VI. Carriers Eligible for Universal Service Support

A. Overview

127. In this section, we discuss which telecommunications carriers will be eligible to receive support from the federal universal service support mechanisms. We address eligibility for support for services provided to schools and libraries below in section X. We conclude that the plain language of section 214(e) precludes adoption of additional eligibility criteria beyond those enumerated in that section. Accordingly, as recommended by the Joint Board, we adopt without expansion the statutory criteria set out in section 214(e) as the rules governing eligibility.

128. We interpret the term "facilities" in section 214(e)(1) to mean any physical components of the telecommunications network that are used in the transmission or routing of the services designated for support under section 254(c)(1). We further conclude that a carrier that offers any of the services designated for universal service support, either in whole or in part, over facilities obtained as unbundled network elements pursuant to section 251(c)(3) satisfies the "own facilities" requirement of section 214(e). Consistent with the Joint Board's recommendation, we find that no additional measures are necessary to implement the advertising requirement of section 214(e)(1) and the provisions of section 254(e) that limit the purposes for which universal service funds may be used.

129. We recognize that the states have responsibility for designating the service areas of non-rural carriers. We also agree with the Joint Board, however, that states should not designate service areas that are unreasonably large because we recognize, as did the Joint Board, that an unreasonably large service area could greatly increase the scale of operations required of new entrants. Thus, unreasonably large service areas may prohibit or have the effect of prohibiting the ability of entities to provide local exchange service and are not necessary to preserve and advance universal service. State designation of an unreasonably large service area could, therefore, violate section 253 as a market entry barrier. We conclude, as did the Joint Board, that rural telephone companies' study areas will be used as their designated service areas, although we encourage states to consider disaggregating a rural telephone company's study area into service areas composed of the contiguous portions of that study area. Finally, we agree with the Joint Board that no additional regulations are necessary at this time to govern the designation of carriers to serve unserved areas.

B. Eligible Telecommunications Carriers

1. Background

130. Section 254(e) provides that, after the effective date of the Commission's regulations implementing section 254, "only an eligible telecommunications carrier designated

under section 214(e) shall be eligible to receive specific Federal universal service support."[299] The legislative history indicates that "this restriction should not be construed to prohibit any telecommunications carrier from using any particular method to establish rates or charges for its services to other telecommunications carriers, to the extent such rates or charges are otherwise permissible under the Communications Act or other law."[300] Section 254(e) further prescribes that a carrier receiving universal service support "shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended."[301] Additionally, section 254(k) prohibits a carrier from using non-competitive services to subsidize services that are subject to competition.[302]

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

> A common carrier designated as an eligible telecommunications carrier under [subsection 214(e)(2)] or [subsection 214(e)(3)] 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 therefore using media of general distribution.[303]

132. Pursuant to section 214(e)(2), state commissions must, either upon their own motion or upon request, designate a common carrier that meets the requirements of section 214(e)(1) "as an eligible telecommunications carrier for a service area designated by the State

[299] 47 U.S.C. § 254(e). Section 254(h)(1)(B)(ii) states that telecommunications carriers providing service to schools and libraries under section 254(h)(1)(B) shall receive support "notwithstanding the provisions of [section 254(e)]." 47 U.S.C. § 254(h)(1)(B)(ii).

[300] Joint Explanatory Statement at 131-32.

[301] 47 U.S.C. § 254(e).

[302] 47 U.S.C. § 254(k). The Commission intends to address issues related to section 254(k) in a separate proceeding.

[303] 47 U.S.C. § 214(e)(1).

commission."[304] Section 214(e)(2) also provides for the designation of more than one carrier as an eligible telecommunications carrier. It states, in part:

> Upon request and consistent with the public interest, convenience, and necessity, the State commission may, in the case of an area served by a rural telephone company,[305] and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of [subsection 214(e)(1)]. Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest.[306]

Section 214(e) also contains provisions governing a carrier's relinquishment of its eligible carrier designation in areas served by more than one eligible carrier. The statute requires states to permit eligible carriers to relinquish their designation after giving the state notice. The statute requires remaining eligible carriers to serve the relinquishing carrier's customers and requires the relinquishing carrier to give notice sufficient to permit remaining carriers to construct or purchase facilities, if necessary.[307]

133. The Joint Board recommended that the Commission adopt, without elaboration,

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[304] 47 U.S.C. § 214(e)(2).

[305] 47 U.S.C. § 153(37) provides as follows:

> The term 'rural telephone company' means a local exchange carrier operating entity to the extent that such entity-
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> (A) provides common carrier service to any local exchange carrier study area that does not include either-
>
> (i) any incorporated place of 10,000 inhabitants or more, or any part thereof, based on the most recently available population statistics of the Bureau of the Census; or
>
> (ii) any territory, incorporated or unincorporated, included in a urbanized area, as defined by the Bureau of the Census as of August 10, 1993;
>
> (B) provides telephone exchange service, including exchange access, to fewer that 50,000 access lines;
>
> (C) provides telephone exchange service to any local exchange carrier study area with fewer than 100,000 access lines; or
>
> (D) has less than 15 percent of its access lines in communities of more than 50,000 on the date of enactment of the Telecommunications Act of 1996.

[306] 47 U.S.C. § 214(e)(2).

