

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the matter of)	
)	
Federal-State Joint Board on)	
Universal Service)	
)	CC Docket No. 96-45
Petition of Cingular Wireless, LLC)	
for Designation as an Eligible)	
Telecommunications Carrier in the)	
State of Georgia)	

**Comments of the

INDEPENDENT TELEPHONE and
TELECOMMUNICATIONS ALLIANCE

and the

WESTERN TELECOMMUNICATIONS ALLIANCE**

TO THE COMMISSION:

The Independent Telephone and Telecommunications Alliance (ITTA)¹ and the Western Telecommunications Alliance (WTA)² urge the Commission to consider the above-referenced Petition of Cingular Wireless, LLC, for Designation as an Eligible Telecommunications Carrier in the State of Georgia (Petition)³ in the context of the larger

¹ ITTA represents mid-size local exchange companies that provide a broad range of high-quality wireline and wireless voice, data, Internet, and video telecommunications services to more than 13 million customers in 43 states.

² WTA is a trade association that represents approximately 250 rural telephone companies operating west of the Mississippi. Most members serve fewer than 3,000 access lines overall, and fewer than 500 access lines per exchange.

³ See Commission's Public Notice DA 07-158, released January 23, 2007.

proceeding on universal service reform.⁴ In order to engage rational decision-making, the Commission must incorporate into its deliberations the active and serious debate on the larger universal service program. Otherwise, the Commission will continue to make within the context of ETC applications incremental decisions toward one direction, while at the same time considering universal service modifications that take a far different direction. Accordingly, ITTA and WTA urge the Commission to import the record produced in the reverse auctions proceeding to its decision on the instant Petition.

I INTRODUCTION

Section 214(e) of the Communications Act of 1934, as amended (the Act) establishes that a common carrier designated as an eligible telecommunications carrier (ETC) shall be eligible to receive universal service support. State commissions are charged with the primary responsibility for performing ETC designations.⁵ In areas served by non-rural telephone companies, the state is required to designate a qualified applicant as a competitive ETC (CETC). In areas served by rural telephone companies, the state may, but is not required to, designate an otherwise qualified applicant as a CETC. In each instance, the state is required to ensure that the designation is consistent with the public interest. Rural areas, however, are held to a higher public interest standard, as evidenced by the language of the statute:

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

⁴ ITTA and WTA filed comments and reply comments on Cingular's petition for ETC designation in Virginia. See Commission's Public Notice DA 06-2367, released November 27, 2006. That petition is hereinafter referred to as the "Cingular-Virginia Petition."

⁵ 47 USC 214(e)(2).

telecommunications carrier . . . 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.⁶

This language is mirrored in the Commission's rules.⁷ Where a carrier is not subject to the jurisdiction of a state commission, the Commission undertakes the designation process.⁸

II COHERENT DECISIONMAKING REQUIRES THE COMMISSION TO CONSIDER THE PETITION IN THE CONTEXT OF CHANGES NEEDED IN UNIVERSAL SERVICE PROGRAM

A Growth of Fund and Recent Comments Cycle

Because the ETC designation process requires a public interest determination, the instant Petition must be examined against the urgent need to address the high-cost universal service support program, as evidenced by the open proceeding on that matter. *See*, "Federal-State Joint Board on Universal Service Seeks Comment on the Merits of Using Auctions to Determine High-Cost Universal Service Support," Public Notice FCC 06J-1 (*Auctions PN*) (Aug. 11, 2006). The public interest finding required by the statute must be a dynamic concept that reflects current circumstances, similar to Congress's understanding that universal service funds support an "evolving" set of services.⁹

⁶ 47 USC 214(e)(2) (emphasis added).

⁷ 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 (d) of this section. 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 CFR 54.201(c).

⁸ 47 USC 214(e)(6).

⁹ *See* 47 USC 254(c)(1).

Deciding who should receive universal service funds is the subject of active debate. ITTA and WTA are among parties that filed comments in the Commission’s reverse auctions proceeding, demonstrating that the high-cost element of universal service support has spiraled upward in recent years, leading to recoil among the public and Congress who have witnessed the increases with growing alarm. As described in their respective comments in the auctions proceeding, the fund’s growth can be attributed to both regulatory movement of access charges into universal service and the streaming emergence of competitive ETCs.¹⁰ Implicated by both is the identical support rule, which bestows upon CETCs costs incurred by other carriers, including access charges that a wireless CETC would never have received. Part of the Commission’s revision of universal service regulations should include elimination of the identical support rule; CETCs should receive only support based on their own costs in serving the designated areas.

When commenting on Cingular’s recent petition for ETC designation in Virginia, NTCA noted that grant of that petition could “entic[e] all national wireless providers to seek federal USF support at the FCC and at state commissions in all 50 states . . . lead[ing] to the collapse of universal service funding mechanisms . . .”¹¹ This concern is especially troubling when one considers that, as Verizon and NTCA provided, Cingular has at least 57.3 million subscribers and annual revenues in the tens of billions of dollars

¹⁰ See, *i.e.*, *I/M/O Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, WC Docket No. 05-337, Comments of Balhoff & Rowe, LLC on Behalf of the Independent Telephone and Telecommunications Alliance at 13-26; Comments of Western Telephone Alliance at 8.

