of the South Dakota Public Utilities Commission, affirmed "the circuit court's interpretation of § 214(e) that a carrier need not be presently offering required services before qualifying as an eligible carrier."[7]

The Court further held that designation as an ETC is not a guarantee that a carrier will receive support. "A carrier must still provide the enumerated services required by federal law." [8] Accordingly, any concern that ExOp will somehow be able to receive universal service support without offering the required services is unfounded.

The Staff has attached the opinion of the South Dakota Supreme Court, labeled "Appendix B." The Court's opinion is a reasonable and persuasive interpretation of the Act and is consistent with the Staff's position.

4. Purpose of the Act is Consistent with the Staff's Position.

The Telecommunications Act of 1996 was designed to open all telecommunications markets to competition by establishing a pro-competitive, de-regulatory national policy framework that sought to eliminate the barriers that CLECs faced in offering local telephone

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[5] *Id.* at paragraph 2.
[6] *Id.* at paragraph 18.
[7] *The Filing by GCC License Corp.*, 2001 SD 32, Opinion filed March 14, 2001, at paragraph 19.
[8] *Id.* at paragraph 17.

service.[9] The U.S. Court of Appeals for the Eighth Circuit best summarized the purpose of the Act when it stated:

> Through this Act, Congress sought "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[10]

The Congressional intent is that every provision in Sections 254 and 214 is designed to implement these goals and that ambiguities should err on the interpretation that best promotes competition.

Which interpretation best promotes competition? Is a carrier that cannot receive ETC designation for an area until it provides service more likely to become a competitor than is a carrier that is given ETC designation for an area before it provides service? The answer is no. The carrier that must serve before designation may choose not to compete in Missouri rather than incur substantial expenses to establish its services with no assurance that it will receive universal service funding and be able to compete with the carriers (including incumbent carriers) that receive universal service funds. The carrier that is given ETC designation before providing service knows that universal service funding will not place it at a competitive disadvantage so long as the carrier offers and advertises the required services. The disadvantage this places upon the carrier that must serve before its ETC designation is clear because that carrier's investment risk is higher.[11] From this, the Commission can conclude that carriers may not want to take the risk of serving an area before it knows that universal service funds will be made available. ETC designation allows a carrier to make the necessary investments knowing that once it offers the required services and advertises those services, it will receive universal service funding.

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[9] AT&T Corp. v. FCC, 220 F.3d 607, 611 (D.C. Cir. 2000).
[10] Iowa Utilities Bd. v. FCC, 219 F.3d 744, 748 (8th Cir. 2000).

It is hard if not impossible to imagine why placing burdensome restrictions on one segment of carriers would promote competition. Carriers need to know whether they are eligible to receive universal service funds before they make the necessary investments. Otherwise, high cost areas will not attract competition.

III. CONCLUSION

The Staff supports a finding by the Commission that ExOp is not required to serve an area before ETC designation and that ExOp is thereby designated an ETC in its certificated exchanges. Such a decision would foster competition in Missouri's exchanges and it would be consistent with the FCC's own interpretation and the compelling findings of the Supreme Court of South Dakota. The Staff respectfully requests that the Commission approve ExOp's application and designate it an ETC for its certificated area.

Respectfully submitted,

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[11] *The Filing by GCC License Corp.*, at paragraph 15.

Certificate of Service

I hereby certify that copies of the foregoing have been mailed or hand-delivered to all counsel of record as shown on the attached service list this 23rd day of March 2001.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Federal-State Joint Board on	)	
Universal Service	)	CC Docket No. 96-45
	)	
	)	
Western Wireless Corporation	)	
Petition for Preemption of an	)	
Order of the South Dakota	)	
Public Utilities Commission	)	

DECLARATORY RULING

Adopted: July 11, 2000 **Released:** August 10, 2000

By the Commission: Commissioner Furchtgott-Roth dissenting and issuing a statement.

I. INTRODUCTION

1. In this Declaratory Ruling, we provide guidance to remove uncertainty and terminate controversy regarding whether section 214(e)(1) of the Communications Act of 1934, as amended, (the Act) requires a common carrier to provide supported services throughout a service area prior to being designated an eligible telecommunications carrier (ETC) that may receive federal universal service support.[1] We believe the guidance provided in this Declaratory Ruling is necessary to remove substantial uncertainty regarding the interpretation of section 214(e)(1) in pending state commission and judicial proceedings.[2] We believe the guidance provided in this Declaratory Ruling will assist state commissions in acting expeditiously to fulfill their obligations under section 214(e) to designate competitive carriers as eligible for federal universal service support.

[1] The Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion, issue a declaratory ruling terminating a controversy or removing uncertainty. *See* 5 U.S.C. § 554(e), 47 C.F.R. § 1.2.

[2] *See, e.g.*, Letter from Competitive Universal Service Coalition, to Chairman William E. Kennard, FCC, dated March 8, 2000 at 2, 6; Letter from Gene DeJordy, Western Wireless, to Chairman William E. Kennard, FCC, dated March 29, 2000 at 1-2; *Petition for Preemption of an Order of the South Dakota Public Utilities Commission*, filed by Western Wireless (June 23, 1999) (*Western Wireless petition*); *The Filing by GCC License Corporation for Designation as an Eligible Telecommunications Carrier*, Notice of Appeal to the Supreme Court of South Dakota, Civ. 99-235, filed by the South Dakota Public Utilities Commission (May 10, 2000) (South Dakota PUC Notice of Appeal).

2. We believe that interpreting section 214(e)(1) to require the provision of service throughout the service area prior to ETC designation prohibits or has the effect of prohibiting the ability of competitive carriers to provide telecommunications service, in violation of section 253(a) of the Act. We find that such an interpretation of section 214(e)(1) is not competitively neutral, consistent with section 254, and necessary to preserve and advance universal service, and thus does not fall within the authority reserved to the states in section 253(b). In addition, we find that such a requirement conflicts with section 214(e) and stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress as set forth in section 254. Consequently, under both the authority of section 253(d) and traditional federal preemption authority, we find that to require the provision of service throughout the service area prior to designation effectively precludes designation of new entrants as ETCs in violation of the intent of Congress. We believe that the guidance provided in this Declaratory Ruling will further the goals of the Act by ensuring that new entrants have a fair opportunity to provide service to consumers living in high-cost areas.

3. We note that Western Wireless has raised similar issues in its petition for preemption of a decision of the South Dakota Public Utilities Commission (South Dakota PUC).[3] In its petition, Western Wireless asks the Commission to preempt, under section 253 and as inconsistent with the Act, the South Dakota PUC's requirement that, pursuant to section 214(e), a carrier may not receive designation as an ETC unless it is providing service throughout the service area. In light of the recent South Dakota Circuit Court decision overturning the South Dakota PUC's decision and granting Western Wireless ETC status in each exchange served by non-rural telephone companies in South Dakota, we believe that it is unnecessary to act on the Western Wireless petition at this time.[4] In doing so, we note that section 253(d) requires the Commission to preempt state action only "to the extent *necessary* to correct such violation or inconsistency."[5] We acknowledge, however, that the *South Dakota Circuit Court Order* has been automatically stayed with the filing of the South Dakota PUC's notice of appeal to the Supreme Court of South Dakota.[6] We therefore place Western Wireless' petition for preemption of the South Dakota PUC Order in abeyance pending final resolution of this appeal.[7] The Commission

[3] *See Western Wireless petition.* Comments cited herein are in response to this petition. *See also The Filing by GCC License Corporation for Designation as an Eligible Telecommunications Carrier*, Finding of Facts and Conclusions of Law; Notice of Entry of Order, Before the Public Utilities Commission of the State of South Dakota, TC98-146 (May 19, 1999).

