

Virginia Cellular and Highland Cellular: The FCC Establishes a Framework for Eligible Telecommunications Carrier Designation in Rural Study Areas

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I. INTRODUCTION

In 1996, Congress passed the first substantial rework of the Communications Act of 1934.¹ This Act was intended to benefit consumers by encouraging competition and establishing a series of explicit mechanisms for assuring universal service. As with any complex legislation—particularly a federal body of legislation that took five years to pass—there have been unforeseeable and unintended consequences. Accelerating technological changes have also added unexpected outcomes. One of these outcomes is the creation of significant controversy over the federal, and in some cases, state universal service subsidy for the class of telecommunications providers typically known as wireless or cellular and defined by federal statute as “commercial mobile radio service” (“CMRS”).² Incumbent local exchange carriers (“ILECs”)—traditional local telephone companies using much more costly landline telephone systems—characterize these subsidies as a windfall and as unnecessary to provide wireless phone service. They argue that federal and state universal service funding is intended to subsidize high-cost local telephone service—not wireless service—which is substandard compared to landline service. CMRS providers assert that the federal Act was designed to create competition and that their services provide consumers alternatives, create competition, and provide a quality and convenient service with mobile advantages not offered by landlines.

This Article will examine two recent Federal Communications Commission (“FCC”) decisions and a Federal-State Joint Board on Universal Service Recommended Decision³ that are impacting this regulatory landscape. These decisions will affect the manner in which the FCC and state public utility commissioners deal with the eligible telecommunications carrier designation affecting the viability of companies, the scope of services to consumers, and the allocation of hundreds of millions of universal service dollars annually.

1. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at scattered sections of 47 U.S.C.).

2. 47 CFR § 20.3 (2005) (providing a definition of CMRS). See also Federal-State Joint Board on Universal Service, *Western Wireless Corp.*, Memorandum Opinion And Order, 16 F.C.C.R. 48, para. 11 (2000), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-00-2896A1.pdf [hereinafter *Western Wireless Order*].

3. *Western Wireless Order*, *supra* note 2.

II. BACKGROUND

Universal service, assuring affordable residential access for all Americans, is a long-standing goal of federal policymakers.⁴ Beginning with the Communications Act of 1934, Congress established a policy of making telecommunications available “so far as possible, to all the people of the United States.”⁵ In the 1950s, universal service efforts by the FCC, state regulators, and industry began to promote access through a series of cross-subsidies.⁶ “Because American Telephone and Telegraph Company (AT&T) provided both nationwide long distance service and local telephone service to approximately 80 percent of the nation’s telephone subscribers, universal service was largely promoted by shifting costs between different customers and services.”⁷ The most politically appealing cross-subsidies were long distance revenues subsidizing local telephone service, business service subsidizing residential service, and urban service subsidizing rural service.⁸ This scheme of implicit subsidy was complex and largely ordered upon AT&T’s monopoly structure.

The universal service landscape began to change following the intricate 1982 settlement between the United States Department of Justice and AT&T in the government’s antitrust case against the telecommunications giant.⁹ The FCC addressed the concern for potential excessive rate hikes by implementing a two-pronged approach to universal service subsidization. First, the FCC mandated that long-distance companies pay access charges to local phone companies as a means to pay for the origination and termination of long-distance phone calls.¹⁰ Second, local phone service customers were charged a “subscriber line charge” to help offset local phone companies’ costs.¹¹ Subsequent complaints by long-distance companies arguing that access charges raised consumer long-distance rates and unnecessarily inflated local companies’ profits were among issues under discussion as Congress began debating the Federal

4. See UNITED STATES GENERAL ACCOUNTING OFFICE, TELECOMMUNICATIONS: FEDERAL AND STATE UNIVERSAL SERVICE PROGRAMS AND CHALLENGES TO FUNDING (Feb. 2002), available at <http://www.gao.gov/new.items/d02187.pdf> [hereinafter GAO CHALLENGES TO FUNDING].

5. *Id.* at 2 (quoting Title 1 of the Communications Act of 1934).

6. *Id.*

7. *Id.*

8. STUART MINOR BENJAMIN ET AL., TELECOMMUNICATIONS LAW AND POLICY 618–19 (2001).

9. See *United States v. AT&T Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff’d*, 460 U.S. 1001 (1983).

10. BENJAMIN, *supra* note 8, at 713.

11. *Id.*

Telecommunications Act that would be passed in 1996.¹²

The 1996 Federal Telecommunications Act moved from a system of implicit subsidy to statutory support for explicit universal service funding.¹³ While this Article will focus on the application of universal service mechanisms used to support provision of services to rural and high-cost areas, the Act broadened the scope of universal service to support eligible schools, libraries, and rural health providers and continued support of access for low-income consumers.¹⁴ The Act changed the mechanism for universal service funding. “Every telecommunications carrier that provides interstate telecommunications services [is now required to contribute] on an equitable and nondiscriminatory basis.”¹⁵ Contributions are deposited into the federal Universal Service Fund (“USF”) and are administered and distributed by the Universal Service Administrative Company (“USAC”) in accord with regulations promulgated by the FCC.¹⁶

While the FCC is the agency charged with promulgating regulations and in acting as a quasi-judicial body in accordance with the 1996 Telecommunications Act, telecommunications regulation has a history of joint federal and state regulation. Congress recognized this shared role when it mandated that the FCC create a Federal-State Joint Board on Universal Service (“Joint Board”)¹⁷ as a mechanism for communication and coordination between the FCC and state commissions in developing and implementing a federal program of universal service. This board develops reports and recommendations which the FCC and state commissions have relied upon during the evolution of federal universal service support.¹⁸

III. CONTROVERSY AND SIGNIFICANCE

Only eligible telecommunications carriers (“ETCs”) are able to draw funds from the federal USF.¹⁹ Some states have created their own universal service funds and have tied state eligibility requirements to those of the federal Act.²⁰ The 1996 Telecommunications Act created the opportunity

12. *Id.* at 714.

13. GAO CHALLENGES TO FUNDING, *supra* note 4, at 3.

14. *Id.*

15. 47 U.S.C. § 254(d) (2002).

16. GAO CHALLENGES TO FUNDING, *supra* note 4, at 4.

17. 47 U.S.C. § 254(a)(1) (2000).

18. *See* Federal-State Joint Bd. on Universal Serv., Virginia Cellular, LLC, *Memorandum Opinion and Order*, 19 F.C.C.R. 1563, para. 19. [hereinafter *Virginia Cellular Order*].

19. 47 U.S.C. § 254(e) (2002).

20. Kansas is such a state. KAN. STAT. ANN. § 66-2008(c) (2003).

for companies other than ILECs to become ETCs and to be subsidized for serving rural areas.²¹ This new class of ETCs, sometimes known as Competitive Eligible Telecommunications Carriers (“CETCs”), has exploded in number. The growth in the number of ETCs has been geometric as providers have sought the economic benefit of the universal service subsidy. The Joint Board noted this growth in its 2004 recommended decision.

Based on USAC data, 2 competitive ETCs received just over \$500,000 in high-cost support in 1999, 4 competitive ETCs received \$1.5 million in 2000, 25 competitive ETCs received \$17 million in 2001, and 64 competitive ETCs received \$47 million in 2002. In 2003, 109 competitive ETCs received approximately \$131.5 million in high-cost support. Based on USAC quarterly projections, support for competitive ETCs will increase from \$62.9 million in the fourth quarter of 2003, to \$111.5 million in the second quarter of 2004, an increase of 77%.²²

This rise in expenditures is contrary to congressional expectations. Congress believed that competition and new technologies would reduce dependence upon universal service support by lowering costs.²³

According to the Organization for the Promotion and Advancement of Small Telecommunications Companies (“OPASTCO”), whose members are rural independent telephone companies serving high-cost areas, the vast majority of the growth in ETCs has resulted from wireless companies successfully seeking and receiving certification as CETCs.²⁴ The Joint Board has noted that, “[t]he vast majority of multiple connections provided today—the overwhelming bulk of the 148 million CMRS handsets—are not subsidized. . . . Moreover, studies have shown little if any difference in pricing between rural and urban markets.”²⁵ Such data would suggest that a universal service subsidy is not required to assure wireless services in rural areas. In contrast, wireless providers argue that to completely provide high-quality wireless coverage to service areas with remote regions and sparse

21. See 47 U.S.C. § 214(e)(2) (2002).

22. Federal-State Joint Bd. on Universal Serv., *Recommended Decision*, 19 F.C.C.R. 10,812, para. 67 n.183 (2004) (citation omitted) [hereinafter *Joint Board Decision*].

23. *Id.* para. 65 n.180 (citing S. REP. NO. 104-23, at 26 (“The Committee expects that competition and new technologies will greatly reduce the actual cost of providing universal service over time, thus reducing or eliminating the need for universal service support mechanisms as actual costs drop to a level that is at or below the affordable rate for such service in an area . . .”) (citation omitted)).

24. Stuart Polikoff, USF = Keeping Rural America Connected, Presentation Before NARUC Staff Subcommittee on Accounting and Finance 6 (Sept. 16, 2003), available at <http://www.puc.state.id.us/RELATEDSITES/ACCT/polikoff.ppt> [hereinafter USF PowerPoint].

25. *Joint Board Decision*, *supra* note 22, para. 62 n.167.

populations, a subsidy is necessary.²⁶

Based upon existing federal rules, when a wireless provider is recognized as a CETC in a high-cost study area, it may seek universal service support for all of its wireless “lines” or subscriptions in that area.²⁷ This may mean that without any visible change in the type of service provided to local customers, even if the wireless services were initially deployed without any expectation of federal subsidy, the newly designated CETC is able to draw universal service funding for those services.²⁸ Therefore, it is clear that as a CETC enters and adds lines, the demand for required universal service support increases. This is also the case if a CETC takes lines from an ILEC. ILEC support does not fall to offset the CETC support. The amount of support increases to even higher levels because there is a subsequent up-tick in support based on the rural ILEC’s now-increased effective per-line costs.²⁹

OPASTCO and similar ILEC advocates, argue that the skyrocketing growth of CETC study areas and support threatens the sustainability of universal service funding for rural and high-cost areas. Growth of distributions and requisite demands for contributions are likely to face political resistance. Cuts in distributions to rural ILECs threaten the viability of these companies which often carry substantial embedded costs inherent in building and upgrading landline networks in sparsely populated areas.³⁰ OPASTCO points to the contribution factor applied to interstate telecommunications services for universal service rising from 5.7 percent in the fourth quarter of 2000 to 9.2 percent in the fourth quarter of 2004 as evidence of the impact of growing expenditures from the fund. OPASTCO expresses concerns that increases of this magnitude cannot be sustained and that if the number of carriers receiving support continues to grow “then no carrier will have the funding necessary to provide affordable, high-quality

26. Petition of RCC Minnesota, Inc. for Designation as an Eligible Telecomm. Carrier Under 47 U.S.C. § 214(e)(2), *Verified Petition*, Dkt. No. 04-RCCT-338-ETC, para. 33 (2003) (appearing before the State Corporation Commission of the state of Kansas).

