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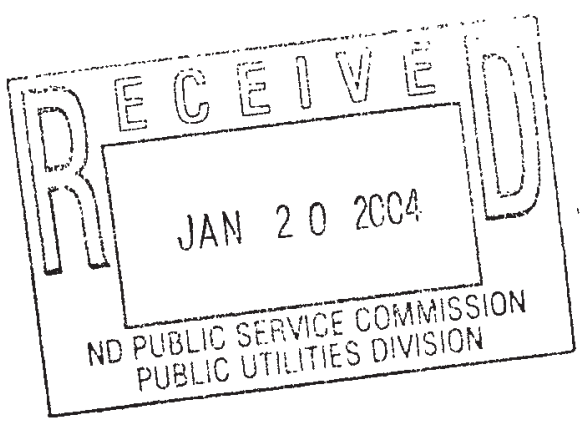

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January 16, 2004

Patrick Fahn
Chief Engineer
North Dakota Public Service Commission
600 East Boulevard, Dept. 408
Bismarck, ND 58505-0480

Re: In the Matter of the Application of WWC Holding Co., Inc. d/b/a CellularOne© for Designation as an Eligible Telecommunications Carrier Docket No. PU-2077-03-636

Dear Mr. Fahn:

I am writing as a follow-up to the items discussed at the Informal Hearing of January 14, 2004, in the above-captioned matter. Specifically, the Commission raised a question regarding WWC Holding Co.'s ("Western Wireless") obligation to provide service as a federal eligible telecommunications carrier ("ETC") throughout its designated service areas.

The Federal Communications Commission ("FCC") has set forth the standard regarding an ETC's obligation to provide service throughout a designated service area in *In the Matter of Federal-State Joint Board on Universal Service Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission*, CC Docket 96-45, Declaratory Ruling, 15 FCC Rcd. 15168 (2000) ("*Declaratory Ruling*"). A copy of the FCC's *Declaratory Ruling* is enclosed. As set forth in para. 17, the FCC addressed whether gaps in coverage throughout a service area could preclude designation. The FCC specifically determined that a new entrant, once designated as an ETC, is required to extend its network to serve new customers upon reasonable request. (*Declaratory Ruling*, ¶ 17.) Western Wireless reaffirms its obligation as a designated ETC to comply with this standard throughout its designated service areas in North Dakota.

Moreover, the Commission issued its "Findings of Fact, Conclusions of Law and Order" on December 15, 1999 when designating Western Wireless as a federal ETC in Case No. PU-1564-98-428. As set forth in Finding of Fact No. 36, the Commission determined that an applicant for ETC status is not required to be providing the required universal services to 100% of a service area before receiving designation as an ETC. Moreover, the Commission stated, "Facilities to serve customers are required at some reasonable time after the customer agrees to the terms and conditions of the service provided." (*Id.*) Western Wireless agrees the

Commission should include a similar finding in its Order granting ETC designation in this proceeding.

Finally, Western Wireless' compliance filing previously submitted in Case No. PU-1564-98-248 will apply throughout the newly designated areas which are the subject of the Application in this proceeding. Similarly, Western Wireless agrees the Commission should include the requirement to provide quarterly reports describing the status of its E911 implementation, pursuant to the Order on Remand dated October 3, 2001 in Case No. PU-1564-98-248, in the Order granting ETC designation in this proceeding.

Thank you for the opportunity to provide this additional clarification. If you should have any questions, please feel free to contact me.

Very truly yours,

Mark J. Ayotte

MJA/sjc
Enclosure

cc: Illona Jeffcoat-Sacco (w/enclosure)
James H. Blundell (w/enclosure)
Rae Ann Kelsch (w/enclosure)
Thomas D. Kelsch (w/enclosure)

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

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

DECLARATORY RULING

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

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

I. INTRODUCTION

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

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

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

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

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

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

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

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

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

[7] South Dakota PUC Notice of Appeal.

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

II. BACKGROUND

A. The Act

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

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

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

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

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[8] 47 U.S.C. § 254(e).

[9] 47 U.S.C. § 214(e)(2).

[10] 47 U.S.C. § 214(e)(1).

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

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

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

B. Federal Preemption Authority

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

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

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

[12] 47 U.S.C. § 253(a).

[13] 47 U.S.C. § 253(b).