[4] *Filing by GCC License Corporation for Designation as an Eligible Telecommunications Carrier*, Findings of Fact, Conclusions of Law, and Order, Civ. 99-235 (SD Sixth Jud. Cir. March 22, 2000) (*South Dakota Circuit Court Order*) (concluding that the South Dakota PUC "erred as a matter of law by determining that an applicant for ETC designation must first be providing a universal service offering to every location in the requested designated service area prior to being designated an ETC").

[5] 47 U.S.C. § 253(d) (emphasis added).

[6] *See* South Dakota Codified Laws § 15-26A-38.

[7] South Dakota PUC Notice of Appeal.

will make a determination at that time as to whether it is necessary to proceed consistent with the guidance provided in this Declaratory Ruling.

II. BACKGROUND

A. The Act

4. Section 254(e) provides that "only an eligible telecommunications carrier designated under section 214(e) shall be eligible to receive specific Federal universal service support."[8] Section 214(e)(2) provides that "[a] State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of [subsection 214(e)(1)] as an eligible telecommunications carrier for a service area designated by the State commission."[9]

5. Section 214(e)(1) provides that:

> A common carrier designated as an eligible telecommunications carrier under [subsections 214(e)(2), (3), or (6)] shall be eligible to receive universal service support in accordance with section 254 and shall, throughout the service area for which the designation is received –
>
> > (A) offer the services that are supported by Federal universal service support mechanisms under section 254(c), either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier); and
> >
> > (B) advertise the availability of such services and the charges therefor using media of general distribution.[10]

6. Section 253 establishes the legal framework for Commission preemption of a state statute, regulation, or legal requirement that prohibits or has the effect of prohibiting the competitive provision of telecommunications service. The Commission has interpreted and applied this standard on a number of occasions.[11] First, the Commission must determine whether

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[8] 47 U.S.C. § 254(e).

[9] 47 U.S.C. § 214(e)(2).

[10] 47 U.S.C. § 214(e)(1).

[11] *See, e.g., American Communications Services, Inc., MCI Telecommunications Corp. Petition for Expedited Declaratory Ruling Preempting Arkansas Telecommunications Regulatory Reform Act of 1997 Pursuant to Sections 251, 252, and 253 of the Communications Act, as amended,* Memorandum Opinion and Order, CC Docket No. 97-100, FCC 99-386 (rel. Dec. 23, 1999); *Petition of Pittencrieff Communications, Inc., for Declaratory Ruling Regarding Preemption of the Texas Public Utility Regulatory Act of 1995*, Memorandum Opinion and Order, File No. WTB/POL 96-2, 13 FCC Rcd 1735 (1997) *aff'd CTIA v. FCC*, 168 F.3d 1332 (D.C. Cir. 1999) (*Pittencrieff Communications, Inc.*); *Silver Star Telephone Company, Inc., Petition for Preemption* (continued....)

the challenged law, regulation, or requirement violates section 253(a). Specifically, the Commission examines whether the state provision "prohibit[s] or ha[s] the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[12]

7. If the Commission finds that the state requirement violates section 253(a), then it will determine whether it is nevertheless permissible under section 253(b). The criteria set forth in section 253(b) preserve the states' ability to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service.[13] The Commission has held that a state program must meet all three criteria – it must be "competitively neutral," "consistent with Section 254," and "necessary to preserve and advance universal service" – to fall within the "safe harbor" of section 253(b).[14] The Commission has preempted state regulations for failure to satisfy even one of the three criteria.[15] If a requirement otherwise impermissible under section 253(a) does not satisfy section 253(b), the Commission must preempt the enforcement of the requirement in accordance with section 253(d).[16]

B. Federal Preemption Authority

8. The Supremacy Clause of the Constitution empowers Congress to preempt state or local laws or regulations under certain specified conditions.[17] As explained by the United States Supreme Court:

> Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to preempt state law, when there is outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislated comprehensively, thus occupying an entire field of regulation

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and Declaratory Ruling, Memorandum Opinion and Order, CCB Pol 97-1, 12 FCC Rcd 15639 (1997) (*Silver Star*) *reconsideration denied*, 13 FCC Rcd 16356 (1998) *aff'd, RT Communications, Inc. v. FCC*, 201 F.3d 1264 (10th Cir. 2000).

[12] 47 U.S.C. § 253(a).

[13] 47 U.S.C. § 253(b).

[14] *Pittencrieff Communications, Inc.*, 13 FCC Rcd at 1752, para. 33.

[15] For example, in *Silver Star*, the Commission preempted a Wyoming statute for its failure to satisfy the "competitive neutrality" criterion. *Silver Star*, 12 FCC Rcd at 15658-60, paras. 42, 45.

[16] 47 U.S.C. § 253(d). ("If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.").

[17] *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 368 (1986).

> and leaving no room for the States to supplement federal law, or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.[18]

It is well established that "[p]re-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may preempt state regulations."[19]

III. DISCUSSION

A. Section 253(a) Analysis

1. Background

9. In order to determine whether a section 253(a) violation has occurred, we must consider whether the cited statute, regulation, or legal requirement "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[20] We therefore examine whether the requirement that a carrier must be providing service throughout the service area prior to designation as an ETC "may prohibit or have the effect of prohibiting" carriers that are not incumbent LECs from providing telecommunications service.

2. Discussion

10. We find that requiring a new entrant to provide service throughout a service area prior to designation as an ETC has the effect of prohibiting the ability of the new entrant to provide intrastate or interstate telecommunications service, in violation of section 253(a).

11. Legal Requirement. As an initial matter, we find that the requirement that a new entrant must provide service throughout its service area as a prerequisite to designation as an ETC under section 214(e) constitutes a state "legal requirement" under section 253(a). We have previously concluded that Congress intended the phrase, "[s]tate or local statute or regulation, or other State or local requirement" in section 253(a), to be interpreted broadly.[21] The resolution of

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[18] *Id.* at 368-369 (citations omitted).

[19] *Id.* at 369; *Fidelity Federal Sav. And Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 153-54 (1982); *City of New York v. FCC*, 486 U.S. 57, 64 (1988) ("[t]he statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof").

[20] *See* 47 U.S.C. § 253(a).

[21] *See The Petition of the State of Minnesota for a Declaratory Ruling Regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way*, Memorandum Opinion and Order, CC Docket No. 98-1, FCC 99-402 (rel. Dec. 23, 1999) (concluding that an agreement between a developer and the State creates a "legal requirement" subject to section 253 preemption) at paras. 17-(continued....)

a carrier's request for designation as an ETC by a state commission is legally binding on the carrier and may prohibit the carrier from receiving federal universal service support. We find therefore that any such requirement constitutes a "legal requirement" under section 253(a).

12. Prohibiting the Provision of Telecommunications Service. We find that an interpretation of section 214(e) requiring carriers to provide the supported services throughout the service area prior to designation as an ETC has the effect of prohibiting the ability of prospective entrants from providing telecommunications service.[22] A new entrant faces a substantial barrier to entry if the incumbent local exchange carrier (LEC) is receiving universal service support that is not available to the new entrant for serving customers in high-cost areas. We believe that requiring a prospective new entrant to provide service throughout a service area before receiving ETC status has the effect of prohibiting competitive entry in those areas where universal service support is essential to the provision of affordable telecommunications service and is available to the incumbent LEC. Such a requirement would deprive consumers in high-cost areas of the benefits of competition by insulating the incumbent LEC from competition.