27. *Joint Board Decision*, *supra* note 22, para. 67.

28. Federal-State Joint Bd. on Universal Serv., Highland Cellular, Inc., *Memorandum Opinion and Order*, 19 F.C.C.R. 6422, paras. 17–18 (2004) [hereinafter *Highland Cellular Order*]. The actual probability of a wireless company successfully receiving approval of its status quo infrastructure may be rare in the future. The Highland Cellular ETC designation is a representation of other recent FCC designations. In Highland Cellular, the FCC required a commitment to infrastructure upgrades and reporting. However, the FCC clearly acknowledged in its decision that Highland Cellular was seeking to provide services largely using existing infrastructure. *See id.*

29. *Joint Board Decision*, *supra* note 22, para. 70. *See also Virginia Cellular Order*, *supra* note 18, para. 43.

30. USF PowerPoint, *supra* note 24, at 7.

telecommunications services and rural consumers will be denied the benefits promised by the Act.”³¹

OPASTCO argues that “[r]ural ILECs are the only providers of ubiquitous, high-quality, facilities-based telecommunications service throughout their respective areas. For rural ILECs, high-cost support is a critical means of genuine *cost recovery*.”³²

This series of arguments would conclude that reduction in universal service support for rural ILECs will negatively impact rural consumers. In contrast, advocates for wireless companies can successfully document public advantages to CETC designation for wireless providers. When the FCC recently approved a wireless CETC in Virginia, it recognized that the wireless company would be serving residences “that . . . do not have access to the public switched network through the incumbent telephone company.”³³ The FCC recognized the mobility advantage that wireless service offers rural consumers, who “must drive significant distances to places of employment, stores, schools, and other critical community locations.”³⁴ Additionally, the FCC pointed to the benefit of access to emergency services “that can mitigate the unique risks of geographic isolation associated with living in rural communities.”³⁵ These benefits are tangible and accrue to the persons intended to benefit from universal service.

IV. ELIGIBLE TELECOMMUNICATIONS DESIGNATION FRAMEWORK

A. 1996 Telecommunications Act

Section 214(e)(2) of the federal Act delegates to state public utility commissions the primary responsibility for designating ETCs. However, by state law some state public utility commissions do not have jurisdiction to make this decision or to otherwise regulate CRMS providers.³⁶ Section 214(e)(6)³⁷ directs the FCC to designate eligible carriers when those carriers are not subject to the jurisdiction of the state commission.³⁸ This

31. Stuart Polikoff, OPASTCO, *Universal Service in Rural America: A Congressional Mandate At Risk* 8 (2003), available at <http://www.opastco.org/docs/USFWhitePaper.pdf>.

32. USF PowerPoint, *supra* note 24, at 7.

33. *Virginia Cellular Order*, *supra* note 18, para. 29 (citation omitted).

34. *Id.*

35. *Id.*

36. See *Western Wireless Order*, *supra* note 2.

37. 47 U.S.C. § 214(e)(6) (2000).

38. *Id.*

has created a legal anomaly as state commissions are called to interpret and apply federal statutes and FCC regulations in designating most ETCs. Commissions in states such as Wyoming and Virginia do not have jurisdiction over CRMS carriers. In those cases, the FCC makes the ETC designation, establishing precedent for itself and for other states to follow in making their own ETC designations.

The statutory guidance for ETC designation is limited. Section 254(e) of the Act establishes that “only an eligible telecommunications carrier designated under section 214(e) shall be eligible to receive specific Federal universal service support.”³⁹ Pursuant to section 214(e)(1), a common carrier designated as an ETC must offer and advertise the services supported by the federal universal service mechanisms throughout the designated service area.⁴⁰ Section 214(e)(2) establishes a final threshold with a two-tier public interest test with differing standards for areas served by nonrural and rural telephone companies.⁴¹

B. FCC Regulations and Decisions

The 1996 Telecommunications Act established a general framework for regulation. The FCC and state commissions were bequeathed the responsibility of filling in the particulars through both regulatory and rulemaking authority and quasi-judicial decision making authority. The FCC has developed rules applying to universal service and ETC designation.

1. Early FCC Decision: *Western Wireless Wyoming Decision*

The seminal FCC ETC designation of a wireless provider was the ETC designation for *Western Wireless* in 2000 in Wyoming.⁴² Until the 2004 decisions, this case provided the primary precedent for state commissions. *Western Wireless*, a CMRS provider, sought and received an ETC designation from the FCC. In considering the *Western Wireless* application, the FCC clearly opened the door for universal service support for wireless companies when it stated:

[W]e reject the implication that service offered by CMRS providers is ineligible for universal service support. In the *Universal Service Order*, the Commission concluded that universal service support mechanisms and rules should be competitively neutral. The Commission concluded that the principle of competitive neutrality includes technological

39. *Id.* § 254(e).

40. *Id.* § 214(e)(1).

41. *Id.* § 214(e)(2).

42. *Western Wireless Order*, *supra* note 2, para. 5.

neutrality. Thus, a common carrier using any technology, including CMRS, may qualify for designation so long as it complies with the section 214(e) eligibility criteria.⁴³

In a short opinion, the FCC found that Western Wireless had met “all the requirements set forth in sections 214(e)(1) and (e)(6) to be designated as an ETC . . . for the designated service areas in the state of Wyoming.”⁴⁴ The company offered the services required through a combination of its own facilities and resale of other carrier’s facilities and it committed to advertise these services.⁴⁵ The FCC found the designation of Western Wireless as an additional ETC in “areas served by rural telephone companies serves the public interest by promoting competition and the provision of new technologies to consumers in high-cost and rural areas of Wyoming.”⁴⁶

In weighing the public interest requirement, the FCC established a minimal standard. The FCC stated that it could find no empirical evidence on the record to support the contention that designating Western Wireless as an ETC in the rural service areas would harm consumers.⁴⁷ It concluded that consumers in those service areas would instead benefit from “competitive service and new technologies.”⁴⁸

The FCC agreed with Western Wireless’s argument that competition will result in the deployment of new facilities and technologies as well as provide an incentive for incumbent rural telephone companies to improve their networks, thus improving service for Wyoming customers.⁴⁹ Specifically, the FCC found “that the provision of competitive service will facilitate universal service to the benefit of consumers in Wyoming by creating incentives to ensure that quality services are available at ‘just, reasonable, and affordable rates.’”⁵⁰

In continuing its public interest analysis, the FCC briefly described several factual findings. It found that Western Wireless was financially stable,⁵¹ rural ILECs were not likely to withdraw from service areas because of competition,⁵² and Western Wireless offered a local calling area that in many cases was larger than that of the incumbent, potentially

43. *Id.* para. 11.

44. *Id.* para. 7.

45. *Id.* paras. 8, 14, 15.

46. *Id.* para. 1.

47. *Id.* para. 16.

48. *Id.*

49. *Id.* para. 17.

50. *Id.*

51. *See id.* para. 19.

52. *Id.* para. 20.

reducing the number of intraLATA toll calls for consumers.⁵³ The FCC recognized “that some rural areas may in fact be incapable of sustaining more than one ETC,” but stated that in the current case no evidence demonstrating this had been provided for the requested service areas.⁵⁴

In many areas of the law, a four-year-old decision would be considered an infant, one that is still subject to examination, reflection, and maturity. In the world of twenty-first century telecommunications in which technologies, service packages, markets, and financial bottom lines shift quarterly, a four-year-old decision interpreting an eight-year-old law is virtually an octogenarian. This decision opened the door for wireless providers to seek ETC status—and the rush began. By the time that the FCC would announce two ETC cases in 2004, pressure on the USF and objections from ILECs and others, would cause the FCC to provide substantially greater specificity and a tighter framework for designation of ETCs.

2. *Texas Office of Public Utility Counsel v. FCC*

Major legislation establishing new regulatory frameworks typically results in legal challenges and judicial interpretation. This was the case with the 1996 Telecommunications Act. *Texas Office of Public Utility Counsel v. FCC* is a case in which the universal service funding and distribution framework was challenged.⁵⁵ Of particular relevance to this Article is that in this case, several states and Southwestern Bell challenged the FCC’s interpretation of section 214(e) as too narrow and restrictive of the ability of state commissions to set their own criteria and to exercise their own discretion over a carrier’s eligibility.⁵⁶

After applying rules of statutory construction, the Fifth Circuit concluded that “[n]othing in the statute, under this reading of the plain language, speaks at all to whether the FCC may prevent state commissions from imposing additional criteria on eligible carriers.”⁵⁷ The court noted in a footnote that there are limitations to additional criteria stating “to be sure, 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.’”⁵⁸

53. *Id.* para. 21.

54. *Id.* para. 22.

55. *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 418 (5th Cir. 1999).

56. *See id.*

57. *Id.* at 419.

58. *Id.* at 418 n.31.

Based upon this holding, states—through statutory action or regulatory processes and the FCC through its own regulatory processes—have the ability to impose additional eligibility requirements beyond the minimum standards of the 1996 Telecommunications Act.

V. VIRGINIA CELLULAR AND HIGHLAND CELLULAR DESIGNATIONS

The FCC's recent decisions regarding Virginia Cellular's eligibility for ETC status in January 2004 and Highland Cellular's eligibility in April 2004 have helped to clarify contested ETC issues for the benefit of state commissions and the telecommunications industry (and ideally consumers). In *Virginia Cellular*, the FCC specifically pointed to the precedential value of its decision when it stated, "[t]he framework enunciated in this Order shall apply to all ETC designations for rural areas pending further action by the Commission."⁵⁹

A. Offer and Advertise Services

1. Offer Services

The FCC has defined the services that are to be supported by the federal universal service support mechanisms. These services include:

- (1) *Voice grade access to the public switched network. . . .*
- (2) *Local usage. . . .*
- (3) *Dual tone multi-frequency signaling or its functional equivalent. . . .*
- (4) *Single-party service or its functional equivalent. . . .*
- (5) *Access to emergency services [including 911 and enhanced 911]. . . .*
- (6) *Access to operator services. . . .*
- (7) *Access to interexchange services. . . .*
- (8) *Access to directory assistance. . . .*
- (9) *Toll limitation for qualifying low-income consumers. . . .*⁶⁰

The 1996 Telecommunications Act authorizes states to "adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service."⁶¹ A state may add additional definitions or standards as long as they do not burden federal universal support mechanisms.⁶²

The FCC, in *Virginia Cellular*, emphasized that services do not have to exist when an applicant company applies. Such a requirement would have "the effect of prohibiting the ability of prospective entrants from providing telecommunications service."⁶³ The FCC acknowledged its

59. *Virginia Cellular Order*, *supra* note 18, para. 4.