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

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

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

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

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

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

III. DISCUSSION

A. Section 253(a) Analysis

1. Background

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

2. Discussion

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

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

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

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

[20] *See* 47 U.S.C. § 253(a).

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

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

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

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

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

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

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

[23] *Western Wireless petition* at 8.

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

[25] 47 U.S.C. § 214(e)(1).

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

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

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

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

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

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

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

[29] Washington UTC reply comments at 4.

[30] ALTS comments at 4-5.

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

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

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

B. Section 253(b) Analysis

1. Background

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

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

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

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

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

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

2. Discussion

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

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

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

[36] 47 U.S.C. § 253(b).

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

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

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

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

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

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

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

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

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

[43] 47 U.S.C. § 253(b).

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

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

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

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

C. Federal Preemption Authority

1. Background

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

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

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[46] *See* 47 U.S.C. § 254(b).

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

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

[49] Washington UTC reply comments at 5.

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

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

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

2. Discussion

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

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[52] *See generally* section 254.

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

[54] *See* 47 U.S.C. § 254(b)(3).

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

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

[57] 47 U.S.C. § 254(f).

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

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

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

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

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

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[59] 47 U.S.C. § 152(b).

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

[61] 47 U.S.C. § 214(e)(1).

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

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

[64] *See* 47 U.S.C. § 254(b)(3).

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

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

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[65] 47 U.S.C. § 254(e).

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

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

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

[69] 47 U.S.C. § 254(f).

IV. ORDERING CLAUSES

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

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

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

DISSENTING STATEMENT OF
COMMISSIONER HAROLD FURCHTGOTT-ROTH

Re: Federal-State Board on Universal Service, Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission, Declaratory Ruling, CC Docket No. 96-45.

I dissent from today's Declaratory Ruling. It is not necessary for the Commission to issue this advisory statement, and its ruling is inconsistent with section 253's plain mandate and with past Commission precedent interpreting that provision. Indeed, the Commission rests its section 253 analysis upon a factual predicate that does not exist. Moreover, the South Dakota PUC has permissibly interpreted section 214(e)(1), and it is inappropriate for the Commission to override the PUC's determination.

This Declaratory Ruling Is Unnecessary. To begin with, there is no need for the Commission to issue an advisory statement concerning the South Dakota Public Utilities Commission's decision. A South Dakota trial court has vacated the PUC's order, and an appeal is currently pending in the South Dakota Supreme Court.[1] There is no reason to think that the state supreme court will not appropriately resolve the issue. Further, contrary to the Commission's assertions,[2] this order will be of no assistance to other state commissions. No other state commissions have interpreted section 214 in the way that the South Dakota PUC has done, nor have other state commissions indicated that they plan to adopt the South Dakota PUC's interpretation of section 214. There is therefore no need for the Commission to offer "guidance" on this issue.

The Commission Has Improperly Applied Section 253. Not only is the Commission's ruling unnecessary, but also its preemption analysis is faulty. Oddly, although the Commission claims that the purpose of this order is to "provide guidance to remove uncertainty and terminate controversy regarding whether section 214(e)(1) . . . requires a common carrier to provide supported services throughout a service area prior to being designated an eligible telecommunications carrier,"[3] it devotes the bulk of its discussion to preemption under section 253.

First, even if it were appropriate for the Commission to issue a statement regarding its understanding of section 214(e) – which it is not – there is no reason for it also to address section 253 preemption. Moreover, by issuing an advisory statement regarding section 253, the Commission wades into dangerous waters. Section 253(d) specifies that the Commission should preempt state regulations only "*to the extent necessary* to correct . . . a violation or inconsistency

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[1] *See Federal-State Board on Universal Service, Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission*, Declaratory Ruling, CC Docket No. 96-45, at ¶ 3 (hereinafter "*Declaratory Ruling*"); *Filing by GCC License Corporation for Designation as an Eligible Telecommunications Carrier*, Findings of Fact, Conclusions of Law, and Order, Civ. 99-235 (S.D. Sixth Jud. Cir. March 22, 2000).

[2] *See Declaratory Ruling* at ¶ 1.

[3] *Declaratory Ruling* at ¶ 1.