13. No competitor would ever reasonably be expected to enter a high-cost market and compete against an incumbent carrier that is receiving support without first knowing whether it is also eligible to receive such support.[23] We believe that it is unreasonable to expect an unsupported carrier to enter a high-cost market and provide a service that its competitor already provides at a substantially supported price. Moreover, a new entrant cannot reasonably be expected to be able to make the substantial financial investment required to provide the supported services in high-cost areas without some assurance that it will be eligible for federal universal service support.[24] In fact, the carrier may be unable to secure financing or finalize business plans due to uncertainty surrounding its designation as an ETC.

14. In addition, we find such an interpretation of section 214(e)(1) to be contrary to the meaning of that provision. Section 214(e)(1) provides that a common carrier designated as an eligible telecommunications carrier shall "offer" and advertise its services.[25] The language of the

(Continued from previous page)
18 (*Minnesota Declaratory Ruling*). "We believe that interpreting the term 'legal requirement' broadly, best fulfills Congress' desire to ensure that states and localities do not thwart the development of competition." *Id.*

[22] *See, e.g.*, ALTS comments at 3-5; AT&T comments at 7-9; CTIA reply comments at 4; Minnesota PUC comments at 2; PCIA comments 4-5; Washington UTC reply comments at 3.

[23] *Western Wireless petition* at 8.

[24] *See Minnesota Cellular Corporation's Petition for Designation as an Eligible Telecommunications Carrier*, Order Granting Preliminary Approval and Requiring Further Filings, Docket No. P-5695/M-98-1285 (Oct. 27, 1999) (*Minnesota PUC Order*) at 7.

[25] 47 U.S.C. § 214(e)(1).

statute does not require the actual provision of service prior to designation.[26] We believe that this interpretation is consistent with the underlying congressional goal of promoting competition and access to telecommunications services in high-cost areas. In addition, this interpretation is consistent with the Commission's conclusion that a carrier must meet the section 214(e) criteria as a condition of its being designated an eligible carrier "and *then* must provide the designated services to customers pursuant to the terms of section 214(e) in order to receive support."[27]

15. In addition, we note that ETC designation only allows the carrier to become *eligible* for federal universal service support. Support will be provided to the carrier only upon the provision of the supported services to consumers.[28] We note that ETC designation prior to the provision of service does not mean that a carrier will receive support without providing service.[29] We also note that the state commission may revoke a carrier's ETC designation if the carrier fails to comply with the ETC eligibility criteria.

16. In addition, we believe the fact that a carrier may already be providing service within the state prior to designation is not conclusive of whether the carrier can reasonably be expected to provide service throughout the service area, particularly in high-cost areas, prior to designation. While a requirement that a carrier be providing service throughout the service area may not affect the provision of service in lower-cost areas, it is likely to have the effect of prohibiting the ability of carriers without eligibility for support to provide service in high-cost areas.[30]

17. Gaps in Coverage. We find the requirement that a carrier provide service to every potential customer throughout the service area before receiving ETC designation has the effect of prohibiting the provision of service in high-cost areas. As an ETC, the incumbent LEC is required to make service available to all consumers upon request, but the incumbent LEC may not have facilities to every possible consumer.[31] We believe the ETC requirements should be no different

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[26] *See, e.g., Western Wireless Corporation Designated Eligible Carrier Application*, Findings of Fact, Conclusions of Law and Order, North Dakota Public Service Commission, Case No. PU-1564-98-428 (Dec. 15, 1999) (*North Dakota Order*); *Minnesota PUC Order*. *See also* Washington UTC reply comments at 3-5.

[27] *Federal-State Joint Board on Universal Service*, Report and Order, CC Docket No. 96-45, 12 FCC Rcd 8876, 8853, para. 137 (1997), as corrected by *Federal-State Joint Board on Universal Service*, Erratum, CC Docket No. 96-45, FCC 97-157 (rel. June 4, 1997), *aff'd in part, rev'd in part, remanded in part sub nom. Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) *cert. granted*, 120 S.Ct. 2214 (U.S. June 5, 2000) (No. 99-1244) (*Universal Service Order*) (emphasis in original).

[28] *Universal Service Order*, 12 FCC Rcd 8853, para. 137.

[29] Washington UTC reply comments at 4.

[30] ALTS comments at 4-5.

[31] *See Minnesota PUC Order* at 11, concluding that, "[a]ll carriers, but especially rural carriers, have pockets within their study areas where they have no customers or facilities. If development occurs, they have to build out to the new customer or customers. Minnesota Cellular appears to have the same build-out capacity as the (continued....)

for carriers that are not incumbent LECs. A new entrant, once designated as an ETC, is required, as the incumbent is required, to extend its network to serve new customers upon reasonable request. We find, therefore, that new entrants must be allowed the same reasonable opportunity to provide service to requesting customers as the incumbent LEC, once designated as an ETC.[32] Thus, we find that a telecommunications carrier's inability to demonstrate that it can provide ubiquitous service at the time of its request for designation as an ETC should not preclude its designation as an ETC.

18. State Authority. Finally, although Congress granted to state commissions, under section 214(e)(2), the primary authority to make ETC designations, we do not agree that this authority is without any limitation.[33] While state commissions clearly have the authority to deny requests for ETC designation without running afoul of section 253, the denials must be based on the application of competitively neutral criteria that are not so onerous as to effectively preclude a prospective entrant from providing service. We believe that this is consistent with sections 214(e), 253, and 254, as well as the decision of the United States Court of Appeals for the Fifth Circuit in *Texas Office of Public Utility Counsel v. FCC*.[34] We reiterate, however, that the state commissions are primarily responsible for making ETC designations. Nothing in this Declaratory Ruling is intended to undermine that responsibility. In fact, it is our expectation that the guidance provided in this Declaratory Ruling will enable state commissions to move expeditiously, in a pro-competitive manner, on many pending ETC designation requests.

B. Section 253(b) Analysis

1. Background

19. Section 253(b) preserves the state's authority to impose a requirement affecting

(Continued from previous page)
incumbents, and the potential need for build-out is no reason to deny ETC status." *See also North Dakota Order* at para. 36, concluding that, "[a] requirement to be providing the required universal services to 100% of a service area before receiving designation as an ETC could be so onerous as to prevent any other carrier from receiving the ETC designation in any service area and would require the Commission to rescind the ETC designation already given to North Dakota ILECs and Polar Telecom, Inc."

[32] *See, e.g., Minnesota PUC Order* at 10-11; *North Dakota Order* at para. 36; Washington UTC reply comments at 5-6. *See also South Dakota Circuit Court Order*, Conclusions of Law at para. 12.

[33] *See, e.g.*, Coalition of Rural Telephone Companies comments at 12 (contending that state decisions under section 214(e) should not be reviewed under section 253); South Dakota PUC comments at 9 (contending that preemption may not be granted because the South Dakota PUC exercised a power lawfully delegated to it by Congress in a manner consistent with federal law).

[34] *See Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 418 n.31 (5th Cir. 1999) *cert. granted*, 120 S.Ct. 2214 (U.S. June 5, 2000) (No. 99-1244) ("if a state commission imposed such onerous eligibility requirements that no otherwise eligible carrier could receive designation, that state commission would probably run afoul of § 214(e)(2)'s mandate to 'designate' a carrier or 'designate' more than one carrier.").

the provision of telecommunications services in certain circumstances.[35] Section 253(b) allows states to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications service, and safeguard the rights of consumers.[36] Section 253(d) requires that we preempt such requirements unless we find that they meet each of the relevant criteria set forth in section 253(b). The Commission has preempted state regulations for failure to satisfy even one of the relevant criteria.[37]

2. Discussion

20. We find that a requirement to provide the supported services throughout the service area prior to designation as an ETC does not fall within the "safe harbor" provisions of section 253(b). To the contrary, we find that this requirement is not competitively neutral, consistent with section 254, or necessary to preserve and advance universal service. We therefore find that a requirement that obligates new entrants to provide supported services throughout the service area prior to designation as an ETC is subject to our preemption authority under section 253(d).