60. 47 C.F.R. § 54.101(a) (2004).

61. 47 U.S.C. § 254(f) (2000).

62. *Id.*

63. *Virginia Cellular Order*, *supra* note 18, para. 17.

previous statement that “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.”⁶⁴ In order to prevent ETC certification from serving as a barrier to entry, “a new entrant can make a reasonable demonstration . . . of its capability and commitment to provide universal service without the actual provision of the proposed service.”⁶⁵

In *Virginia Cellular*, the FCC applied the applicant’s facts to the regulatory structure. It acknowledged that Virginia Cellular is an “A-Band” cellular carrier that

provides all of the services and functionalities enumerated in section 54.101(a) of the Commission’s rules throughout its cellular service area in Virginia. Virginia Cellular certifies that it has the capability to offer voice-grade access to the public switched network, and the functional equivalents to DTMF signaling, single-party service, access to operator services, access to interexchange services, access to directory assistance, and toll limitation for qualifying low-income consumers.⁶⁶

The FCC also stated the following:

Virginia Cellular also complies with applicable law and Commission directives on providing access to emergency services. In addition, although the Commission has not set a minimum local usage requirement, Virginia Cellular certifies it will comply with “any and all minimum local usage requirements adopted by the FCC” and it intends to offer a number of local calling plans as part of its universal service offering.⁶⁷

Further, demonstrating its intent that applicants will actually deliver what they have promised, the FCC noted that “Virginia Cellular has committed to report annually its progress in achieving its build-out plans at the same time it submits its annual certification required under sections 54.313 and 54.314 of the Commission’s rules.”⁶⁸

The FCC performed an almost identical fact analysis in *Highland Cellular* and arrived at the same conclusion based upon the petitioning company’s offerings.⁶⁹ In both determinations, the FCC imposed as ongoing conditions the commitments the companies made on the record in this proceeding and stated that these conditions will ensure that each

64. *Id.* para. 13 (citation omitted).

65. *Id.* para. 17.

66. *Id.* para. 14 (citations omitted).

67. *Id.* (citations omitted).

68. *Id.* (citations omitted).

69. *Highland Cellular Order*, *supra* note 28, para. 15.

company “satisfies its obligations under section 214(e) of the Act.”⁷⁰ In *Virginia Cellular*, the FCC noted that an ETC can provide the services by either “using its own facilities or a combination of its own facilities and resale of another carrier’s services.”⁷¹

In *Virginia Cellular*, the FCC rejected “the argument of the Virginia Rural Telephone Companies that Virginia Cellular does not offer all of the services supported by the federal universal service support.”⁷² The rural telephone companies unsuccessfully argued the following:

Virginia Cellular[] (1) has not yet upgraded from analog to digital and until this [upgrade occurs], Virginia Cellular cannot effectively implement E-911 or the Communications Assistance for Law Enforcement Act (CALEA); (2) offers no local usage; (3) has stated that its customers will not have equal access to interexchange carriers; (4) states only that it will participate “as required” with respect to Lifeline service; and (5) has wireless signals that are sporadic or unavailable in some of the mountainous regions that Virginia Cellular proposes to serve.⁷³

Virginia Cellular was able to satisfy the FCC by stating that it is upgrading to digital technology, complies with state and federal 911 mandates, will provide multiple local usage plans, and is committed to participating in Lifeline and Linkup programs after being designated an ETC.⁷⁴ The FCC affirmed that “Section 54.101(a)(7) of the rules states that one of the supported services is access to interexchange services, not equal access to those services.”⁷⁵ As Virginia Cellular stated that it provides access to interexchange services, the FCC determined that it satisfied this requirement.⁷⁶ The FCC pointed out that dead spots are acknowledged by the Commission’s rules,⁷⁷ that Virginia Cellular is committed to using its ETC support to upgrade its services,⁷⁸ and that “Virginia Cellular will annually submit information detailing how many requests for service from potential customers in the designated service areas were unfulfilled for the past year.”⁷⁹

The FCC accepted in both *Virginia Cellular* and *Highland Cellular*, the commitment of the wireless providers “to become a signatory to the

70. *Virginia Cellular Order*, *supra* note 18, paras. 4, 46.

71. *Id.* para. 24 (citing § 47 U.S.C. 214(e)(1)(A) (2000)).

72. *Id.* para. 18 (citation omitted).

73. *Id.* (citations omitted).

74. *Id.* paras. 18–20, 22.

75. *Id.* para. 21 (citing 47 C.F.R. § 54.101(a)(7) (2004)).

76. *Id.*

77. *Id.* para. 23.

78. *Id.* para. 44.

79. *Id.* para. 46.

Cellular Telecommunications Industry Association's Consumer Code for Wireless Service and provide the number of consumer complaints per 1,000 mobile handsets on an annual basis."⁸⁰ While compliance with this code is not required by statute or regulation, it appears that the FCC has identified that a company's commitment to comply is evidence of an intent to provide the services established by the FCC.⁸¹

2. Advertise Services

The 1996 Telecommunications Act requires that ETCs must "advertise the availability of such [supported] services and the charges therefore using media of general distribution."⁸² In both the *Virginia Cellular* and *Highland* cases, the FCC accepted the company's commitment to advertise their supported services.⁸³ The FCC wrote approvingly of Virginia Cellular's additional plans to advertise the availability of its services. The company committed that it would promote its services and Lifeline and Linkup discounts at local unemployment, social security, and welfare offices for the benefit of unserved consumers.⁸⁴ Virginia Cellular also committed "to publicize locally the construction of all new facilities in unserved or underserved areas so customers are made aware of improved service."⁸⁵

The FCC reaffirmed its statement on advertising and its belief in market power from earlier decisions. It stated that "because an ETC receives universal service support only to the extent that it serves customers, we believe that strong economic incentives exist, in addition to the statutory obligation, for an ETC to advertise its universal service offering in its designated service area."⁸⁶

In sum, if a potential ETC commits to advertise its supported services to the public, and particularly targets the unserved public, it will likely meet the advertising requirement.

3. Service Area

The definition of service area is important in designating an ETC for multiple reasons. A service provider can only receive universal support for

80. *Id.* para. 46; *Highland Cellular Order*, *supra* note 28, para. 43.

81. *Virginia Cellular Order*, *supra* note 18, para. 46. *See also* 47 C.F.R. § 54.101(a) (2004).

82. 47 U.S.C. § 214(e)(1)(B) (2000).

83. *Virginia Cellular Order*, *supra* note 18, para. 25; *Highland Cellular Order*, *supra* note 27, para. 7.

84. *Virginia Cellular Order*, *supra* note 18, para. 25.

85. *Id.*

86. *Id.* (citing *Western Wireless Order*, *supra* note 2, para. 10).

subscribers in areas it is designated as an ETC. An ETC has a responsibility to provide the supported services throughout its defined ETC areas. The definition of “service area” is statutorily provided.⁸⁷ The statute addresses nonrural and rural areas differently. A state commission may define nonrural service areas, with some flexibility, as “a geographic area established by a State commission . . . for the purpose of determining universal service obligations and support mechanisms.”⁸⁸ Service areas served by rural telephone companies are presumed to be the company’s study area “unless and until the Commission and the States, after taking into account recommendations of a Federal-State Joint Board . . . establish a different definition of service area for such company.”⁸⁹

In *Virginia Cellular* and in *Highland Cellular*, the CRMS company sought ETC designation in several service areas. In both cases, the petitioning company sought designation in only parts of areas served by rural telephone companies. The FCC stated that in order for it to approve an ETC in a service area that is smaller than the affected rural telephone company study areas, the FCC was required to redefine the service areas of the rural telephone companies in concert with state commissions and the recommendations of the Joint Board.⁹⁰ The FCC took into account the Joint Board’s concerns regarding rural telephone company service areas as discussed in the *1996 Recommended Decision*.⁹¹ These concerns included “(1) minimizing creamskimming; (2) recognizing that the 1996 Act places rural telephone companies on a different competitive footing from other LECs; and (3) recognizing the administrative burden of requiring rural telephone companies to calculate costs at something other than a study area level.”⁹² The FCC transformed these three concerns into a three-factor test which it applied in both cases.⁹³ First, the FCC found that there was “little likelihood of rural creamskimming effects.”⁹⁴ Second, the FCC considered the rural telephone providers and pointed out that the incumbents would lose no universal service funding due to the designations.⁹⁵ Third, the FCC found “that redefining the rural telephone

87. 47 U.S.C. § 214(e)(5) (2000).

88. *Id.*

89. *Id.*

90. *Virginia Cellular Order*, *supra* note 18, para. 41.

91. *Id.*

92. *Id.* (citing *Recommended Decision*, *supra* note 22, paras. 172–74 (1996)).

93. *Id.* paras. 42–44; *Highland Cellular Order*, *supra* note 28, paras. 39–41.

94. *Virginia Cellular Order*, *supra* note 17, para 42; *Highland Cellular Order*, *supra* note 28, para. 39.

95. *Virginia Cellular Order*, *supra* note 17, para 43; *Highland Cellular Order*, *supra* note 28, para. 40. If the Joint Board recommendation of supporting only one line per

company service areas as proposed will not require the rural telephone companies to determine their costs on a basis other than the study area level.”⁹⁶ Based upon these findings, in both *Virginia Cellular* and *Highland Cellular*, the FCC was willing to redefine a service area in which a cellular company was only licensed to serve part of the area. The redefined service area would fit the CRMS’ licensed area.⁹⁷

4. Public Interest Test

The 1996 Telecommunications Act requires that an ETC designation be “consistent with the public interest, convenience, and necessity.”⁹⁸ The statute further requires that “[b]efore 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.”⁹⁹ The FCC, in *Virginia Cellular* and in *Highland Cellular*, emphasized that “in determining whether the public interest is served, the Commission places the burden of proof upon the ETC applicant.”¹⁰⁰

The term rural telephone company is also defined statutorily.¹⁰¹ Under this statutory definition, rural telephone companies are incumbent LECs that either serve study areas with fewer than 100,000 access lines or meet one of three alternative criteria.¹⁰² The term nonrural carrier refers to incumbent LECs that do not meet the statutory definition of a rural telephone company.¹⁰³

In *Virginia Cellular*, the FCC stated “that the Bureau previously has found designation of additional ETCs in areas served by nonrural telephone companies to be per se in the public interest based upon a demonstration that the requesting carrier complies with the statutory eligibility obligations

residence is adopted by the Commission and if a forward looking modeled universal service cost structure is adopted in the future, incumbent companies may be impacted. At the time of the *Virginia Cellular* and *Highland Cellular* designations, the universal service structure was such that incumbent local telephone companies would lose no universal service support with the designation of additional ETCs.