[with sections 253(a) and (b)]." In view of this statutory directive, it is inappropriate for the Commission to issue *any* advisory statement regarding section 253. Quite simply, how can it be "necessary" for the Commission to act to correct a violation of sections 253(a) or (b) where, as here, a court has vacated the state PUC's order, and no state requirement even exists?

Even assuming that the South Dakota PUC's order presented an issue that could appropriately be addressed under section 253, the Commission's application of that provision to South Dakota's requirement is inconsistent with the statute's plain language. Section 253(a) proscribes only those state requirements that "*may prohibit* or *have the effect of prohibiting* the ability of any entity to provide any interstate or intrastate telecommunications service."[4] It is impossible to understand how failing to assign a new carrier eligible telecommunications carrier status could "prohibited" or had the "effect of prohibiting" it from providing service in South Dakota. The Declaratory Ruling asserts that "[a] new entrant faces a substantial barrier to entry if the incumbent local exchange carrier (LEC) is receiving universal service support that is not available to the new entrant for serving customers in high-cost areas."[5] Amazingly, however, the order leaves out the fact that in the non-rural areas of South Dakota, the incumbent does *not* receive federal universal support for *any* of the non-rural lines it serves. In other words – and contrary to the linchpin of the Commission's reasoning here – designation as an ETC confers *no* benefit at all upon the non-rural incumbent carrier that has received that status, and there is no factual basis for concluding that another carrier's lack of ETC status could have the effect of prohibiting that carrier from offering service.

To be sure, incumbent carriers that serve rural areas in South Dakota do receive some federal universal service support. But whether to designate more than one carrier as an ETC in these rural areas lies *entirely* within the South Dakota PUC's discretion, and I do not understand the majority to question that principle, which is dictated by the 1996 Act and our precedent.[6] A state commission remains free to decline to grant an applicant ETC status for rural areas, based on public interest considerations, and this order can have no effect on its exercise of that discretion.

In addition to being incompatible with section 253's plain language, the Commission's interpretation of this provision is not consistent with this agency's precedent. The Commission pretends that its prior decisions support its preemption of the South Dakota PUC's order. But an examination of the facts of these cases demonstrates just the opposite. In its past decisions, the

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[4] *See* 47 U.S.C. § 253(a) (emphasis added).

[5] *Declaratory Ruling* at ¶ 12.

[6] *See* 47 U.S.C. §214(e)(2) ("Upon request and consistent with the public interest, convenience, and necessity, the State commission *may*, in the case of an areas served by a rural telephone company . . . designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of [§ 214(e)(1)].") (emphasis added); *Federal-State Joint Board On Universal Service*, 12 FCC Rcd 8776 [¶ 135] (1997) ("[T]he discretion afforded a state commission under section 214(e)(2) is the discretion to decline to designate more than one eligible carrier in an area that is served by a rural telephone company; in that context, the state commission must determine whether the designation of an additional eligible carrier is in the public interest.").

Commission has indicated that section 253 preemption is appropriate only if a state requirement is so burdensome it effectively precludes a provider from providing service, and it previously has refused to preempt state requirements that fall short of that standard.[7]

For example, the majority cites *Pittencrieff Communications, Inc.* as support for its preemption analysis here.[8] But the Commission did *not* preempt the Texas requirement at issue in that case, which required all carriers, including the petitioner, a commercial mobile radio service provider operating in Texas, to contribute to the state universal service fund.[9] The Commission ruled that the requirement did not prohibit a CMRS provider from entering the market since it applied to *all* telecommunications providers operating in Texas.[10] Indeed, the logic applied in *Pittencrieff* compels the conclusion that preemption is inappropriate here – the South Dakota PUC's requirement that, in order to qualify as an eligible telecommunications carrier under section 214(e), a carrier must currently be providing service to subscribers, applies to incumbents and new entrants alike.[11]

The Commission's decision is also at odds with its recent decision rejecting Minnesota's petition for a declaration that its contract with a fiber optics developer was permissible under the 1996 Act. Under the contract at issue, the developer was to receive exclusive access to freeway rights-of-way in Minnesota in exchange for installing 1,900 miles of fiber optic cable and allowing the state to use some of that cable. For procedural reasons, the Commission did not preempt Minnesota's contract.[12] Nevertheless, it determined that the contract posed grave problems under section 253, in that it gave a single developer what amounted to a monopoly on freeway rights-of-way. The contract would essentially have precluded later entrants from gaining access to the freeway rights-of-way to lay their own fiber optic cable for ten years,[13] and it would have been prohibitively expensive for competitors to purchase alternative rights-of-way.[14] In view of these facts, the Commission determined that the agreement potentially ran afoul of section 253 because it singled out one provider for preferential treatment, while effectively prohibiting others from entering the market altogether. Similarly, in *New England Public Communications Council*