21. Competitive Neutrality. We find that the requirement to provide service prior to designation as an ETC is not competitively neutral. We believe this finding is consistent with the Commission's determination in the *Universal Service Order* that "[c]ompetitive neutrality means that universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another."[38] At the outset, we believe that, to meet the competitive neutrality requirement in non-rural telephone company service areas, the procedure for designating carriers as ETCs should be functionally equivalent for incumbents and new entrants.[39] As discussed above, requiring the actual provision of supported services throughout the service area prior to ETC designation unfairly skews the universal service support mechanism in favor of the incumbent LEC. As a practical matter, the carrier most likely to be providing all the supported services throughout the requested designation area before ETC designation is the incumbent LEC.[40] Without the

[35] 47 U.S.C. § 253(b). Section 253(c) sets forth additional situations, which are not present here, in which a state or local government requirement that inhibits entry may still be acceptable.

[36] 47 U.S.C. § 253(b).

[37] For example, in *Silver Star*, the Commission preempted a Wyoming statute for its failure to satisfy the "competitive neutrality" criterion. *Silver Star*, 12 FCC Rcd at 15658-60, paras. 42, 45.

[38] *Universal Service Order*, 12 FCC Rcd at 8801, para. 47.

[39] We thus would be troubled by a process in which the incumbent LEC were able to self-certify that it meets the criteria for ETC designation, while new entrants were subject to a more rigorous, protracted state proceeding.

[40] The 1996 Act required carriers to receive an eligible telecommunications carrier designation under section 214(e) to become eligible for federal high-cost support. 47 U.S.C. § 254(e).

assurance of eligibility for universal service funding, it is unlikely that any non-incumbent LEC will be able to make the necessary investments to provide service in high-cost areas.

22. We are not persuaded that such a requirement is competitively neutral merely because the requirement to provide service prior to ETC designation applies equally to both new entrants and incumbent LECs.[41] We recently concluded that the proper inquiry is whether the *effect* of the legal requirement, rather than the method imposed, is competitively neutral.[42] As discussed above, we find that the result of such a requirement is to favor incumbent LECs over new entrants. Unlike a new entrant, the incumbent LEC is already providing service and therefore bears no additional burden from a requirement that it provide service prior to designation as an ETC. We therefore find that requiring the provision of supported services throughout the service area prior to ETC designation has the effect of uniquely disadvantaging new entrants in violation of section 253(b)'s requirement of competitive neutrality.

23. Consistent with Section 254 and Necessary to Preserve and Advance Universal Service. We find that the requirement to provide service prior to designation as an ETC is not consistent with section 254 or "necessary to preserve and advance universal service."[43] To the contrary, we find that such a requirement has the effect of prohibiting the provision of service in high-cost areas. As discussed above, this requirement clearly has a disparate impact on new entrants, in violation of the competitive neutrality and nondiscriminatory principles embodied in section 254.[44] We believe that it is unreasonable to expect an unsupported carrier to enter a high-cost market and provide a service that its competitor already provides at a substantially supported price. If new entrants are not provided with the same opportunity to receive universal service support as the incumbent LEC, such carriers will be discouraged from providing service and competition in high-cost areas.[45] Consequently, under an interpretation of section 214(e) that requires new entrants to provide service throughout the service area prior to designation as an

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[41] South Dakota PUC comments at 10; South Dakota Independent Telephone Coalition at 31.

[42] *Minnesota Declaratory Ruling* at para. 51 (emphasis added). "We do not believe that Congress intended to protect the imposition of requirements that are not competitively neutral in their *effect* on the theory that the non-neutral requirement was somehow *imposed* in a neutral manner. Moreover, we do not believe that this narrow interpretation is appropriate because it would undermine the primary purpose of section 253 – ensuring that no state or locality can erect legal barriers to entry that would frustrate the 1996 Act's explicit goal of opening all telecommunications markets to competition."

[43] 47 U.S.C. § 253(b).

[44] *Universal Service Order*, 12 FCC Rcd at 8801, para. 48 ("We agree with the Joint Board that an explicit recognition of competitive neutrality in the collection and distribution of funds and determination of eligibility in universal service support mechanisms is consistent with congressional intent and necessary to promote a pro-competitive, de-regulatory national policy framework.").

[45] The Commission recognized that, in order to promote competition and the availability of affordable access to telecommunications service in high-cost areas, there must be a competitively neutral support mechanism for competitive entrants and incumbent LECs. *Universal Service Order*, 12 FCC Rcd at 8932, para. 287.

ETC, the benefits that may otherwise occur as a result of access to affordable telecommunications services will not be available to consumers in high-cost areas. We believe such a result is inconsistent with the underlying universal service principles set forth in section 254(b) that are designed to preserve and advance universal service by promoting access to telecommunications services in high-cost areas.[46]

24. A new entrant can make a reasonable demonstration to the state commission of its capability and commitment to provide universal service without the actual provision of the proposed service. There are several possible methods for doing so, including, but not limited to: (1) a description of the proposed service technology, as supported by appropriate submissions; (2) a demonstration of the extent to which the carrier may otherwise be providing telecommunications services within the state;[47] (3) a description of the extent to which the carrier has entered into interconnection and resale agreements;[48] or, (4) a sworn affidavit signed by a representative of the carrier to ensure compliance with the obligation to offer and advertise the supported services.[49] We caution that a demonstration of the capability and commitment to provide service must encompass something more than a vague assertion of intent on the part of a carrier to provide service. The carrier must reasonably demonstrate to the state commission its ability and willingness to provide service upon designation.

C. Federal Preemption Authority

1. Background

25. State regulatory provisions may be preempted when enforcement of a state legal requirement conflicts with federal law or "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[50] Preemption may result not only from action taken by Congress, but also from a federal agency acting within the scope of its congressionally delegated authority.[51]

26. In section 254, Congress codified the Commission's historical policy of promoting universal service to ensure that consumers in all regions of the nation have access to

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[46] *See* 47 U.S.C. § 254(b).

[47] *See North Dakota Order* at para. 39.

[48] *See North Dakota Order* at para. 34.

[49] Washington UTC reply comments at 5.

[50] *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699 (1984), *citing Hines v. Davidowitz*, 312 U.S. 57, 67 (1941); *State Corporation Commission of Kansas v. FCC*, 787 F.2d 1421, 1425 (10th Cir. 1986). *See also Louisiana PSC*, 476 U.S. at 368-69.