96. *Virginia Cellular Order*, *supra* note 18, para. 44; *Highland Cellular Order*, *supra* note 27, para. 41.

97. *Virginia Cellular Order*, *supra* note 18, para 45; *Highland Cellular Order*, *supra* note 27, para. 42.

98. 47 U.S.C. § 214(e)(2) (2000).

99. *Id.*

100. *Virginia Cellular Order*, *supra* note 18, para 26; *Highland Cellular Order*, *supra* note 28, para. 20.

101. 47 U.S.C. § 153(a)(37) (2000).

102. *Id.*

103. *See id.*

of section 214(e)(1) of the Act.”¹⁰⁴

In making this per se determination, the FCC has acknowledged the 1996 Telecommunication Act’s emphasis upon competition. Areas served by nonrural companies are typically served by Bell Operating Companies (“BOCs”) who are well positioned to compete with newcomers. These areas are likely to be economically attractive areas for competition. A substantial portion, if not a majority, of the lines in service areas served by nonrural telephone companies are likely to be ineligible for universal service support. However, while the FCC has established a presumption for designation of additional ETCs in areas served by nonrural telephone companies, the presumption is not absolute. The FCC observed in *Virginia Wireless*, “designation of an additional ETC in a nonrural telephone company’s study area based 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.”¹⁰⁵

The FCC left unstated the circumstances in which it would not be in the public interest to designate an additional ETC in a nonrural telephone company’s service area. It appears that a weighing of multiple factors can possibly tip this scale. These factors might include: blatant creamskimming and avoidance of high-cost areas, the previous entry of one or more CETC, an ILEC which does not qualify as a rural provider but which serves lightly populated rural territories, public opposition to designation, and a questionable quality of service record by the petitioner.¹⁰⁶

In considering the public interest for nonrural areas in both *Virginia Cellular* and *Highland Cellular*, the FCC in both cases pointed to the petitioners’ commitments to providing quality services and the lack of opposition to designation in those areas. These two considerations were enough to satisfy the public interest test for areas served by nonrural telephone companies.¹⁰⁷

Congress and the FCC raised the bar significantly higher in considering the public interest in areas served by rural telephone

104. *Virginia Cellular Order*, *supra* note 18, para. 27 (citing Federal-State Joint Bd. on Universal Serv., Cellco P’ship, *Memorandum Opinion and Order*, 16 F.C.C.R. 39 (2000)).

105. *Id.*

106. A factor adding to the unlikelihood of the disapproval of an ETC applicant in a nonrural area is that the regional BOCs under section 271 of the Federal Telecommunications Act need to show competition in their local service area as one factor in receiving approval to enter interLATA long distance service. A regional BOC would have a difficult time objecting to the entry of a CETC. There are a few nonBell, nonrural local telephone companies who do serve highly rural areas.

107. *Virginia Cellular Order*, *supra* note 18, para. 27; *Highland Cellular Order*, *supra* note 28, para. 21.

companies. In both of the recent cases, the FCC considered “whether the benefits of an additional ETC in the wire centers for which [a competitor] seeks designation outweigh any potential harms.”¹⁰⁸ It emphasized that “this balancing of benefits and harms is a fact-specific exercise.”¹⁰⁹

5. Public Interest Factors

The FCC identified the facts to be weighed in this balancing act, stating as follows:

[i]n determining whether designation of a competitive ETC in a rural telephone company’s service area is in the public interest, we weigh the benefits of increased competitive choice, the impact of the designation on the universal service fund, the unique advantages and disadvantages of the competitor’s service offering, any commitments made regarding quality of telephone service, and the competitive ETC’s ability to satisfy its obligation to serve the designated service areas within a reasonable time frame.¹¹⁰

In identifying these factors, the FCC recognized that the Joint Board would soon be releasing its recommended order and warned that it did not want to prejudge the Joint Board’s deliberations. It noted that, in following the Joint Board’s work, it “may adopt a different framework for the public interest analysis of ETC applications.”¹¹¹

6. Benefits of Access and Mobility

In considering the public interest benefits for areas served by rural telephone companies, in both *Virginia Cellular* and *Highland Cellular*, the FCC pointed to the fact that some customers will be served who do not have access to a wireline telephone. It identified several additional benefits, specifically:

[T]he mobility of Virginia Cellular’s wireless service will provide other benefits to consumers. For example, the mobility of telecommunications assists consumers in rural areas who often must drive significant distances to places of employment, stores, schools, and other critical community locations. In addition, the availability of a wireless universal service offering provides access to emergency services that can mitigate the unique risks of geographic isolation associated with living in rural communities.¹¹²

108. *Virginia Cellular Order*, *supra* note 18, para. 28; *Highland Cellular Order*, *supra* note 28, para. 22.

109. *Virginia Cellular Order*, *supra* note 18, para 28.

110. *Id.*

111. *Id.*

112. *Virginia Cellular Order*, *supra* note 18, para. 29. *See also Highland Cellular Order*, *supra* note 28, para 23.

7. Benefit of Larger Local Calling Area

In both cases, the FCC also identified as a benefit the fact that the cellular company's local calling area was larger than that of the ILECs the cellular companies compete against. This will result in fewer toll calls for the cellular company's customers.¹¹³

8. Service Quality Disadvantage of Wireless Providers

The FCC acknowledged in both cases that "arguments in the record that wireless telecommunications offerings may be subject to dropped calls and poor coverage."¹¹⁴ It also recognized that "[p]arties also have noted that wireless carriers often are not subject to mandatory service quality standards."¹¹⁵ In both cases, the cellular companies committed to mitigating these concerns. In order to offer evidence of commitment to high-quality service, the companies committed to comply with the Cellular Telecommunications Industry Association Consumer Code for Wireless Service, and to provide the FCC "with the number of consumer complaints per 1,000 handsets on an annual basis."¹¹⁶ Additionally, Virginia Cellular assured the FCC that it would "alleviate dropped calls by using universal service support to build new towers and facilities to offer better coverage."¹¹⁷

9. Disadvantageous Impact on the Universal Service Fund

In *Virginia Cellular* and *Highland Cellular*, the FCC considered the impact of granting ETC status on the USF and determined that the grant of the specific ETC status "will not dramatically burden the universal service fund."¹¹⁸ However, in both cases, the FCC expressed its concern that "the amount of high-cost support distributed to competitive ETCs is growing at a dramatic pace."¹¹⁹ The FCC acknowledged the arguments of commentators who propose that designations of competitive ETCs will place significant burdens on federal universal service without

113. *Virginia Cellular Order*, *supra* note 18, para. 29; *Highland Cellular Order*, *supra* note 28, para. 23.

114. *Virginia Cellular Order*, *supra* note 18, para. 30. *See also Highland Cellular Order*, *supra* note 28, para. 24.

115. *Virginia Cellular Order*, *supra* note 18, para. 30. *See also Highland Cellular Order*, *supra* note 28, para. 24.

116. *Virginia Cellular Order*, *supra* note 18, para. 30; *Highland Cellular Order*, *supra* note 28, para. 24.

117. *Virginia Cellular Order*, *supra* note 18, para. 30.

118. *Id.* at para 31; *Highland Cellular Order*, *supra* note 28, para. 25.

119. *Virginia Cellular Order*, *supra* note 18, para 31; *Highland Cellular Order*, *supra* note 28, para. 25.

corresponding benefits. It stated that it has asked the Joint Board to examine the “rules relating to high-cost universal service support in service areas in which a competitive ETC is providing service, as well as the Commission’s rules regarding support for second lines,”¹²⁰ but declined to take action or to establish a precedent in deciding these issues in the cases at hand.

10. Rural Public Interest Test and Creamskimming

The next step in the FCC’s public interest analysis in both *Virginia Cellular* and *Highland Cellular* was to consider whether the company would be creamskimming. “‘Creamskimming’ refers to the practice of targeting only the customers that are the least expensive to serve, thereby undercutting the ILEC’s ability to provide service throughout the area.”¹²¹ In *Virginia Cellular*, the FCC recognized that the contour of the company’s licensed area differed from the existing rural telephone companies’ study areas and that “[g]enerally, a request for ETC designation for an area less than the entire study area of a rural telephone company might raise concerns that the petitioner intends to creamskim in the rural study area.”¹²² However, because Virginia Cellular committed to provide universal service throughout its licensed service area, the FCC determined that Virginia Cellular was not “deliberately seeking to enter only certain portions of these companies’ study areas in order to creamskim.”¹²³ The FCC acknowledged:

[a]t the same time, we recognize that, for reasons beyond a competitive carrier’s control, the lowest cost portion of a rural study area may be the only portion of the study area that a wireless carrier’s license covers. Under these circumstances, granting a carrier ETC designation for only its licensed portion of the rural study area may have the same effect on the ILEC as rural creamskimming.¹²⁴

Therefore, the FCC determined it would not be in the public interest to designate Virginia Cellular as an ETC in a study area in which it would only be serving the lowest-cost, highest-density wire center.¹²⁵

Similarly, in *Highland Cellular*, while the FCC approved areas fully served by Highland Cellular and some areas only partially covered due to

120. *Virginia Cellular Order*, *supra* note 18, para. 31; *Highland Cellular Order*, *supra* note 28, para 25.

121. *Virginia Cellular Order*, *supra* note 18, para. 32 n.102 (citation omitted). *See also Highland Cellular Order*, *supra* note 28, para. 26.

122. *Virginia Cellular Order*, *supra* note 18, para. 32.

123. *Id.*

124. *Id.* para. 33.

125. *Id.* para. 35.

licensing limits, the FCC excluded a study area from the company's ETC designation due to creamskimming concerns.¹²⁶ It agreed with the arguments of Verizon South that Highland Cellular should not be allowed to serve only the low-cost customers in a rural telephone company's study area and excluded this area from Highland Cellular's ETC designation.¹²⁷ In *Highland Cellular*, the FCC concluded that before designating a competitor as an additional ETC in a rural telephone company's service area, the company must commit to providing the supported services in the designated area. The FCC emphasized:

[a] rural telephone company's wire center is an appropriate minimum geographic area for ETC designation because rural carrier wire centers typically correspond with county and/or town lines. We believe that requiring a competitive ETC to serve entire communities will make it less likely that the competitor will relinquish its ETC designation at a later date. Because consumers in rural areas tend to have fewer competitive alternatives than consumers in urban areas, such consumers are more vulnerable to carriers relinquishing ETC designation.¹²⁸

Highland Cellular previously stated before the FCC's decision that, if the FCC imposed a requirement that competitive ETCs serve complete rural telephone company wire centers, Highland Cellular would not seek designation in a particular wire center.¹²⁹ The FCC, therefore, declined to designate the company as an ETC for that wire center.¹³⁰

In an unusual footnote to discussions of the potential for creamskimming in *Highland Cellular*, the FCC advised rural telephone companies of a defensive strategy against creamskimming. The FCC pointed out that in the *Rural Task Force Order*, it provided incumbent LECs with options for disaggregating their study areas, effectively causing uneconomic incentives for competitive entry.¹³¹ The FCC also provides

126. See *Highland Cellular Order*, *supra* note 28, para. 29.

127. *Id.* para. 32.

