

**Before the
U.S. DEPARTMENT OF COMMERCE
NATIONAL TELECOMMUNICATIONS AND INFORMATION
ADMINISTRATION
Washington, D.C. 20230**

In the Matter of)
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Broadband Opportunity Council) Docket No. 1540414365-5365-01
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) RIN 0660-XC01
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COMMENTS OF THE UTILITIES TELECOM COUNCIL

The Utilities Telecom Council (“UTC”) hereby files the following comments in response to the Notice and Request for Comments by the Broadband Opportunity Council (BOC).¹ UTC is pleased to provide its perspectives and recommended actions that the federal government can take to promote broadband deployment, adoption, and competition, including identifying and removing regulatory barriers that unduly impede investments in broadband technology.

I. Introduction and Background.

UTC is the international association for the telecommunication and information technology interests of electric, gas and water utilities and other critical infrastructure industries (CII).² UTC’s members own, manage and control extensive communication infrastructure and networks that they use to

¹ Broadband Opportunity Council Notice and Request for Comment, Docket No. 1540414365-5365-01, Department of Agriculture, Rural Utilities Service and Department of Commerce, National Telecommunications and Information Administration, 80 Fed. Reg. 23785 (2015).

² For more information about the Utilities Telecom Council visit www.utc.org.

monitor and control the safe, secure and effective delivery of essential electric, gas and water services to the public at large. Owing to the essential nature of the underlying services that they support, these communications systems are designed, built and operated to high standards for reliability.

UTC has created a Rural Broadband Council to assist utilities that are interested in deploying broadband in rural unserved and underserved communities.³ The RBC has been focused on helping utilities to access federal funding for their rural broadband deployments, which has helped utilities to be able to cost-effectively deploy broadband networks and provide broadband services to unserved areas. Today, there are many utilities that are providing broadband to the communities that they serve.

II. The BOC Should Consider Ways to Accelerate the ETC Certification Process or Eliminate the Requirement of ETC Certification to Receive Support from the Connect America Fund,

One of the first issues that utilities have encountered has been obtaining eligible telecommunications carrier (ETC) status in order to qualify for access to the Connect America Fund (CAF). ETC status is a requirement, because the CAF evolved from the Universal Service Fund, and the enabling statute requires that USF applicants become ETCs.⁴

³ For more information about the Rural Broadband Council visit www.ruralbroadbandcouncil.org.

⁴ See Section 54.201 of the Communications Act of 1934 (defining eligible telecommunications carriers, generally, and stating that (1) Only eligible telecommunications carriers designated under this subpart shall receive universal service support distributed pursuant to part 36 of this chapter, and subparts D and E of this part.)

The FCC has attempted to address this barrier by allowing utilities to obtain ETC status after they have been provisionally awarded funding under CAF.⁵ This enables utilities to apply for funding, even though they have not been awarded ETC status, thus helping to reduce this barrier to access to broadband funding. The Commission has also established a process by which utilities may request that the FCC intervene if states do not grant ETC status within prescribed timelines.⁶

While some states have processed ETC certification requests in a timely manner, there have been several utilities that have not been able to obtain ETC status within the prescribed timelines and have sought a waiver from the FCC.⁷ Thus, ETC status can still be a barrier for utilities to obtain access to federal funding.

UTC suggests that the BOC consider ways to reduce ETC status as a barrier to broadband funding by accelerating the certification process or eliminating the requirement. Electric utilities are interested in providing broadband to their communities and they are interested in offering voice services as well. But, the panoply of regulatory requirements that go along with ETC status – particularly the time and expense of obtaining ETC certification – can

⁵ *Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, WC Docket No. 10-90, 29 FCC Rcd 8769 at ¶22.

⁶*Id.*

⁷ See e.g. Petition for Waiver and Request for Extension of Time to File Proof of ETC Designation of Northeast Rural Services, Inc. in WC Docket No. 10-90 (filed June 2, 2015); Petition for Waiver and Request for Extension of Time to File Proof of ETC Designation of Midwest Energy Cooperative D/B/A Midwest Connections, WC Docket No. 10-90 (filed May 27, 2015).

discourage utilities from seeking federal funding for broadband deployment. This in turn may prevent utilities from deploying broadband networks and offering broadband services altogether.

UTC believes that ETC certification represents an unnecessary barrier to broadband deployment. There are other ways to ensure that a broadband provider is legally, financially, and technically qualified to provide broadband services. Moreover, requiring broadband providers to offer voice services may be unnecessary as well. Utilities may voluntarily choose to offer voice services without being required to do so; and these services may meet standards for reliability without any such regulatory requirements. In short, broadband should be the driver here; policymakers should let regulatory requirements for voice services become a barrier to broadband deployment.

III. The BOC Should Consider Ways to Reduce Barriers to the Use of Utility Easements and Rights of Way for Communications Purposes.