[51] *Louisiana PSC*, 476 U.S. 368-69, *citing Fidelity Federal Savings and Loan Assn. v. De la Cuesta*, 458 U.S. 141; *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691.

telecommunications services.[52] Congress, recognizing that existing universal service support mechanisms were adopted in a monopoly environment, directed the Commission, in consultation with a federal-state Joint Board, to establish support mechanisms for the preservation and advancement of universal service in the competitive telecommunications environment that Congress envisioned.[53] Section 254(b) sets forth the underlying principles on which Congress directed the Commission to base policies for the preservation and advancement of universal service. These principles include the promotion of access to telecommunications services in rural and high-cost areas of the nation.[54] As noted above, consistent with the recommendation of the Joint Board, the Commission adopted the additional guiding principle of competitive neutrality.[55] In doing so, the Commission concluded that competitive neutrality will foster the development of competition and benefit certain providers, including wireless carriers, that may have been excluded from participation in the existing universal service mechanism.[56] Section 254(f) also provides that, "[a] State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service."[57]

2. Discussion

27. We find an interpretation of section 214(e)(1) that requires a new entrant to provide service throughout the service area prior to designation as an ETC to be fundamentally inconsistent with the universal service provisions in the 1996 Act. Specifically, we find such a requirement to be inconsistent with the meaning of section 214(e)(1), Congress' universal service objectives as outlined in section 254, and the Commission's policies and rules in implementing section 254. As discussed above, this approach essentially requires a new entrant to provide service throughout high-cost areas prior to its designation as an ETC. We find that such a requirement stands as an obstacle to the Commission's execution and accomplishment of the full objectives of Congress in promoting competition and access to telecommunications services in high-cost areas.[58] To the extent that a state's requirement under section 214(e)(1) that a new entrant provide service throughout the service area prior to designation as an ETC also involves

[52] *See generally* section 254.

[53] According to the Joint Explanatory Statement, the purpose of the 1996 Act is " to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition . . . ." Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. at 113 (Joint Explanatory Statement).

[54] *See* 47 U.S.C. § 254(b)(3).

[55] *Universal Service Order*, 12 FCC Rcd at 8801-8803, paras. 47-51.

[56] *Universal Service Order*, 12 FCC Rcd at 8802, para. 49.

[57] 47 U.S.C. § 254(f).

[58] *See* Joint Explanatory Statement at 113.

matters properly within the state's intrastate jurisdiction under section 2(b) of the Act,[59] such matters that are inseparable from the federal interest in promoting universal service in section 254 remain subject to federal preemption.[60]

28. Section 214. We find that the requirement that a carrier provide service throughout the service area prior to its designation as an ETC conflicts with the meaning and intent of section 214(e)(1). Section 214(e)(1) provides that a common carrier designated as an eligible telecommunications carrier shall "offer" and advertise its services.[61] The statute does not require a carrier to provide service prior to designation. As discussed above, we have concluded that a carrier cannot reasonably be expected to enter a high-cost market prior to its designation as an ETC and provide service in competition with an incumbent carrier that is receiving support. We believe that such an interpretation of section 214(e) directly conflicts with the meaning of section 214(e)(1) and Congress' intent to promote competition and access to telecommunications service in high-cost areas.[62]

29. While Congress has given the state commissions the primary responsibility under section 214(e) to designate carriers as ETCs for universal service support, we do not believe that Congress intended for the state commissions to have unlimited discretion in formulating eligibility requirements. Although Congress recognized that state commissions are uniquely suited to make ETC determinations, we do not believe that Congress intended to grant to the states the authority to adopt eligibility requirements that have the effect of prohibiting the provision of service in high-cost areas by non-incumbent carriers.[63] To do so effectively undermines congressional intent in adopting the universal service provisions of section 254.

30. Section 254. Consistent with the guidance provided above, we find a requirement that a carrier provide service prior to designation as an ETC inconsistent with the underlying principles and intent of section 254. Specifically, section 254 requires the Commission to base policies for the advancement and preservation of universal service on principles that include promoting access to telecommunications services in high-cost and rural areas of the nation.[64] Because section 254(e) provides that only a carrier designated as an ETC under section 214(e) may be eligible to receive federal universal service support, an interpretation of section 214(e) requiring carriers to provide service throughout the service area prior to designation as an ETC

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[59] 47 U.S.C. § 152(b).

[60] *See Louisiana Public Service Commission v. FCC*, 476 U.S. at 368-69; *AT&T v. Iowa Utilities Board*, 119 S.Ct 721, 730 (1999); *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d at 423.

[61] 47 U.S.C. § 214(e)(1).

[62] *See* Joint Explanatory Statement at 113. *See also supra* section III.B for discussion of competitive neutrality.

[63] *See Texas Office of Public Utility Counsel v. FCC*, 183 F.3d at 418 n.31.

[64] *See* 47 U.S.C. § 254(b)(3).

stands as an obstacle to the accomplishment of the congressional objectives outlined in section 254.[65] If new entrants are effectively precluded from universal service support eligibility due to onerous eligibility criteria, the statutory goals of preserving and advancing universal service in high-cost areas are significantly undermined.

31. In addition, such a requirement conflicts with the Commission's interpretation of section 254, specifically the principle of competitive neutrality adopted by the Commission in the *Universal Service Order*.[66] In the *Universal Service Order*, the Commission stated that, "competitive neutrality in the collection and distribution of funds and determination of *eligibility* in universal service support mechanisms is consistent with congressional intent and necessary to promote a pro-competitive, de-regulatory national policy framework."[67] As discussed above, a requirement to provide service throughout the service area prior to designation as an ETC violates the competitive neutrality principle by unfairly skewing the provision of universal service support in favor of the incumbent LEC. As stated in the *Universal Service Order*, "competitive neutrality will promote emerging technologies that, over time, may provide competitive alternatives in rural, insular, and high cost areas and thereby benefit rural consumers."[68] Requiring new entrants to provide service throughout the service area prior to ETC designation discourages "emerging technologies" from entering high-cost areas. In addition, we note that section 254(f) provides that, "[a] State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service."[69] For the reasons discussed extensively above, we find an interpretation of section 214(e) requiring the provision of service throughout the service area prior to designation as an ETC to be inconsistent with the Commission's universal service policies and rules.

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[65] 47 U.S.C. § 254(e).

[66] *Universal Service Order*, 12 FCC Rcd at 8801, para. 47.

[67] *Universal Service Order*, 12 FCC Rcd at 8801-02, para. 48 (emphasis added).

[68] *Universal Service Order*, 12 FCC Rcd at 8803, para. 50.

[69] 47 U.S.C. § 254(f).

IV. ORDERING CLAUSES

32. Accordingly, IT IS ORDERED that pursuant to sections 4(i), 253, and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 253, and 254, and section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, and Article VI of the U.S. Constitution, that this Declaratory Ruling IS ADOPTED.

33. IT IS FURTHER ORDERED that Western Wireless' Petition for Preemption of an Order of the South Dakota Public Utilities Commission shall be placed in abeyance pending resolution of the appeal.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

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South Dakota Supreme Court

The Filing by GCC License Corp., 2001 SD 32

Opinion Filed March 14, 2001

The Filing by GCC License Corporation for Designation as an Eligible Telecommunications Carrier

[2001 SD 32]

South Dakota Supreme Court
Appeal from the Circuit Court of
The Sixth Judicial Circuit
Hughes County, South Dakota
Hon. James W. Anderson, Judge

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Opinion Filed 3/14/2001

#21510

KONENKAMP, Justice

[¶1.] In this appeal, we examine whether the South Dakota Public Utilities Commission erroneously denied a wireless telecommunications company's application to become an eligible telecommunications carrier (ETC). To answer the question, we interpret 47 USC 214(e)(1), the federal statute governing the requirements for ETC status. The PUC read this statute to require that applicants must presently be providing or offering all enumerated services before ETC designation. On appeal, the circuit court reversed, ruling that federal law only requires applicants to show that they are capable of offering or providing the required services. The court remanded the case to the PUC solely for findings on whether ETC designation in South Dakota rural exchanges is in the public interest. We affirm the circuit court in all respects.

A.