128. *Id.* para. 33.

129. *Id.*

130. *Id.*

131. *Id.* para. 32 n.96. The FCC further stated:

[u]nder disaggregation and targeting, per-line support is more closely associated with the cost of providing service. There are fewer issues regarding inequitable universal service support and concerns regarding the incumbent's ability to serve its entire study area when there is in place a disaggregation plan for which the per-line support available to a competitive ETC in the wire centers located in "low-cost" zones is less than the amount a competitive ETC could receive if it served in one of the wire centers located in the "high-cost" zones. . . . Although the deadline (May 15, 2002) for carriers to file disaggregation plans has passed, the relevant state commission or appropriate regulatory authority may nonetheless require a

companies with the process and authority to implement this strategy.¹³²

11. Public Interest Test Summarized

To reiterate, in *Virginia Cellular* and *Highland Cellular*, the FCC's determination of public interest rested upon the benefits of provision of services to persons currently without service, the mobility offered by wireless services, and the benefits of a larger local calling area. It considered the disadvantages of the quality of wireless services, the impact upon universal service funding, and the potential for creamskimming. The potential for creamskimming appears to be the critical factor in this relatively organic weighing of factors. In both decisions, while potential providers were approved for ETC designation in several study areas, they were denied approval for study areas which naturally lent themselves to creamskimming. In both cases, the FCC carefully examined the demographics of the study areas and the high- or low-cost nature of the wire centers making up the partial portions of areas to be served by the applicants. Regardless of whether the selection of service area was possibly intentional due to strategy or unintentional due to factors such as limits on a CRMS license area, the FCC demonstrated its skepticism of applications intending to serve primarily more densely populated low-cost portions of a study area.

B. Regulatory Oversight

The 1996 Telecommunications Act does not speak to reporting requirements for ETCs. However, in both the *Virginia Cellular* and *Highland Cellular* ETC determinations, the FCC emphasized accountability and transparency. In a clear warning to wireless and cellular ETCs, and perhaps as a rebuke to critiques of the licensing of these ETCs, the FCC noted "that Virginia Cellular is obligated under section 254(e) of the Act to use high-cost support 'only for the provision, maintenance, and upgrading of facilities and services for which support is intended.'"¹³³ The FCC additionally emphasized that its rules require the companies to certify annually that they are in compliance with section 254(e) and that the companies have "committed to submit records and documentation on an

carrier to disaggregate, either on its own motion or that of an interested party.
Id. (citations omitted).

132. *Id.*

133. *Virginia Cellular Order*, *supra* note 18, para. 46 (citing 47 U.S.C. § 254(e) (2000); 47 C.F.R. §§ 54.313, 54.314 (2004)); *Highland Cellular Order*, *supra* note 28, para. 43 (citing 47 U.S.C. § 254(e) (2000); 47 C.F.R. §§ 54.313, 54.314 (2004)).

annual basis detailing [their] progress towards meeting build-out plans.”¹³⁴ In both cases, the applicant companies “committed to become a signatory to the Cellular Telecommunications Industry Association’s Consumer Code for Wireless Service and provide the number of consumer complaints per 1,000 mobile handsets on an annual basis.”¹³⁵ Finally, the FCC required the wireless and cellular companies to “annually submit information detailing how many requests for service from potential customers. . . . were unfulfilled for the past year.”¹³⁶ The required reports must be submitted to the FCC and USAC.¹³⁷

The FCC fired some parting shots over the bow as it concluded both cases. The shots appear to be aimed at all ETCs generally as much as the particular company seeking ETC status. The FCC noted that “the Commission may institute an inquiry on its own motion to examine any ETC’s records and documentation to ensure that the high-cost support it receives is being used ‘only for the provision, maintenance, and upgrading of facilities and services’ in the areas where it is designated as an ETC.”¹³⁸ ETCs “will be required to provide such records and documentation to the Commission and USAC upon request.”¹³⁹ The FCC further emphasized that if an ETC fails to fulfill the requirements of the statute, FCC rules, or the terms of an ETC designation order after it begins receiving universal service support, the FCC has authority to revoke its ETC designation and may assess forfeitures for violations of its rules and orders.¹⁴⁰

VI. SEPARATE OPINIONS

The FCC commissioners accompanied the *Virginia Cellular* decision with five separate statements—four concurring and one dissenting. The number of opinions reflected the important precedent established in the decision. In their individual opinions, each of the commissioners

134. *Virginia Cellular Order*, *supra* note 18, para. 46; *Highland Cellular Order*, *supra* note 28, para. 43.

135. *Virginia Cellular Order*, *supra* note 18, para. 46; *Highland Cellular Order*, *supra* note 28, para. 43.

136. *Virginia Cellular Order*, *supra* note 18, para. 46; *Highland Cellular Order*, *supra* note 28, para. 43.

138. *Virginia Cellular Order*, *supra* note 18, para. 46; *Highland Cellular Order*, *supra* note 28, para. 43.

138. *Virginia Cellular Order*, *supra* note 18, para. 46 (citing 47 U.S.C. § 254(e) (2000); 47 C.F.R. §§ 54.313, 54.314 (2004)); *Highland Cellular Order*, *supra* note 28, at para. 43 (citing 47 U.S.C. § 254(e) (2000); 47 C.F.R. §§ 54.313, 54.314 (2004)).

139. *Virginia Cellular Order*, *supra* note 18, para. 46; *Highland Cellular Order*, *supra* note 28, para. 43.

140. *Virginia Cellular Order*, *supra* note 18, para. 46; *Highland Cellular Order*, *supra* note 28, para. 43.

acknowledged the importance of impending recommendations of the Joint Board.

Chairman Michael K. Powell emphasized his belief that “[c]ompetition is for rural as well as urban consumers.”¹⁴¹ He praised the decision for recognizing the unique value that mobile services provided to rural consumers in the public interest standard and for reinforcing “the requirement that wireless networks be ready, willing and able to serve as carriers of last resort to support our universal service goals.”¹⁴² Powell further expressed that despite his emphasis upon competition and competitively neutral support, the FCC had a responsibility to ensure that increasing demands on the high cost fund not be allowed to threaten its viability.¹⁴³

Commissioner Kathleen Q. Abernathy applauded the Commission for having “taken an important (albeit incremental) step toward establishing a more rigorous framework for evaluating ETC applications.”¹⁴⁴ Abernathy acknowledged that competition is a core goal under the 1996 Telecommunications Act, but urged that in rural study areas where the cost of providing service substantially exceed retail rates, regulators should weigh whether subsidizing additional ETCs is in the public interest. She applauded requiring ETC’s to submit build-out plans documenting use of federal universal service funding and emphasized and emphasized the FCC was “right to consider the increasing demands on the universal service fund.”¹⁴⁵

However, Commissioner Michael J. Copps stated that the FCC made headway in *Virginia Cellular* toward “articulating a more rigorous template for review of ETC applications.”¹⁴⁶ Copps expressed his belief “that the ETC process needs further improvement.”¹⁴⁷ He specifically pointed to the “consequences that flow from using the fund to support multiple competitors in truly rural areas.”¹⁴⁸

Commissioner Jonathan S. Adelstein applauded the order for establishing “a better template for the ETC designation process that is a significant improvement from past Commission decisions and that more

141. *Virginia Cellular Order*, *supra* note 18 (Michael K. Powell, Chairman, separate statement).

142. *Id.*

143. *Id.*

144. *Id.* (Kathleen Q. Abernathy, Comm’r, separate statement).

145. *Id.*

146. *Id.* (Michael J. Copps, Comm’r, separate statement).

147. *Id.*

148. *Id.*

fully embraces the statutory public interest mandate.”¹⁴⁹ Adelstein noted that he expected state commissions will also find the template to be useful in their deliberations of ETC requests. He emphasized that the template provides a much more stringent examination of the public interest in making ETC determinations.¹⁵⁰ He noted approvingly that Virginia Cellular “made significant investment and service quality commitments throughout its proposed service areas.”¹⁵¹

Commissioner Kevin J. Martin dissented. He objected to the “Order’s finding that the goals of universal service are to ‘provide greater mobility’ and ‘a choice’ of providers in rural areas.”¹⁵² Martin emphasized that he believed “the main goals of the universal service program are to ensure that all consumers—including those in high cost areas have access at affordable rates.”¹⁵³ Martin expressed his concerns “with the Commission’s policy of using universal service support as a means of creating ‘competition’ in high cost areas.”¹⁵⁴ He was critical of subsidizing “multiple competitors to serve areas in which costs are prohibitively expensive for even one carrier.”¹⁵⁵

Martin was troubled by the decision’s failure to require the same obligations of CETC as incumbents. Specifically, he pointed to type and quality of service, carrier of last resort, and equal access obligations.

Three commissioners supplied additional statements in *Highland Cellular*. Commissioner Kevin J. Martin dissented and echoed his statements in *Virginia Cellular*. Commissioner Michael J. Copps, however, supported the decision and stated, “[t]he long-term viability of universal service depends on a more rigorous review process for ETC applications.”¹⁵⁶ He applauded the *Highland Cellular* and *Virginia Cellular* cases as steps, but emphasized that as the FCC considers the Joint Board’s recommendations, it needs to further improve it, considering “the consequences that flow from using the fund to support several competitors in truly remote areas.”¹⁵⁷ He also articulated his thoughts that when CETCs are funded, the “rules must provide the right level of support.”¹⁵⁸

Concurring, Commissioner Jonathan S. Adelstein stated that *Highland Cellular* along with *Virginia Cellular*, “marks a significant

149. *Id.* (Jonathon S. Adelstein, Comm’r, separate statement).

150. *Id.*

151. *Id.*

152. *Id.* (Kevin J. Martin, Commr, dissenting statement).

153. *Id.*

154. *Id.*

155. *Id.*

156. *Highland Cellular Order*, *supra* note 28 (Michael J. Copps, Comm’r, statement).