In addition to ETC status, utilities may also be discouraged or prevented from offering broadband services to the extent that they are subject to legal actions for using their easements and rights of way for communications purposes. This is a real issue for utilities, having been the subject of legal actions that have resulted in significant liability.⁸ Moreover, there is uncertainty surrounding this issue because different states may interpret easements and rights of way differently. Some may require an affirmative grant of authority to

⁸ Recently, a judgement of \$79 million was awarded against a telecom subsidiary of an electric utility. *Chase Barfield, et al. v. Sho-Me Power Electric Cooperative, et al.*, Case No. 2:11-cv-4321NKL (W.D. Mo., 2015)

use the easement or right of way for communications purposes; whereas other states may permit the use of the easement or right of way for communications purposes so long as there are no restrictions against such use. Utilities need certainty on this issue in order to provide broadband services.

As a legal matter, there is no reason for utilities to incur liability for using their existing easements and rights-of-way for communications purposes. This is so because there is no discernable impact on the underlying property when utilities use their existing easements and rights of way for communications purposes. Because there is no diminution of the value of the underlying property rights, there should be no liability from utility use of their easements and rights of way for communications purposes.⁹

Alternatively, there is no reason for utilities to incur liability for using their existing easements and rights of way for communications, because in many cases broadband or commercial traffic is merely traveling on additional strands of fiber within the same cable that is already deployed for smart grid, such that this use does not exceed the scope of the easement or right of way. Where the broadband traffic is carried over the same strands, the BOC could also treat the broadband traffic as just additional packets of data that do not exceed the scope of the easement or right-of-way.

⁹ In the cases of FTTH deployments, there are studies that show that property values are increased by the existence of access to fiber networks.

UTC submits that policymakers can adopt a solution to this problem: they can clarify for purposes of state property law that the use of utility easements and rights-of-way for communications purposes is permissible within the scope of their existing utility easements and rights-of-way. There is precedent for this. The state of Texas passed a law that clarified that no additional easements are necessary for utilities to offer broadband over power line (BPL) services.¹⁰ This provision stated as follows:

Because BPL systems provide benefits to electric delivery systems, the installation of a BPL system on an electric delivery system shall not require the electric utility or the owner of the BPL system or an entity defined in Section 11.003(9) to obtain or expand easements or other rights-of-way for the BPL system or to give additional consideration as a result of the installation or the operation of a BPL system. For purposes of this section, installation of a BPL system shall be deemed to be consistent with installation of an electric delivery system.¹¹

As explained above, policymakers may clarify that the use of utility easements and rights of way for communications purposes is within the scope of the utility easement, whether the communications are used for utility purposes or not.

Again, this is so because the use of the existing easement and right of way does not result in any diminution of the property rights of the underlying landowner, and may in fact increase the value of the property.

IV. The BOC Should Consider Ways to Promote Dual-Purpose Programs

In a similar way that UTC suggests promoting the use of utility easements for both electric and communications purposes, UTC also suggests that the BOC

¹⁰ Tex. Util. Code. §43.054

¹¹ *Id.*

consider ways to leverage funding from electric and broadband programs to support both broadband and electric services. This would promote synergies and economies of scale that would make more effective use of limited funding, instead of restricting funding for one purpose or another.

Currently funding programs are siloed so that they restrict funding from being used for other purposes besides broadband or electric services. This ignores the reality of today's networks: which is that broadband and electric networks are complementary and support one another. Today's utility networks use communications to support a variety of applications, such as remote monitoring and control of utility substations, as well as transmission and distribution automation systems. As these systems become more pervasive and the functionality is enhanced, bandwidth requirements increase - leading to the need for broadband communications capabilities.

At the same time, broadband deployment is advanced by leveraging utility infrastructure. The systems are hardened and made more reliable in order to meet higher standards for electric services. Moreover, coverage is improved because the broadband network can be extended to areas that could otherwise not be served economically, based solely on residential broadband services alone. Finally, there are additional potential synergies that can produce ancillary benefits, such as improving the reliability of services such VoIP that are carried over broadband networks.

V. The BOC Should Consider Eliminating the Right-of-First-Refusal (ROFR) for Price Cap Carriers to Receive CAF Support in Unserved Areas.

One of the principal barriers that exist for utilities to access the Connect America Fund is the FCC's policy that provides price cap carriers with a right-of-first-refusal ("ROFR") for CAF support in unserved areas. This Faustian bargain that the Commission entered into with the price cap carriers has not proven effective at increasing broadband deployment in rural areas. The price cap carriers have mainly deployed only at the edge of their existing coverage areas (i.e. underserved areas); they have largely avoided deploying in areas outside of their existing service territories (i.e. areas that are truly unserved). Even the FCC commissioners have voiced their reluctance to support the ROFR.

The Commission should not give incumbents a right-of-first refusal to CAF support, which thwarts the competitive forces that would otherwise be unleashed by allowing other entities besides price cap carriers and rural LECs to receive CAF support. UTC has urged the Commission to open up access to the CAF to any entity, not just price cap carriers and rural LECs.¹² The monopoly that price cap carriers currently enjoy over access to CAF has created inefficiencies and encouraged price cap carriers to decline support in unserved areas.