[¶2.] The Telecommunications Act of 1996 accomplished the most comprehensive restructuring of telecommunications law since the Communications Act of 1934. Indeed, Congress directed that the 1996 Act, including its provisions on local competition, be inserted into the 1934 Act. Telecommunications Act of 1996 § 1(b), PubLaw 104 –104, 110 Stat 56. In the main, the Act creates a framework to encourage swift deployment of new technologies, to open telecommunications markets to competition, and to reduce regulation, so that Americans can enjoy lower prices and higher quality services. *Id.* To attain these goals, Congress sought to end the previously monopolistic local telephone markets in part by prohibiting states from imposing legal obstacles to impede competition. AT& T Corp. v. Iowa Utilities Bd., 525 US 366, 371, 119 SCt 721, 726, 142 LEd2d 835 (1999). "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications services." 47 USC 253. Congress was so set on removing barriers to entry that it authorized the FCC to preempt any state infringement "to the extent necessary to correct such violation or inconsistency." 47 USC 253(d). To be legally viable, any state regulation must be administered on a "competitively neutral basis." 47 USC 253(b).

[¶3.] The 1996 Act empowers states to grant certain entities the status of "eligible telecommunications carrier." 47 USC 214(e).[1] One of the benefits of becoming an ETC is the requirement that other carriers make available "public switched network infrastructure, technology, information, and telecommunications facilities and functions" at reasonable prices. 47 USC 259(a); 47 USC 259(b). ETCs are eligible to receive federal universal service financial support, but must use such support "only for the provision, maintenance, and upgrading of facilities and services for which the support is intended." 47 USC 254(e). An ETC is obliged, at the risk of financial sanctions, to serve designated customers at appropriate prices. 47 USC 214(d). State utility commissions are required to ensure that telephone service providers not exclude areas more costly to serve and those commissions must "determine which common carrier or carriers are best able to provide such service to the requesting unserved community or portion thereof. . . ." 47 USC 214(e)(3).

B.

[¶4.] On August 25, 1998, GCC License Corporation, a mobile cellular service provider, and a

"common carrier" under federal law, applied for ETC status in all South Dakota counties.[2] Intervening to oppose GCC's request were Dakota Telecommunications Group, Inc., South Dakota Independent Telephone Coalition,[3] and US West Communications, Inc (now Qwest).[4] The hearing took place on December 17-18, 1998.

[¶5.] GCC is licensed to provide cellular service throughout South Dakota and has existing signal coverage in 98% of the state. In its application, GCC asserted that it currently provides or is capable of providing all the federally required services within its current mobile cellular offering. It is undisputed that GCC meets the definition of a common carrier, but it does not presently advertise a universal service offering. The latter requirement was not the focus of the case before the PUC. Instead, the dispute centered on the provision of statutorily enumerated support services. GCC admitted that it did not presently provide a universal service offering or a package containing all of the federally required enumerated services. A GCC representative testified that its universal service offering would be "shaped by consumer preferences." GCC assumed that customers would want services and features comparable to those offered by traditional local exchanges, so access could be provided through a "wireless local loop service."[5] This wireless local loop would be supported by GCC's existing network infrastructure.[6] At the time of its application, GCC was not providing wireless local loop service to any customer in South Dakota.

[¶6.] GCC asserted that it could implement a universal service offering immediately upon designation. The PUC, however, was unconvinced of GCC's ability to provide the required services throughout the state. The commission noted that GCC had, at the time of the hearing, applied for ETC status in thirteen states. The PUC emphasized, "GCC admitted that it could not provide service to every location in South Dakota."

[¶7.] After the hearing, the commissioners unanimously voted to deny GCC's application. In its findings of fact and conclusions of law, the PUC ruled that "an ETC must be actually offering or providing the services supported by the federal universal support mechanisms throughout the service area before being designated an ETC." It also concluded: "Even if the Commission could grant a company ETC status based on intentions to serve, the Commission finds that GCC has failed to show that its proposed fixed wireless system could be offered to customers throughout South Dakota immediately upon being granted ETC status." GCC appealed to the circuit court under SDCL 1-26-30.2. After reviewing briefs and hearing oral argument, the court entered its own findings of fact and conclusions of law reversing the PUC and remanding the matter solely for a public interest determination for rural service areas. The PUC, SDITC, and Qwest appeal.[7]

C.

[¶8.] In reviewing an agency ruling, we apply the same standard as the circuit court, with no assumption that the court's ultimate decision was correct. Cheyenne River Sioux Tribe Tel. Auth. v. Public Utilities Comm'n, 1999 SD 60, ¶12, 595 NW2d 604, 608 (citing Appeal of Templeton, 403 NW2d 398, 399 (SD 1987)). Questions of fact are reviewed with deference under the clearly erroneous standard. *Cheyenne River Sioux Tribe*, 1999 SD 60, ¶12, 595 NW2d at 608 (citations omitted). In this instance, our review of the circuit court's fact findings reverts to the PUC's findings because the court's fact findings were based solely on the record before the PUC. *Cf.* State Div. of Human Rights v. Miller, 349 NW2d 42, 46 n2 (SD 1984). Questions of law, as well as mixed questions of law and fact, are fully reviewable. Zoss v. United Bldg. Center, Inc., 1997 SD 93, ¶6, 566 NW2d 840, 843 (citing Permann v. South Dakota Department of Labor, 411 NW2d 113 (SD 1987))(further citations omitted).

D.

Requirements for ETC Designation

[¶9.] To attain ETC designation, an applicant must: (a) be a common carrier; (b) *offer* certain supported services prescribed by the FCC in 47 CFR § 54.101(a)(1)-(9);[8] (c) advertise the availability of the services and charges using media of general distribution; and (d) request an appropriate designated service area. *See* 47 USC 214(e)(1)(A)(B)(emphasis added); 47 USC 214(e)(2). Additionally, before designating an additional ETC in an area served by a rural telephone company, a state utility commission must find that the designation is in the "public interest." 47 USC 214(e)(2).

[¶10.] In interpreting these requirements, the PUC ruled that the word "offer" in 47 USC 214(e)(1)(A) requires a carrier to actually be "offering or providing" the enumerated services throughout the service area "before being designated an ETC." Thus, the commission concluded that it "cannot grant a company ETC status based on intentions to serve." The PUC also relied on the use of the present tense of the verb "meets" in 47 USC 214(e)(2): "the State commission may, in the case of an area served by a rural telephone company . . . designate more than one common carrier as an [ETC] . . . so long as each additional requesting carrier *meets* the requirements of paragraph (1)."

[¶11.] We interpret statutory provisions to learn the intent of the law. De Smet Ins. Co. of South Dakota v. Gibson, 1996 SD 102, ¶7, 552 NW2d 98, 100 (citations omitted). Where possible, congressional intent should be gleaned from the plain text of the statute. *Id.* When statutory language is clear and unambiguous we can simply declare the meaning as expressed. *Id.* Here, we face two possible readings of § 214(e)(1). On the one hand, the statute might be construed to require that an applicant presently provide or offer the required services before ETC designation. On the other hand, the requirement that a common carrier *offer* enumerated services and *advertise* those services could be understood as a post-designation condition. The statute says the offering and advertising must occur "throughout the service area for which the designation is *received*. . . ." 47 USC 214(e)(1)(emphasis added). The word "received" is in the past tense.

[¶12.] We must concede that both interpretations seem reasonable, which captures the very essence of ambiguity. Regrettably, the 1996 Act is rife with ambiguities, as the United States Supreme Court noted:

> It would be gross understatement to say that the Telecommunications Act of 1996 is not a model of clarity. It is in many important respects a model of ambiguity or indeed even self-contradiction. That is most unfortunate for a piece of legislation that profoundly affects a crucial segment of the economy worth tens of billions of dollars.