157. *Id.*

158. *Id.*

improvement from past Commission decisions by more fully embracing the statutory public interest mandate¹⁵⁹ and examining it more stringently. He also noted the FCC improved accountability in the process by requiring ETC's to submit documentation of their progress towards meeting their service commitments.¹⁶⁰

Finally, he emphasized three reforms that could reduce fund growth without short-changing rural America: first, reform of the process for designating ETCs; second, "funding new entrants based upon their own costs, instead of those of the incumbent"; and third, exploring frameworks "to identify very high-cost areas where it would be prohibitive to fund more than one ETC."¹⁶¹

VII. SUMMARY AND IMPACT OF VIRGINIA CELLULAR AND HIGHLAND CELLULAR

The FCC appeared to have attempted a balancing act in *Virginia Cellular* and *Highland Cellular* while at the same time it signaled emphatically that it was anxiously awaiting the Joint Board recommendations. The FCC reaffirmed that CRMS licensed telecommunications companies can qualify for ETC status and that the services required are only those defined by regulation for universal service support. States can add additional services as long as they do not burden federal universal support mechanisms. The FCC was emphatic that to requiring services to exist when an applicant seeks ETC status has the effect of prohibiting entrants. Entrants only are required to make a reasonable demonstration of capability and commitment to provide the required services. Advertising services in media of general distribution appears to be a low hurdle for applicants. The FCC applauded commitments to target unserved populations with advertising efforts.

In *Virginia Cellular* and *Highland Cellular*, the FCC provided additional clarity to the process of defining service areas and emphasized that a designated ETC must serve the entire designated area using either its own or leased infrastructure. Perhaps, the most crucial clarification provided by these cases is the analysis of public interest. The burden of proof rests on the ETC applicant with a higher standard required for areas served by rural telephone companies than for others. The FCC identified and applied several factors in strengthening the public interest test used in rural ETC designations. Some of these factors identified unique assets of CRMS providers; however, the factor which received the greatest emphasis

159. *Id.* (Jonathan S. Adelstein, Comm'r, separate statement).

160. *Id.*

161. *Id.*

was weighing the potential for creamskimming. The FCC emphasized that universal service support must be used only for the provision, maintenance, and upgrading of facilities and services for which support is intended. It strengthened reporting requirements designed to ensure that universal service funding is spent as intended—to assure all consumers—including those in high-cost areas have access at affordable rates.

A. *Joint Federal-State Board on Universal Service Recommended Decision*

The Joint Board's recommended 2004 decision "concerning the process for designation of eligible telecommunications carriers (ETCs) and the Commission's rules regarding high-cost universal service support" have been anxiously awaited by differing industry factions, state commissions, and even the FCC.¹⁶² In *Virginia Cellular* and *Highland Cellular*, the FCC used the same language expressing its anticipation, stating "[i]t is our hope that the Commission's pending rulemaking proceeding also will provide a framework for assessing the overall impact of competitive ETC designations on the universal service mechanisms."¹⁶³ The recommended order was developed under pressure to balance the rapid growth of universal funding of competitive ETCs with principles of universal service and protection of the public interest.

On February 27, 2004, the Joint Board released the *Recommended Decision*. To many readers, the Joint Board's *Recommended Decision* was anticlimactic. It made a series of recommendations concerning the process of designating ETCs, but these generally provide less clarity than the FCC's *Virginia Cellular* and *Highland Cellular* ETC designations and its language exhibits substantial political waffling and compromise. Its clearest and most tangible recommendations regarding high-cost universal support are controversial and may not be implemented by the FCC.

B. *Justification of Permissive Federal Guidelines*

The Joint Board recommended that the FCC adopt permissive federal guidelines for the states to consider in ETC designation proceedings. The guidelines would allow for a more predictable application process among states, establish a rigorous designation process, and assure that only carriers who are qualified, capable, and committed to providing universal service would receive support.¹⁶⁴

162. *Joint Board Decision*, *supra* note 22, para. 1.

163. *Virginia Cellular Order*, *supra* note 18, para. 31; *Highland Cellular Order*, *supra* note 28, para. 25.

164. *Joint Board Decision*, *supra* note 22, para. 2.

Based upon three arguments, the Joint Board justified the requirement of rigorous reviews of ETC applications and a fact-intensive analysis. The first argument was that “an ETC must be prepared to serve all customers within a designated service area and must be willing to be the sole ETC should other ETCs withdraw from the market.”¹⁶⁵ The second argument related to section 214(e)(2) of the 1996 Telecommunications Act that “requires that designation of an additional ETC serve the public interest.”¹⁶⁶ Finally, the third argument was a “rigorous application process ensures that consumers in all regions of the nation, including rural and low-income consumers, have access to telecommunications services that are reasonably comparable to services provided in urban areas.”¹⁶⁷

C. Additional Minimum Eligibility Requirements

The Joint Board reviewed the mandatory federal statutory and regulatory standards. Its analysis was much in line with the FCC’s analysis in *Virginia Cellular*. The Joint Board proposed additional minimum eligibility standards for potential use by the FCC and state commissions. It described these as tools that will assist states in ensuring that “additional ETCs are able and willing to serve all customers in the designated service area upon reasonable request.”¹⁶⁸ It pointed to the Fifth Circuit decision, *Texas Office of Public Utility Counsel v. FCC*, standing for the proposition that states have the authority in designating ETCs to establish eligibility requirements above and beyond section 213(e)(1) of the 1996 Telecommunications Act.¹⁶⁹ These additional minimum requirements will be addressed individually below.

1. Adequate Financial Resources

The Joint Board recommended “that the Commission adopt guidelines encouraging states to evaluate whether ETC applicants have the financial resources and ability to provide quality services throughout the designated service area.”¹⁷⁰ The Joint Board justified this examination of the potential long-term viability of ETC applicants based upon prudence and the public interest of not supporting a financially unsound carrier who even with

165. *Id.* para. 11.

166. *Id.*

167. *Id.*

168. *Id.* para. 37.

169. *Id.* para. 10 n.17 (citing *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 418 (5th Cir. 1999)).

170. *Id.* para. 22.

universal support would still be unable to achieve long-term viability.¹⁷¹ These guidelines would examine a factor not considered by the FCC in *Virginia Cellular* and *Highland Cellular*.

2. Commitment and Ability to Provide the Supported Services

In addition, the Joint Board recommended “that the Commission adopt a guideline encouraging state commissions to require ETC applicants to demonstrate their capability and commitment to provide service throughout the designated service area to all customers who make a reasonable request for service.”¹⁷² Much of the discussion of this recommendation is very consistent with the FCC’s actions in *Virginia Cellular* and *Highland Cellular*. Slipped into the discussion is the major recommendation that the FCC

adopt guidelines encouraging states, as a condition of ETC designation, to require competitive ETCs to be prepared to provide equal access if all other ETCs in that service area exercise their rights to relinquish their designations pursuant to section 214(e)(4). Under section 214(e)(4), when an ETC seeks to relinquish its ETC designation, the state commission will require the remaining ETC or ETCs to serve the customers that had been served by the relinquishing carrier.¹⁷³

Requiring ETCs to provide equal access to interexchange long distance carriers is a significant policy decision. In *Virginia Cellular*, the FCC rejected the claim that ETC designation should be denied because the cellular company’s customers would not have equal access to interexchange carriers.¹⁷⁴ It noted in its decision that in 2002, four members of the Joint Board recommended adding equal access as a supported service. The Commission decided to defer consideration of the issue pending resolution of its proceeding examining the rules addressing high-cost universal service support in competitive areas.¹⁷⁵

The requirement that ETCs “be prepared to provide equal access” appears to be a compromise position.¹⁷⁶ The Joint Board stopped short of requiring that ETCs offer equal access as a condition for approval as an ETC. The recommendation would allow an ETC time to ramp-up after notification that it would become the sole ETC in the service area.¹⁷⁷

171. *Id.*

172. *Id.* para. 23.

173. *Id.* para. 28.

174. *Virginia Cellular Order*, *supra* note 17, para. 21.

175. *Id.* para. 21 n.64.

176. *Joint Board Decision*, *supra* note 21, para. 28.

177. *See id.* para. 23.

The Joint Board acknowledged that the FCC did not resolve whether to include equal access in the definition of supported services, but the Joint Board acknowledged, but it justified this recommendation as a consumer protection issue. It argued “that this recommended guideline will protect consumers in the event of relinquishment by ensuring that consumers will continue to have equal access to long distance providers, without imposing any unnecessary administrative burdens on the remaining ETC or ETCs.”¹⁷⁸ The Joint Board may have been subtly pointing out a fairness or a competitive neutrality issue when it noted that incumbent LECs are required by statute to provide equal access.¹⁷⁹ As the Joint Board, not the FCC is the “speaker” or author of this report, I believe it should be the active noun leading the sentence. Perhaps, the amended wording will provide clarity.

3. Ability to Remain Functional in Emergencies

The Joint Board recommended that the FCC “adopt a guideline encouraging states to require ETC applicants to demonstrate the ability to remain functional in emergency situations.”¹⁸⁰ It quoted a commentator who argued that the “security of a carrier’s network and the ability to protect critical telecommunications infrastructure should be a major consideration in evaluating the public interest.”¹⁸¹ The Joint Board used, as an illustration, the State of Vermont Public Service Board’s use of this factor in analyzing the public interest.¹⁸² What appears to have been unstated is that landline services are robust. Due to their design and redundancy features, they do not require the electrical grid in order to operate in an emergency and they are not generally susceptible to adverse weather or terrorist sabotage. During the Cold War, telecommunications central offices were generally constructed to standards that would allow them to serve as fallout shelters. Cellular and wireless systems have not generally been built to the same resilient standards. There are legitimate public policy reasons to assure networks have this level of functionality and conversely, such standards may exclude some wireless providers from ETC designation. This guideline would extend beyond those considered in *Virginia Cellular* or *Highland Cellular*.

178. *Id.* at para. 28.

179. *Id.* para. 28 (citing 47 U.S.C. § 251(g) (2000)).

180. *Id.* para. 30.

181. *Id.* (citation omitted).

182. *Id.*

4. Consumer Protection

The Joint Board recommended “that the Commission adopt a guideline indicating that state commissions may properly impose consumer protection requirements as part of the ETC designation process.”¹⁸³ This recommendation is consistent with commitments obtained by the FCC in granting ETC approval in *Virginia Cellular* and *Highland Cellular*.¹⁸⁴ In both cases, the petitioning companies committed to comply with the Cellular Telecommunications Industry Association Consumer Code for Wireless Service and to provide the FCC with the number of consumer complaints per 1000 handsets on an annual basis.¹⁸⁵ The Joint Board did qualify its recommendation. It cautioned that “[s]tates should not require regulatory parity for parity’s sake. Rather, requirements should be imposed on ETCs only to the extent necessary to further universal service goals, including the provision of high-quality service throughout the designated service area.”¹⁸⁶

5. Local Usage

In addition, the Joint Board recommended that “[c]onsistent with the requirement that ETCs offer local usage, states may consider how much local usage ETCs should offer as a condition of federal universal service support.”¹⁸⁷ The Joint Board pointed to the fact that local usage is “one of the supported services that ETCs are required to provide in order to receive federal universal service.”¹⁸⁸ The local usage requirement was discussed by the FCC in *Virginia Cellular* and *Highland Cellular* and in both cases, the companies agreed to “comply with any and all minimum local usage requirements adopted by the FCC.”¹⁸⁹ While companies have agreed to comply with an FCC standard, the FCC has not established a minimum amount of local usage to be required as part of a basic package of supported services. In this vacuum, the Joint Board points to the state commission’s authority to establish standards as acknowledged by the Fifth Circuit in *Texas Office of Public Utility Counsel v. FCC*.¹⁹⁰ With statutory

183. *Id.* para. 31.