¹² See e.g. Letter to Marlene H. Dortch, Secretary, Federal Communications Commission from Brett Kilbourne, Deputy General Counsel, Utilities Telecom Council in WC Docket No. 10-90 (filed Dec. 9, 2013) and Statement of the Utilities Telecom Council in WC Docket No. 10-90 (filed Sept. 11, 2013).

The FCC has taken an important first step in breaking down this monopoly by eliminating the ROFR in areas where entities have submitted proposals to provide rural broadband experiments. In response, many entities, including utilities have submitted proposals and the Commission has awarded funding to some of these applicants. Still, price cap carriers and rural LECs continue to enjoy a right of first refusal in other areas, which encourages regulatory gamesmanship by incumbents, thereby frustrating the Commission's goals of promoting diversity as part of the rural broadband experiments. In order to promote competition to provide broadband in rural areas, the BOC should consider ways to eliminate the ROFR in all areas, not just those areas where rural broadband experiments have been proposed.

VI. UTC Responses to Selected Questions Posed by the BOC

With the preceding points as backdrop, UTC is pleased to provide the following responses to the specific questions posed by the BOC in its Notice and Request for Comment.

A. Overarching Questions

Q: What federal regulations and/or statutes could be modernized or adapted to promote broadband deployment and adoption?

A. CAF should be modernized to permit the use of funds without the need to become an ETC as discussed above.

B. Addressing Regulatory Barriers to Broadband Deployment, Competition, and Adoption

Q: What regulatory barriers exist within the agencies of the Executive Branch to the deployment of broadband infrastructure?

A: Federal agencies are siloed and the funding programs that they manage are similarly siloed. Broadband infrastructure deployment could be promoted by using electric programs to support broadband deployment.

Q: What federal programs should allow the use of funding for the deployment of broadband infrastructure or promotion of broadband adoption but do not do so now?

A: The RUS Electric Program is an example of a federal program that should allow the use of funding for the deployment of broadband infrastructure and adoption, but does not do so now.

Q: What inconsistencies exist in federal interpretation and application of procedures, requirements, and policies by Executive Branch agencies related to broadband deployment and/or adoption, and how could these be reconciled?

One example is the variance in broadband speed definitions.

A: As explained above, the federal government interprets its statutory authority to require that recipients of support under the Connect America Fund must

become ETCs. UTC urges the BOC to consider ways that the ETC requirement could be eliminated or reduced, which would promote broadband deployment.

Q: Are there specific regulations within the agencies of the Executive Branch that impede or restrict competition for broadband service, where residents have either no option or just one option? If so, what modifications could agencies make to promote competition in the broadband marketplace?

A: As explained above, the ETC requirement for access to the Connect America Fund can impede or restrict competition for broadband service, where residents have either no option or just one option. As suggested above, the BOC should consider ways of reducing or eliminating the BOC requirement.

Q: Are there federal policies or regulations within the Executive Branch that create barriers for communities or entities to share federally-funded broadband assets or networks with other non-federally funded networks?

Should the federal government promote the implementation of federally-funded broadband projects to coincide with other federally-funded infrastructure projects? For example, coordinating a broadband construction project funded by USDA with a road excavation funded by DOT?

A: As explained above, the federal government could promote the implementation of federally-funded broadband projects to coincide with federal funding of electric programs.

C. Promoting Public and Private Investment in Broadband

Q: How can communities/regions incentivize service providers to offer broadband services, either wired or wireless, in rural and remote areas? What can the federal government do to help encourage providers to serve rural areas? What changes in Executive Branch agency regulations or program requirements could incentivize last mile investments in rural areas and sparsely populated, remote parts of the country?

A: Communities and regions can incentivize service providers to offer broadband services in rural and remote areas by enabling utilities to use existing easements and rights of way for broadband purposes, as described above.

D. Issues Specific to Rural Areas

Q: What federal regulatory barriers can Executive Branch agencies alter to improve broadband access and adoption in rural areas?

A: The FCC could reduce or eliminate the ETC requirement for access to CAF as suggested above.

Q: Would spurring competition to offer broadband service in rural areas expand availability and, if so, what specific actions could Executive Branch agencies take in furtherance of this goal?

A: Yes, competition to offer broadband would promote rural broadband access, and the federal government could promote competition by eliminating the right of first refusal (ROFR) that allows incumbent local exchange carriers to thwart

competition by accepting all of the available CAF support in a given area as a quid pro quo for its statewide commitment, as described above.

Q: Because the predominant areas with limited or no broadband service tend to be rural, what specific provisions should Executive Branch agencies consider to facilitate broadband deployment and adoption in such rural areas?

A: Utilities are located in rural areas and can promote rural broadband access. The Executive Branch could facilitate broadband deployment and adoption in rural areas by eliminating barriers that discourage utilities from providing broadband, as described above.

Respectfully submitted,

Utilities Telecom Council

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