¹¹ Comments of NTCA on the Cingular-Virginia Petition at 2.

(\$27 billion in 2006, \$34.4 billion in 2005).¹² The public interest demands whether wholesale funding of this carrier is truly consistent with the public interest. Verizon predicted, “funding Cingular would continue the trend of subsidizing more and more CETCs with universal service funds in an increasing number of service areas.”¹³

Ultimately, consumers pay for the growing HCF.¹⁴ As illustrated by Verizon, the HCF is expected to reach more than \$4.1 billion per year *without additional growth* – more than double the size of the fund just seven years ago.¹⁵ The receipt of support by more carriers necessitates enlargement of the HCF, which in turn is passed along to consumers who must absorb higher monthly bills. This increase in the fund collides with the statutory mandate to create “just, reasonable, and affordable rates.”¹⁶ No bargain is realized when increased rates are precipitated by the growing support of multiple carriers in markets where the viability of even a single unsupported carrier is not feasible. The perverse results are a cannibalization effect where consumers pay more for competition, rather than less. This trend cannot continue: “[E]xcess subsidization in some cases may detract from universal service by causing rates unnecessarily to rise, thereby pricing some

¹² Comments of NTCA on the Cingular-Virginia Petition at 9, Comments of Verizon on the Cingular-Virginia Petition at 3.

¹³ Comments of Verizon on the Cingular-Virginia Petition at 5.

¹⁴ See Comments of ITTA/WTA on the Cingular-Virginia Petition at n.19, *citing I/M/O Schools and Libraries Universal Service Support Mechanism: First Report and Order*, CC Docket No. 02-6, FCC 02-175, Separate Statement of Chairman Michael K. Powell, Approving in Part and Concurring in Part (rel. Jun. 13, 2002).

¹⁵ Comments of Verizon on the Cingular-Virginia Petition at 6.

¹⁶ 47 USC 254(b)(1).

consumers out of the market.”¹⁷ Moreover, the presence of too many providers in a rural market can make it uneconomic for any of them to provide service, as a finite number of consumers is needed to support an ever-expanding field of providers.

As discussed below, the Commission has taken steps to address the circumstances that threaten the sufficiency of the universal service fund by embarking on an ambitious process to investigate with the industry whether different collection and allocation processes will relieve the growing pressure on the fund. The Commission should not allow grant of new ETC petitions to prejudice the outcome of that proceeding. Thus, ITTA and WTA urge the Commission to import the record produced in the reverse auctions proceeding to inform its decision on the Cingular Petition.

B An Evolving Public Interest Standard

The Commission, to its credit, has evolved its thinking on what the public interest requirement in Section 214 means. In *I/M/O Federal-State Board on Universal Service - Cellco Partnership d/b/a Bell Atlantic Mobile Petition for Designation as an Eligible Telecommunications Carrier: Memorandum Opinion and Order*, CC Docket No. 96-45, DA 00-2895 (rel. Dec. 26, 2000) (*Cellco*), the Commission determined that, “for those areas served by non-rural telephone companies . . . designation of an additional ETC based upon a demonstration that the requesting carrier complies with the statutory eligibility obligations of section 214(e)(1) is consistent *per se* with the public interest. *The carrier need make no further showing to satisfy this requirement.*”¹⁸ In March 2005, however, the Commission recognized tacitly that the facts on the ground have changed

¹⁷ *Alenco Communications v. FCC*, 201 F.3d 608, 620 (5th Cir. 2000).

¹⁸ *Cellco* at para. 14 (emphasis added).

and accordingly revised its approach.¹⁹ Citing *I/M/O Federal-State Board on Universal Service – Virginia Cellular, LLC, Petition for Designation as an Eligible Telecommunications Carrier for the Commonwealth of Virginia: Memorandum Opinion and Order*, CC Docket No. 96-45, FCC 03-338 (rel. Jan. 22, 2004) (*Virginia Cellular*), the Commission stated, “merely showing that a requesting carrier in a non-rural area study area complies with the eligibility requirements outlined in section 214(e)(1) of the Act would not necessarily show that an ETC designation would be consistent with the public interest in every instance.”²⁰

As evidenced by *Virginia Cellular*, the Commission has previously taken opportunity in ETC designation proceedings to revisit its standards. *Virginia Cellular*, along with *I/M/O Federal-State Board on Universal Service – Highland Cellular, Inc., Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia: Memorandum Opinion and Order*, CC Docket No. 96-45, FCC 04-37 (rel. Apr. 12, 2004) (*Highland Order*), were instances in which the Commission granted ETC designation conditioned, in part, upon then-new commitments by the carriers. Certain of those standards were later codified in the *ETC Order*.²¹ The Cingular Petition, filed in the midst of an active proceeding on universal service reform, presents similarly to the Commission an opportunity to assess its public interest policies in the ETC designation process.