184. See *Virginia Cellular Order*, *supra* note 18; *Highland Cellular Order*, *supra* note 28.

185. *Virginia Cellular Order*, *supra* note 18, para. 30; *Highland Cellular Order*, *supra* note 28, para. 24.

186. *Joint Board Decision*, *supra* note 22, para. 34.

187. *Id.* para. 35.

188. *Id.*

189. *Virginia Cellular Order*, *supra* note 18, para. 20; *Highland Cellular Order*, *supra* note 28, para. 15.

190. *Joint Board Decision*, *supra* note 22, para. 35 (citing Texas Office of Pub. Util.

authority affirmed by the courts, the Joint Board suggests that states establish minimum local usage requirements.

D. Public Interest Determinations

Like the FCC in its *Virginia Cellular* and *Highland Cellular* decisions, the Joint Board emphasized that an ETC applicant must meet the public interest requirements of section 214(e)(2) of the Act and acknowledged that Congress did not establish specific criteria to be applied.¹⁹¹ Rather than endorsing or otherwise critiquing the FCC's analysis in *Virginia Cellular* and *Highland Cellular*, the Joint Board discussed the manner in which states have applied the public interest test and the factors that states have considered in making the public interest decisions.¹⁹²

As examples, the Joint Board used the elements identified by the Alaska Commission. The Alaska Commission considered "new choices for customers; affordability; quality of service; service to unserved customers; comparison of benefits to public cost; and considerations of material harm."¹⁹³ The Joint Board pointed out that the FCC in its early decision similarly considered "whether consumers were likely to benefit from increased competition; whether the additional designation will provide benefits not available from incumbent carriers; whether consumers may be harmed should the incumbent withdraw from the service area; and whether there would be harm to a rural incumbent LEC."¹⁹⁴

In weighing the public interest, the FCC examined whether an additional designation would provide consumers benefits not available from incumbent carriers, noted the Joint Board. Examples cited included an ETC applicant providing a wider local calling area than that offered by the incumbent, and a variety of calling plans which would make intrastate toll calls more affordable to consumers.¹⁹⁵ In examining the issue of public interest, the Joint Board also described the FCC's previous creamskimming analysis in the *RCC Holdings Order*,¹⁹⁶ which clearly was extended in

Counsel v. FCC, 183 F.3d 393, 418 (5th Cir. 1999)).

191. *Id.* para. 39.

192. *Id.*

193. *Id.* para. 40 (citation omitted).

194. *Id.* (citing Federal-State Joint Bd. on Universal Serv., Western Wireless Corp., *Memorandum Opinion and Order*, 16 F.C.C.R. 18,133 (2001). *See also* Federal State Joint Bd. on Universal Serv., RCC Holdings, Inc., *Memorandum Opinion and Order*, 17 F.C.C.R. 23,532 [hereinafter *RCC Holdings Order*]).

195. *Joint Board Decision*, *supra* note 22, para. 41 (citations omitted).

196. *Id.* para. 41 (citing *RCC Holdings Order*, *supra* note 194, paras. 24, 27–31).

*Virginia Cellular and Highland Cellular.*¹⁹⁷

The Joint Board was very direct in rejecting the suggestion from commentators who urged that it encourage commissions to “adopt a specific cost-benefit test for the purpose of making public interest determinations.”¹⁹⁸ The Joint Board explained

[w]hile we agree that a consideration of both benefits and costs is inherent in conducting a public interest analysis, we decline to provide any more specific guidance on how this balancing should be performed. We believe that the difficulty of quantifying and weighing the various factors that may be relevant to determining the public interest militate against attempting to create a rigid formula for balancing costs and benefits.¹⁹⁹

In weighing the public interest, the Joint Board did identify a quantifiable factor that it described as “concrete, objective, transparent, and readily obtainable.”²⁰⁰ It believes that “public interest determinations may properly consider the level of federal high-cost per-line support to be received by ETCs.”²⁰¹ The Joint Board reasoned that “[i]f the per-line support is high enough, the state may be justified in limiting the number of ETCs in that study area, because funding multiple ETCs in such areas could impose strains on the universal service fund.”²⁰² It also reasoned:

[p]er-line support is a single “marker” that encompasses various underlying factors that may impact the determination of whether it is in the public interest to have an additional subsidized carrier entering a carrier’s study area . . . such as topography, population density, line density, distance between wire centers, loop lengths and levels of investment.²⁰³

While the Joint Board recommended that per-line support be used as a marker, it declined to adopt specific benchmarks based on per-line support that would be used in making public interest determinations.²⁰⁴ Instead, it recommended that the FCC “solicit comment on whether such national benchmarks merit additional consideration.”²⁰⁵ Use of per-line support would expand the examination used by the FCC in ETC designations.

197. *Virginia Cellular Order*, *supra* note 18, para. 32; *Highland Cellular Order*, *supra* note 28, at para. 26.

198. *Joint Board Decision*, *supra* note 22, para. 42.

199. *Id.*

200. *Id.* para. 43.

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.* para. 44.

205. *Id.*

E. Applicability to Existing ETCs and Rescinding of ETC Status

On the potentially politically and legally explosive issue of the applicability of the proposed guidelines to ETCs that have already been designated, the Joint Board recommended that the FCC seek comment.²⁰⁶ The Joint Board expressed its belief that ETC determinations can be rescinded for failure to comply with section 214(e) of the 1996 Telecommunications Act and conditions imposed upon them by the states (apparently imposed when designated).²⁰⁷ The Joint Board suggested that the FCC consider “whether states should allow ETCs some reasonable transition period to bring their operations into compliance with any new state ETC requirements.”²⁰⁸ The Joint Board also suggested that the FCC consider grandfathering ETC designation for a period of time “to avoid significant market disruptions.”²⁰⁹ This set of recommendations appears to raise the issue of applicability of the new guidelines to existing ETCs, but does not begin to resolve the issue.

F. Annual Certification Requirement

The Joint Board recommended that the annual certification process for all ETCs be used to ensure “that federal universal service support is used to provide the supported services and for associated infrastructure costs . . . [making] this recommendation in order to ensure the accountability of all ETCs for proper use of funds.”²¹⁰ The Joint Board also suggested that states examine compliance with build-out plans. These recommendations are consistent with the FCC’s rules and the additional commitments the FCC obtained from carriers seeking ETC designation in *Virginia Cellular* and *Highland Cellular*.²¹¹ If the annual certification process shows that an ETC fails to comply with the federal or state requirements, the Joint Board expressed that “the state commission may decline to grant an annual certification or may rescind a certification granted previously.”²¹²

206. *Id.* para. 45.

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* para. 46.

211. See *Virginia Cellular Order*, *supra* note 18, para. 46; *Highland Cellular Order*, *supra* note 28, para. 43.

212. *Joint Board Decision*, *supra* note 22, para. 48.

G. *Service Area Redefinition Process and Rural Carrier Disaggregation of Support*

After a substantial discussion of the current process used for redefinition and disaggregation of areas for support, the Joint Board continued its endorsement of the current process and standards. These are the procedures, presumptions, and efforts to avoid creamskimming used by the FCC in *Virginia Cellular* and *Highland Cellular*.²¹³

VIII. SCOPE OF SUPPORT

In its recommendation, the Joint Board dealt with two main missions.. The first issue concerned the process of ETC designation. The second issue was to examine the scope of service. Of the Joint Board's recommendations in its report, the one with the broadest potential impact was its recommendation on scope of support. The issue facing the Joint Board was, effectively, how to balance universal service goals with funding realities in ETC designation and support.

A. *Primary Connection Provision*

The Joint Board recommended that "the Commission limit the scope of high-cost support to a single connection that provides access to the public telephone network."²¹⁴ Currently, all lines in high-cost areas are eligible for support.²¹⁵ If adopted, this limitation would end support for second lines used in homes for Internet access, children's calls, fax machines, or other uses. It would also end support for multiple lines used by businesses in rural areas. Perhaps most importantly for the cost of universal support, this limitation would end universal service support for both a landline and a cellular phone subscribed to by an individual or business. It would force consumers to choose to designate a single connection as their primary connection. Any secondary connections would be unsubsidized.

Several arguments were presented by the Joint Board in support of its recommendation. First, it argued that a single connection is consistent with the 1996 Telecommunications Act as a primary connection "provides access to all of the services included in the definition of universal service under section 254(c)."²¹⁶ A single connection also provides "access to all

213. *Virginia Cellular Order*, *supra* note 18, paras. 40–45; *Highland Cellular Order*, *supra* note 28, paras. 37–42.

214. *Joint Board Decision*, *supra* note 22, para. 56.

215. *Id.* para. 58.

216. *Id.* para. 62.

of the additional telecommunications and information services, including advanced services, available to consumers through the public telephone network.”²¹⁷ In arguing that support of a primary connection would be consistent with the Act, the Joint Board expressed its belief that “supporting a single connection would fulfill the statutory principles of sufficiency and predictability.”²¹⁸ Rural telephone companies contended that primary connection support would jeopardize these principles.²¹⁹

The second argument favoring only primary connection support is that continued subsidy of multiple connections threatens the Universal Service Fund’s sustainability.²²⁰ The growth of high-cost Universal Service Fund’s support used to sponsor competitive ETCs has increased dramatically.²²¹ The Joint Board stated that “[m]uch of this growth represents supported wireless connections that supplement, rather than replace, wireline service.”²²² It reasoned that with limiting support to a primary connection, “[h]igh-cost support would increase with primary connection growth, rather than with growth in the total number of connections provided by both incumbent and competitive ETCs.”²²³ Therefore, single connection support would reduce growth in demand on high-cost universal service funding and would make the fund more sustainable.

The Joint Board’s final argument in support of a single connection was that supporting a single connection would send more appropriate entry signals and would be competitively neutral.²²⁴ It argued that under the proposed model, companies would not be artificially encouraged to seek ETC status where a rational business case cannot be made. “Competitive ETCs instead would have incentives to enter rural and high-cost areas only where doing so makes rational business sense under a model assuming incremental support only for subscribers captured from, or unserved by, the incumbent LEC.”²²⁵ Under the proposed model, support would be available to all ETCs based upon the number of primary connections, regardless of the type of technology. This single connection proposal’s impact upon rural businesses, schools, hospitals, local governments, and other organization’s with multiple land lines would likely be politically untenable.