AT & T Corp., 525 US at 397, 119 SCt at 738, 142 LEd2d 835. Our examination cannot verify from the text of § 214(e)(1) itself what Congress precisely intended. We must therefore go beyond plain language analysis to decide which interpretation more closely comports with congressional intent. In cases where a literal approach leaves us without a definitive interpretation, "the cardinal purpose of statutory construction—ascertaining legislative intent—ought not be limited to simply reading a statute's bare language; we must also reflect upon the purpose of the enactment, the matter sought to be corrected, and the goal to be attained." *De Smet Ins. Co.*, 1996 SD 102, ¶7, 552 NW2d at 100 (citations omitted).

[¶13.] ETCs are creations of the 1996 Act. *See* PubLaw 104-104, Title I, §102(a), 110 Stat 80. Before this legislation, regulation of the telephone industry was "premised on the belief that only

monopolies could provide reliable, universal service." Cablevision of Boston, Inc. v. Public Improvement Comm'n of the City of Boston, 184 F3d 88, 97 (1stCir 1999). The 1996 Act represents a substantial change in telecommunications regulation. *Id.* It seeks to encourage multiple providers and competition. *Id.* (citing Kearny & Merrill, The Great Transformation of Regulated Industries Law, 98 ColumLRev 1323, 1325-26 (1998)).

[¶14.] Congressional desire to bring competition to this long-time monopolistic industry is explicit in the preamble to the 1996 Act: "An act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." *See* PubLaw 104-104, 110 Stat 56 (1996). *See also,* Texas Office of Pub. Utility Counsel v. Federal Communications Comm'n, 183 F3d 393, 406 (5thCir 1999)(*cert granted*, 120 SCt 2214, 147 LEd2d 247 (2000)). We find it difficult to reconcile the PUC's interpretation of § 214(e)(1) with the thrust of the 1996 Act, promoting competition.

[¶15.] If common carriers must provide or offer all the universal services throughout the area at the time they seek designation, an onerous, perhaps overwhelming, burden would confront them. They would have to offer the enumerated services in high cost areas in competition with incumbent carriers without any assurance of support. Only after substantial investment and risk could a new carrier even seek designation, perhaps to later discover that it is not eligible. Such an interpretation gravely disadvantages applicant carriers, while fostering the very monopolies Congress sought to abolish.

[¶16.] Having in mind the congressional purpose behind the 1996 Act, the language of § 214(e)(1) tends to support a less restrictive reading. After all, obtaining ETC status is only the first step in receiving support. Within § 214(e) Congress specifically provided that once ETC status is obtained, federal subsidies are not automatic. Instead, a carrier so designated "shall be *eligible* to receive universal service support. . . . " *See* 47 USC 214(e)(1)(emphasis added). If a carrier wishes to receive subsidies it must follow through with its intentions. Indeed, the Federal Communications Commission declared that "a carrier's continuing status as an eligible carrier is contingent upon continued compliance with the requirements of § 214(e) and . . . attracting and/or maintaining a customer base. . . ." In the Matter of Federal-State Joint Board on Universal Service, Report and Order, 12 FCCR 8776, ¶138 (May 8, 1997)(*aff'd in part and reversed in part*, Texas Office of Pub. Utility Counsel v. FCC, 183 F3d 393 (5thCir 1999)).

[¶17.] An ETC designation is not a guarantee of universal service support. A carrier must still provide the enumerated services required by federal law. In accord with 47 USC 214(e), an ETC is permitted to relinquish its designation in any area with more than one eligible carrier. 47 USC 214(e)(4). In doing so, the law requires the relinquishing ETC to provide the state commission with notice of its intent. *Id.* Notice is required so that the state commission can inform other carriers and "permit the purchase or construction of adequate facilities by any remaining [ETC]." *Id.* The express purpose of such a notice requirement is to ensure that all customers of the relinquishing ETC will continue to have universal services. *Id.* Thus, this section presupposes that ETCs may have to upgrade services even after designation.

[¶18.] Finally, the Federal Communications Commission has ruled on this very issue. After the South Dakota PUC denied ETC status to GCC, Western Wireless, GCC's parent company, sought a preemptive order from the FCC. In a declaratory ruling released on August 10, 2000, the FCC rejected the PUC's interpretation of § 214(e)(1), but declined to order preemption pending the outcome of this appeal.[9] The FCC held that "interpreting § 214(e)(1) to require the provision of service throughout the service area prior to ETC designation prohibits or has the effect of prohibiting the ability of competitive carriers to provide telecommunications service, in violation of § 253(a) of the Act." After designation as an ETC, the FCC ruled, a carrier must be given a reasonable

opportunity to provide the services customers request.

[¶19.] It should be acknowledged, however, that the South Dakota PUC did not rule that applicant carriers must offer and provide required services before designation, only offer or provide them. The FCC did not recognize that distinction. Nevertheless, even if we retained some doubt on the proper construction of § 214(e)(1), we give a federal agency's interpretation of the statutes it administers highly deferential review. Chevron USA v. Natural Resources Defense Council Inc., 467 US 837, 844, 104 SCt 2782, 81 LEd2d 694 (1984). Consequently, we affirm the circuit court's interpretation of § 214(e) that a carrier need not be presently offering required services before qualifying as an eligible carrier. Likewise, inability to provide service immediately upon designation is not a basis for denying ETC status. New carriers, like incumbent carriers, are required to serve new customers on reasonable request. The PUC's contrary interpretation violates congressional intent to promote competition and unlock access to telecommunications markets.

E.

Providing Universal Service "Throughout the Service Area"

[¶20.] The PUC denied GCC's application because § 214(e)(1) requires an ETC to offer supported services throughout the service area and advertise the availability of those services.[10] The PUC concluded that "GCC is not currently offering fixed wireless service nor is it advertising the availability of a fixed wireless service throughout South Dakota." Although the PUC acknowledged GCC's argument that current offering of services is not required, it found that such interpretation was contrary to the plain meaning of the statute. It is apparent from this language that the PUC determination that GCC did not meet the "throughout the service area requirement" was colored by its erroneous interpretation of §214(e)(1). Consequently, after reviewing the record, we affirm the circuit court's ruling that GCC can within a reasonable time meet each of the requirements of §214(e). Along with the court we too conclude that the record sufficiently demonstrates GCC's intent and ability to provide the required enumerated services throughout South Dakota upon designation.

F.

Additional Requirements for ETC Designation

[¶21.] SDITC argues that implicit in the circuit court's decision is a ruling that the PUC cannot impose additional requirements on a carrier seeking ETC status. The PUC's decision to deny GCC designation as an ETC did not hinge on any additional state requirement. The rationale for the PUC's denial is well summarized in one of its conclusions of law.

> The Commission finds that pursuant to 47 USC § 214(e), an ETC must be actually offering or providing the services supported by the federal universal service support mechanisms throughout the service area before being designated an ETC. GCC intends to provide a universal service offering initially through a fixed wireless system. However, it does not currently offer fixed wireless service to South Dakota customers. The Commission cannot grant a company ETC status based on intentions to serve.

[¶22.] The circuit court made no specific finding that the PUC was without authority to compel further requirements. The challenged finding recited that

> [p]ursuant to 47 USC §214(e)(2) the Commission is required to designate a common carrier that meets the requirements of Section 214(e)(1) as an ETC. . . . However, before designating an additional ETC for an area served by a rural telephone company the Commission must find that the designation is in the

public interest.

This statement alone does not constitute a finding that the PUC is with or without such authority. Apparently, the circuit court took the PUC at its word that there were no additional requirements. This Court will not pass on an issue not decided by the circuit court. Matter of Guardianship of Petrik, 1996 SD 24, ¶11, 544 NW2d 388, 390 (citations omitted).[11]

G.