The public interest determination is a linchpin of the ETC designation process.

The Commission has broad power to determine what defines the public interest (“The

¹⁹ See *I/M/O Federal-State Joint Board on Universal Service: Report and Order*, CC Docket No. 96-45, FCC 05-46 (*ETC Order*) (rel. Mar. 17, 2005).

²⁰ *ETC Order* at para. 42.

²¹ See, i.e., *ETC Order* at paras. 14, 15, 22, 28, 77-79.

Supreme Court has held that Congress delegated to the FCC the task of making the initial determination of how its policies may best serve the public,” *Rainbow Broadcasting v. FCC*, 949 F.2d 405, 410 (D.C. Cir. 1991)). ITTA and WTA urge the Commission to exercise that authority by adopting metrics that define the public interest in a manner that advances the goal of ensuring the long-term integrity of the program.

As described in a *Petition for Reconsideration* of the *ETC Order* filed by, *inter alia*, ITTA and WTA, “[a]lthough the *Virginia Cellular* framework represented an important step, various commenters urged the Commission to adopt more specific criteria that would allow the overall impact on the Fund to be taken more clearly into account in individual ETC designation proceedings.”²² In that *Petition for Reconsideration*, the parties proposed measurable metrics that could guide the public interest aspect of an ETC designation process, including: per-line benchmarks; a cap on the total number of ETCs that could receive universal service support for serving a high-cost area, and; a mechanism to deny ETC designation to wireless carriers where universal service support is designed to replace lost access charges.²³

The Commission has described previously a “false choice between competition and universal service.”²⁴ Although articulated originally in the context of competitive neutrality and rural areas, that same sentiment, which would tend to accommodate an equation of universal service and competition, would affect adversely the sustainability of

²² *I/M/O Federal-State Board on Universal Service: Petition for Reconsideration of TDS Telecommunications, Independent Telephone and Telecommunications Alliance, and Western Telecommunications Alliance*, CC Docket No. 96-45 (filed Jun. 24, 2005) (*Petition for Reconsideration*).

²³ *Petition for Reconsideration* at 9-12.

²⁴ *I/M/O Federal-State Joint Board on Universal Service: Report and Order*, CC Docket No. 96-45, FCC 97-157, at para. 50 (rel. May 8, 1997).

the universal service fund as it supports a growing number of ETCs. Indeed, then-Commissioner Kevin Martin subsequently articulated clearly the conundrum:

. . . I have continued to express my concerns with the Commission’s policy of using universal service support as a means of creating “competition” in high cost areas. . . . I am hesitant to subsidize multiple competitors to serve areas in which costs are prohibitively expensive for even one carrier. The Commission’s policy may make it difficult for any one carrier to achieve the economies of scale necessary to serve all of the customers in rural areas.²⁵

The Commission recognized in *Virginia Cellular* that a blanket commitment that fulfillment of 214(e) statutory obligations by an ETC fulfills *per se* the public interest requirement of the statute is no longer effective.²⁶ The exponential cost borne by consumers could no longer support the automatically-triggered equation that the introduction of competition in all markets is the public interest. The Commission’s action in *Virginia Cellular* demonstrated its recognition that a more detailed public interest analysis must be implemented. The Commission should not now permit grant of another ETC petition without fully implementing important changes based on today’s conditions. Then-FCC Chairman Michael Powell’s statements in 2002 regarding the schools and libraries components of the USF are applicable to the instant considerations: “[T]he cost of these programs is ultimately borne by American consumers. Accordingly,

²⁵ *Highland Order, supra*, Dissenting Statement of Commissioner Kevin J. Martin.

²⁶ *Virginia Cellular* at para. 27. The Commission stated:

We note that the Bureau has previously has found designation of additional ETCs in areas served by non-rural telephone companies to be *per se* in the public interest based upon a demonstration that the requesting carrier complies with the statutory eligibility obligations of section 214(e)(1) of the Act. We do not believe that designation of an additional ETC in a non-rural telephone company’s study area based upon merely upon a showing that the requesting carrier complies with section 214(e)(1) of the Act will necessarily be consistent with the public interest in every instance.

(internal citation omitted).

. . . we must balance the needs of funding these programs against the real burden that our contribution requirements could impose on consumers if we do not manage those requirements carefully.”²⁷ Accordingly, ITTA and WTA urge the Commission to adopt a more rigorous public interest analysis for the designation of ETCs, and to begin doing so in this proceeding. In undertaking this rigorous public interest analysis, the Commission should turn to the record developed in the reverse auctions docket.

III CONCLUSION

For the reasons stated above, the Commission should utilize the record created in the auctions proceeding to create public interest standards that can be applied to disposition of the instant Cingular Petition.

Respectfully submitted,

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²⁷ *I/M/O Schools and Libraries Universal Service Support Mechanism: First Report and Order*, CC Docket No. 02-6, FCC 02-175, Separate Statement of Chairman Michael K. Powell, Approving in Part and Concurring in Part (rel. Jun. 13, 2002).