217. *Id.*

218. *Id.* para. 64.

219. *Id.* para. 65 (citation omitted).

220. *Id.* para. 67.

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.* para. 69.

225. *Id.*

B. *Maintaining Sufficient Support for Rural Areas*

The potential negative impact that limiting universal support to a primary connection might have on rural incumbent telephone companies was recognized by the Joint Board. In its response, it offered the FCC four alternatives for future funding which provide ILECs some protection from revenue loss. It suggested that the FCC seek comment on these options. In all four proposals, the current ability of a competitive ETC to receive greater per-line support as it captures incumbent LEC lines would be ended—thus preventing upward spirals in per-line support, which are possible under the status quo. In two of the proposals, if a competitor captures a primary connection, the incumbent would lose a proportionate amount of funding. In the third option, the incumbent would be held harmless. The options are further described below.

1. Restatement Proposal

The first option presented by the Joint Board is the restatement proposal. Under this option, rural carriers would be “eligible for high-cost support based on total embedded costs averaged on a study-area level.”²²⁶ As part of this proposal, “[t]he total amount of high-cost support flowing to an area served by a rural carrier could be restated in terms of support *per first line*, rather than support *per line*, without any effect on the amount of support received by the rural carrier at the time support is restated.”²²⁷

2. Lump Sum Payment Proposal

The Joint Board’s second alternative was to provide rural carriers the same amount of high-cost support on a per-line basis as it received previously, but only for primary lines. In addition, the carriers would also receive a lump sum payment compensating for the loss of support for nonprimary lines. Loss of primary lines to competitors would only result in the high-cost support reductions based upon support for those lines. This structure would prevent competitors from seeking ETC status for arbitrage purposes.²²⁸ The Joint Board acknowledged that the flaw in this proposal is that “making lump-sum payments available to incumbents, but not to competitive ETCs, could be inconsistent with the principle of competitive neutrality.”²²⁹

226. *Id.* para. 73.

227. *Id.*

228. *Id.* para. 74.

229. *Id.*

3. Hold Harmless Proposal

The third alternative offered by the Joint Board was the hold harmless proposal. This proposal would freeze the per-line support available to competitive ETCs upon competitive entry. Like the other two proposals, a competitive ETC would be compensated based upon primary lines captured. The amount of support flowing to the incumbent LEC would not diminish when losing lines.²³⁰ The hold harmless proposal recognizes that incumbent LECs have made substantial investments in infrastructure in reliance upon the existing universal support formula and have substantial stranded investments. This proposal, like the lump sum proposal, is designed to prevent “competitive carriers [from seeking] ETC status merely for arbitrage purposes.”²³¹ The difference between the hold harmless proposal and the status quo is that under the hold harmless proposal, the competitive ETC would not benefit from the incumbent LEC’s increase in per-line cost as the competitor captures a portion of the incumbent’s lines.

4. Cap on Per-Line Support upon Competitive Entry

In its fourth recommendation on scope of funding, the Joint Board suggested capping support on a per primary connection basis upon the entry of a competitor, which would affect both incumbent LECs and competitive ETCs. The Joint Board suggested that “[t]hereafter, per-primary line support would be adjusted annually based on an index factor, rather than changes in the rural carrier’s embedded costs.”²³² The Joint Board justified this cap as “necessary to implement primary-line limitation and to prevent an upward spiral in support due to capture of primary connections by competitive ETCs.”²³³ Without the change, the Joint Board pointed out that “the high-cost universal service mechanisms calculate support for rural carrier[s] . . . per-primary line[, which] automatically increases as its total embedded costs are spread over fewer lines.”²³⁴ Thus, the absence of a per-line cap would, in the Joint Board’s words, “obviate the effect of a single-connection limitation.”²³⁵ It stated that without the cap

fund size could grow significantly if rural carriers lose primary connections to competitive ETCs, because rural carriers would continue to receive the same total support, but the per-line support

230. *Id.* para. 75.

231. *Id.*

232. *Id.* para. 77.

233. *Id.* para. 78.

234. *Id.*

235. *Id.*

amounts available to both the incumbent LEC and competitive ETCs would increase as rural carriers' per-line costs were spread over fewer primary lines.²³⁶

The Joint Board went on to recommend that the FCC develop a record on what index factor should be used to adjust support each year.

C. *Other Issues*

The Joint Board, under the title of "Other Issues," discussed the problem of rural small businesses needing multiple lines and suggested that the FCC seek additional comment on the need for universal support of more than a primary connection.²³⁷ It conceded that an option for addressing this concern was to potentially allow high-cost support for a designated number of connections per business, rather than limiting support to a single connection.²³⁸ The Joint Board suggested that the FCC develop a record on "the treatment of lines provided by unbundled network element (UNE)-based competitive ETCs under [the] recommended approach."²³⁹ The Joint Board encouraged the FCC to seek comment on the impact of the primary connection proposal on telecommunications investment in rural areas.²⁴⁰ Finally, it encouraged the FCC to consider whether it should provide transitional measures for support of existing ETCs in moving to a single connection support system.²⁴¹

IX. BASIS OF SUPPORT

The final major issue that the Joint Board tangled with in this report was the issue of the basis of support for ETCs. It discussed the mechanism of determining the base amount of support provided ETCs. The base for nonrural carriers is a forward-looking model, while the base for rural carriers is founded upon the carrier's own costs. Support for competitive ETCs is determined based upon the costs of the incumbent in the area.²⁴² The Joint Board recognized the arguments of parties suggesting change to this basis of support and of those supporting it. Arguments for change rest upon the concept that "basing a competitive ETC's support on the incumbent LEC's embedded costs provides a windfall and creates an unfair advantage for competitive ETCs with lower costs."²⁴³ Arguments for

236. *Id.*

237. *Id.* para. 84.

238. *Id.*

239. *Id.* para. 85.

240. *Id.* para. 86.

241. *Id.*

242. *Id.* para. 93.

243. *Id.*

support of the status quo are that “the current rules are necessary for competitive neutrality and are the least administratively burdensome way to administer support.”²⁴⁴

While the Joint Board expressed its concern “that funding a competitive ETC based upon the incumbent LEC’s embedded costs may not be the most economically rational method for calculating support,”²⁴⁵ it did not recommend a change in the basis in this report. It recommended that the FCC ask it to conduct a comprehensive review of both rural and nonrural mechanisms.²⁴⁶ The Joint Board made this request as it did “not yet have an adequate record to analyze and understand the consequences of recommending a change in the basis of support for areas served by rural carriers that face competition.”²⁴⁷

X. SUMMARY OF JOINT BOARD REPORT

The Joint Board Report was developed concurrently with the proceedings in *Virginia Cellular* and *Highland Cellular*, and it endorses the path the FCC blazed in those decisions. The Joint Board and the FCC appear to be in agreement that states have authority to establish eligibility requirements above those in section 213(e)(1) of the federal Act. Many of the recommended permissive guidelines have been established by FCC precedent in making ETC designations. For example, the FCC imposed consumer protection standards, weighed local usage offerings, and stiffened the public interest test with a substantial emphasis on avoiding creamskimming. The Joint Board endorsed the current process used for redefinition and disaggregating areas of support which was applied in *Virginia Cellular* and *Highland Cellular*.

Some of the suggested permissive guidelines would differ from the guidelines used by the FCC. These include: determining that ETCs have the financial resources and ability to provide quality services, determining the ability of the CETC to operate in emergencies, and requiring ETCs to be prepared to provide equal access in the case that other ETCs in that service area relinquish their rights as ETCs. The Joint Board rejected suggestions to use a specific cost-benefit analysis, but it did reason that per-line support provides a marker that can be used in determining whether allowing an additional ETC in an area is in the public interest. The Joint Board recommended that the FCC solicit comments on whether such national benchmarks justify additional consideration.

244. *Id.*

245. *Id.* para. 96.

246. *Id.* para. 88.

247. *Id.* para. 96.

Some of the Joint Board's recommendations addressed the larger universal service issues beyond the standards for designating an ETC. The Joint Board recommended that ETC status become an annual status requiring compliance with newly adopted standards, instead of a permanent designation. The Joint Board's recommendation limiting scope of support to a single connection is the recommendation with the greatest potential fiscal savings for the USF and greatest opposition. This proposal and the Joint Board's first three proposed alternatives for implementation are likely to draw substantial comment and controversy. Likewise, the fourth proposal capping per-line support upon entry of a CETC is a significant change designed to slow the growth of the USF, but is also a highly controversial recommendation due to its financial impact upon both ILECs and CETCs. The Joint Board identified other issues for the FCC to seek additional comment upon in developing potential rulemaking.

XI. CONCLUSION

In passing the 1996 Telecommunications Act, Congress anticipated competition would reduce future demand upon the newly devised system of explicit funding of universal service. Instead, demands upon the USF have skyrocketed as wireless technologies have allowed carriers to provide cost effective wireless voice services which meet the ETC service requirements established in the Act. These standards are less stringent than the ILEC standards mandated by other federal and state requirements. The general authority to designate ETCs is delegated to the states; however, in the case of Indian reservations and states which have disavowed jurisdiction over CMRS providers, the FCC determines ETC eligibility. In *Virginia Cellular* and *Highland Cellular*, the FCC has substantially advanced a framework for decision making that is much more extensive than the FCC used in its early decisions. The FCC's weighing of the public interest in these cases is far-reaching, especially when considering applications for rural service areas. This framework should benefit consumers due to its focus on services. The reporting requirements modeled by the FCC should assist in assuring that Universal Service funding is used as intended in supporting infrastructure and services and is not simply a subsidy distorting markets in which CMRS providers would naturally participate without incentives due to the relatively low cost structure of wireless technologies.

The Joint Board's 2004 *Recommended Decision* on eligible telecommunications carrier status and high-cost universal service support embraces the same general framework and recommends additional factors. The Joint Board recommends that the FCC adopt permissive federal guidelines to guide the state utility commissions in their ETC deliberations.

The Joint Board recommended substantial changes to the scope of support—limiting universal service support to a single connection per subscriber and altering the method of determining support for providers. The impact of this recommendation would restrict draws on the USF. The Joint Board argued the single line proposal will satisfy the statutory principles of sufficiency and predictability. Second lines used for fax machines, Internet access, children, and other purposes would lose subsidy. Users with both landline and cellular phones would be required to designate a primary line. The Joint Board recommends the FCC gather comments on this and several other issues. Overall, the imperatives to restrict draws upon the USF, to encourage competition, to assure sufficiency and predictability have demanded change. The FCC has taken clear first steps in tightening the ETC designation process and has good reason to adopt some of the permissive standards as recommended by the Joint Board. However, even with Joint Board recommendations, the next decisions on the scope of support will be much more formidable as these decisions will impact the annual flow of hundreds of millions of dollars of universal service support.