No "Public Interest" Finding for Non-Rural Exchanges

[¶23.] Qwest Corporation alone contends that under the 1996 Act a state utilities commission must make a separate public interest determination before granting ETC status in all telephone exchanges, rural and non-rural. The relevant portion of the statute provides:

> 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.

47 USC 214(e)(2)(emphasis added). Qwest's position contradicts the plain reading of this section.

[¶24.] The portion of the statute addressing non-rural exchanges provides that "consistent with the public interest, convenience, and necessity, the State commission . . . *shall*, in the case of all other areas, designate more than one common carrier . . . so long as each additional requesting carrier meets the requirements of paragraph (1)." 47 USC 214(e)(2)(emphasis added). The PUC *must* designate an additional ETC in a non-rural exchange so long as the requesting carrier "meets the requirements of paragraph (1)." The phrase "consistent with the public interest, convenience, and necessity" when read with the mandatory "shall" expresses the congressional premise that in non-rural exchanges the existence of more than one ETC is in the public interest.

[¶25.] The last sentence of this section further weakens Qwest's position. In that sentence, Congress expressly provides that before designating an additional ETC in a rural exchange, the commission "shall" determine if the designation is in the public interest. *See* 47 USC 214(e)(2). If Congress had intended to require such a finding in all telephone exchanges, whether rural or non-rural, it could have easily so declared. Qwest's interpretation cannot be sustained.

H.

"Public interest" Finding for Rural Exchanges

[¶26.] For ETC designation in rural exchanges, a state utilities commission is expressly required to find whether the designation of an additional telecommunications carrier is in the public interest. "Before designating an additional [ETC] for an area served by a rural telephone company, the State Commission shall find that the designation is in the public interest." 47 USC 214(e)(2); *see also* SDCL 49-31-78. Because it found that GCC was not currently offering or providing the necessary services to support the granting of ETC designation, the PUC ruled that "it need not to reach the issue of whether granting ETC status to GCC in areas served by rural customers is in the public interest." The circuit court remanded this matter for a determination based on record evidence. Although we do

not wish to hamstring the PUC by unreasonably limiting its oversight of the telecommunications industry, we think it vital that there be as little delay as possible in allowing GCC to begin operations in South Dakota. This matter has been delayed for years. Evidence was submitted in 1998 on the public interest question and the issue would have been reached then if the inquiry had not been aborted due primarily to an erroneous application of federal law. Therefore, if based on record evidence the PUC finds that the public interest test has been satisfied in the rural areas where GCC is seeking ETC status, then the PUC must award such designation in those areas.

[¶27.] We affirm the circuit court in all respects.

[¶28.] MILLER, Chief Justice, and SABERS, AMUNDSON, and GILBERTSON, Justices, concur.

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[1]. 47 USC § 214(e) states in relevant part:

> Provision of universal service
>
> (1) Eligible telecommunications carriers
> A common carrier designated as an eligible telecommunications carrier under paragraph (2), (3), or (6) shall be eligible to receive universal service support in accordance with section 254 of this title and shall, throughout the service area for which the designation is received -
>
> (A) offer the services that are supported by Federal universal service support mechanisms under section 254(c) of this title, either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier); and
> (B) advertise the availability of such services and the charges therefor using media of general distribution.
>
> (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 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.

[2]. GCC conducts its cellular business under the tradename Cellular One, a wholly owned subsidiary of Western Wireless Corporation.

[3]. SDITC is an incorporated organization that represents the interests of independent and

municipal telephone companies operating in South Dakota. Each member of this organization is a rural telephone company and an incumbent local exchange carrier.

4. US West, now Qwest, is a non-rural telephone company and is the only non-rural carrier designated as an ETC in all non-rural exchanges where GCC seeks designation.

[5] A fixed wireless local loop service would provide customers with attributes more commonly associated with landline technology. This would allow customers to have a dial tone on their phones, not available with a traditional cellular unit. Furthermore, this fixed offering would permit customers to connect answering machines, fax machines, and other peripheral devices to their phone lines.

[6] In their respective briefs to this Court, both the PUC and the South Dakota Independent Telephone Coalition emphasize that the credibility of this assertion is questionable in light of other statements by GCC. Both contend that GCC indicated a need to build additional towers and cell sites "to provide good quality." More accurately, the complete record reflects GCC's willingness to construct additional facilities and provide additional equipment "where necessary" to "optimize voice quality."

[7] The three appellants in this case collectively present a total of eight issues:

1. Whether an applicant for ETC designation must be providing or offering universal support services prior to obtaining designation.
2. Whether the circuit court applied an improper standard of review.
3. Whether the PUC was clearly erroneous when it found that GCC did not currently offer required universal support services through its existing cellular service at the time of its application.
4. Did the PUC err when it determined that GCC could not provide universal services "throughout the service area?"
5. Did the circuit court err in finding that GCC demonstrated an intent and ability to provide the required universal services throughout the State and provide such services upon designation?
6. Did the circuit court erroneously find that the PUC has no authority to impose additional requirements for ETC designation beyond those provided for in 47 USC 214(e)(1)-(2)?
7. Did the circuit court err when it ordered the PUC to determine "based on the record" whether designation of GCC as an ETC was in the public interest?
8. Whether the public interest requirement under 47 USC 214(e) applies only to rural exchanges.

The central issue involves the interpretation of 47 USC 214(e). Because we affirm the circuit court's interpretation, we need not reach Issues 3 and 4.

[8] These enumerated services include: voice grade access, some amount of local usage free of charge, dual tone multi-frequency signaling or its functional equivalent, single-party service or its functional equivalent, access to emergency service (911 service), access to operator service, access to interexchange service, access to directory assistance, and toll limitation to qualifying low income consumers. *See* 47 CFR 54.101(a)(1)-(9). Also, an ETC is obligated to make available Lifeline and Link Up services to qualifying low income customers. 47 CFR 54.405;

47 CFR 54.411.

[9] *See* In the Matter of Federal-State Joint Board on Universal Service, CC Docket No 96-45, Declaratory Ruling, 15 FCCR 15168, FCC 00-248 (2000). GCC contends that this decision is binding as a result of the United States Supreme Court decision in AT & T Corp. v. Iowa Utilities Board, 525 US 366, 119 SCt 721, 142 LEd2d 835 (1999). We do not interpret that case to so hold. Congress clearly gave the states the authority to designate ETCs. *See* 47 USC 214(e). Similarly 47 USC 152(b) indicates "nothing in this chapter shall be construed to apply or give to the Commission [FCC] jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication . . . ." 47 USC 152(b).

The South Dakota PUC is unique in its interpretation of 47 USC 214(e)(1). To our knowledge, no other state utilities commission has interpreted it in a similar manner. *See e.g.* Western Wireless Corp. Designated Eligible Carrier Application, Findings of Fact and Conclusions of Law, PU-1564-98-428, ¶36, ¶8 (ND PUC 1999)(interpreting the statute in accord with the FCC's declaratory ruling).

[10] The PUC asserted in its fourth issue that "[t]he circuit court erred in finding that the commission's decision required an applicant for ETC designation to show it is providing a universal service offering *to every location* in the requested designated service area." We decline to address the propriety of the circuit court's construction in light of our scope of review. *See Cheyenne River Sioux Tribe*, 1999 SD 60, ¶12, 595 NW2d at 608 (citations omitted). We review agency findings, as did the circuit court with no presumption that the circuit court was correct. *Id.*

[11] Although we decline to reach the merits of SDITC's claim, it is worth mentioning that even if a state commission does retain authority to impose additional requirements, any such requirements must be competitively neutral and consistent with the Act's aim of promoting competition. *See* 47 USC 253(b).

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