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[7] *See, e.g.*, *The Petition of the State of Minnesota for a Declaratory Ruling Regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way*, Memorandum Opinion and Order, CC Docket No. 98-1, ¶ 32 (rel. Dec. 23, 1999) (hereinafter "*Minnesota Declaratory Ruling*").

[8] *Declaratory Ruling* at ¶ 7.

[9] *See Pittencrieff*, 13 FCC Rcd 1735 [¶ 2].

[10] *See id.* at 1751-1752, ¶ 32.

[11] *See Declaratory Ruling* at ¶ 23.

[12] *See Minnesota Declaratory Ruling*, *supra* note 21, at ¶ 64.

[13] *See id.* at ¶¶ 1 & 19.

[14] *See id.* at ¶¶ 22-36.

Petition for Preemption Pursuant to Section 253,[15] a state requirement had the effect of completely preventing independent payphone providers from entering the payphone market, in direct contravention of section 276 of the 1996 Act.[16] Consistent with section 253(a), the Commission preempted the requirement.

The South Dakota PUC, by contrast, has not accorded preferential treatment to any carrier. Rather, it has simply directed that a carrier that wishes to be designated an eligible telecommunications carrier under section 214 show that it currently provides service in the areas in which it seeks ETC status. Even if ETC status conferred some benefit on a carrier (which it clearly does not), I do not understand how a generally applicable rule such as this one could "prohibit" or have the "effect of prohibiting" the ability of a carrier to provide telecommunications services within the meaning of section 253.

The South Dakota PUC's Construction of Section 214(e) Is Permissible. The South Dakota PUC, in ruling that a carrier may not receive ETC designation unless it currently provides service throughout the service area, has permissibly construed section 214(e)(1). That provision states that a common carrier designated as an eligible telecommunications carrier "*shall*, throughout the service area for which the designation is received . . . *offer* the services that are supported by Federal universal service support mechanisms under section 254(c).[17] The verbs "shall" and "offer" are used the present tense, and the South Dakota PUC reasonably concluded that these terms mean that a carrier must *presently* offer its service throughout the service area before it may be designated an ETC and may not merely *intend* to offer that service at some point in the future. Although other state commissions might interpret section 214(e)(1) differently, the South Dakota PUC's interpretation of that provision is clearly permissible.

Indeed, in order to override the South Dakota PUC's determination and reach the outcome it prefers, the Commission must manufacture a far more strained definition of the term "to offer." "To offer," the Commission reasons, has nothing to do with whether an entity actually provides service or is immediately capable of providing that service upon a customer's request. The Commission stretches the statute's language past the breaking point. If Congress had intended for carriers to be eligible telecommunications carriers based simply on a readiness to provide service, it could easily have said so. And the Commission's construction of section 214(e)(1) effectively reads out of the Act one of the provision's chief requirements. If carriers may qualify for ETC status based merely on their "readiness" to make service available, section 214(e)(1) becomes nothing more than a self-certification provision, a result that is plainly at odds with the statute's intent. It is elementary that a construction that renders a statutory provision superfluous must be avoided, and the Commission has ignored that principle here.[18]

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[15] 11 FCC Rcd 19713 (1996) (hereinafter "*New England Public Communications*").

[16] *See New England Public Communications*, 11 FCC Rcd at 19726-19727 [¶¶ 27-30].

[17] 47 U.S.C § 214(e).

[18] *See, e.g.*, *Kawaauhau v. Geiger*, 523 U.S. 57, 62 118 S.Ct. 974, 977 (1998); *United States v. Menasche*, 348 U.S. 528, 538-539, 75 S.Ct. 513, 519-520 (1955).

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Because the Commission's decision is unnecessary, inconsistent with sections 253, and improperly overrides the South Dakota PUC's application of section 214(e), I dissent from this Declaratory Ruling.