[307] 47 U.S.C. § 214(e)(4).

the statutory criteria set out in section 214(e) as the rules that will govern eligibility.[308] The Joint Board rejected arguments that all eligible telecommunications carriers should be required to meet the same obligations that are imposed on incumbent LECs after finding that such regulation would be unnecessary to protect incumbents and would chill competitive entry into high cost areas.[309] The Joint Board recommended that the Commission find that a carrier may satisfy the criteria of section 214(e) regardless of the technology used by that carrier,[310] and that the Commission should exclude no class of carriers, such as price cap carriers, from eligible status.[311] The Joint Board also recommended that, at this time, the Commission adopt no national guidelines to implement the statutory requirement that carriers advertise the availability and rates of federally supported services throughout their service areas.[312] Further, the Joint Board found that the plain language of section 214(e)(1) precludes states from requiring eligible carriers to offer service wholly over their own facilities,[313] and also precludes states from designating "pure" resellers as eligible carriers.[314] The Joint Board recommended that the Commission reject arguments that it forbear from the section 214(e)(1) facilities requirement because the record before it did not demonstrate that the three statutory criteria for forbearance had been met.[315] Finally, the Joint Board recommended that the Commission not adopt rules to implement section 254(e), which requires that an eligible carrier shall use universal service funds only to support the services and facilities for which it is intended.[316]

2. Discussion

a. Eligibility Criteria

134. Adoption of Section 214(e)(1) Criteria. Consistent with the Joint Board's recommendation and the record before us, we adopt the statutory criteria contained in section 214(e)(1) as the rules for determining whether a telecommunications carrier is eligible to receive

[308] Recommended Decision, 12 FCC Rcd at 169.

[309] Recommended Decision, 12 FCC Rcd at 170.

[310] Recommended Decision, 12 FCC Rcd at 169-70.

[311] Recommended Decision, 12 FCC Rcd at 171-72.

[312] Recommended Decision, 12 FCC Rcd at 174.

[313] Recommended Decision, 12 FCC Rcd at 173.

[314] Recommended Decision, 12 FCC Rcd at 172-73.

[315] Recommended Decision, 12 FCC Rcd at 173.

[316] Recommended Decision, 12 FCC Rcd at 174.

universal service support.[317] Pursuant to those criteria, only a common carrier may be designated as an eligible telecommunications carrier, and therefore may receive universal service support. In addition, section 214(e) provides that each eligible carrier must, throughout its service area: (1) offer the services that are supported by federal universal service support mechanisms under section 254(c);[318] (2) offer such services 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 (3) advertise the availability of and charges for such services using media of general distribution.[319]

135. Statutory Construction of Section 214(e). We conclude that section 214(e)(2) does not permit the Commission or the states to adopt additional criteria for designation as an eligible telecommunications carrier.[320] As noted by the Joint Board, "[s]ection 214 contemplates that any telecommunications carrier that meets the eligibility criteria of section 214(e)(1) *shall* be eligible to receive universal service support."[321] Section 214(e)(2) states that "[a] state commission *shall* . . . designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier . . . ."[322] Section 214(e)(2) further states that ". . . the State commission *may*, in the case of an area served by a rural telephone company, and *shall*, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, *so long as each additional requesting carrier meets the requirements of paragraph (1)*."[323] Read together, we find that these provisions dictate that a state commission must designate a common carrier as an eligible carrier if it determines that the carrier has met the requirements of section 214(e)(1).

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[317] *See* Recommended Decision, 12 FCC Rcd at 169. *Accord* Ameritech comments at 8; California PUC comments at 9; CNMI comments at 39; CompTel comments at 13; GCI comments at 4; Maryland PSC at 8-9; Sprint comments at 20; Texas PUC comments at 5; TCA comments at 3; WorldCom comments at 14; AT&T reply comments at 13-14; CPI reply comments at 12. Section 254(e) does not govern the ability of carriers to receive funds distributed pursuant to section 254(h)(1)(B). *See* 47 U.S.C. § 254(h)(1)(B)(ii). We address eligibility for support for services provided to schools and libraries *infra* in section X.B.2.b.

[318] We note that a carrier that currently is unable to provide single-party service, access to enhanced 911 service, or toll-limitation services may petition its state commission to receive universal service support for a designated period of time until the carrier has completed the network upgrades necessary to offer these services. *See supra* section IV and *infra* section VIII.

[319] 47 U.S.C. § 214(e); Recommended Decision, 12 FCC Rcd at 169-70.

[320] *Accord* CompTel comments at 13; WorldCom comments at 14; AT&T reply comments at 14; GCI reply comments at 2.

[321] Recommended Decision, 12 FCC Rcd at 171 (emphasis added).

[322] 47 U.S.C. § 214(e)(2) (emphasis added).

[323] 47 U.S.C. § 214(e)(2) (emphasis added).

Consistent with the Joint Board's finding, the 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.[324] The statute does not permit this Commission or a state commission to supplement the section 214(e)(1) criteria that govern a carrier's eligibility to receive federal universal service support.

136. In addition, state discretion is further limited by section 253: a state's refusal to designate an additional eligible carrier on grounds other than the criteria in section 214(e) could "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service"[325] and may not be "necessary to preserve universal service."[326] Accordingly, we conclude that section 253 also precludes states from imposing additional prerequisites for designation as an eligible telecommunications carrier.[327] Although section 214(e) precludes states from imposing additional eligibility criteria, it does not preclude states from imposing requirements on carriers within their jurisdictions, if these requirements are unrelated to a carrier's eligibility to receive federal universal service support and are otherwise consistent with federal statutory requirements.[328] Further, section 214(e) does not prohibit a state from establishing criteria for designation of eligible carriers in connection with the operation of that state's universal service mechanism, consistent with section 254(f).[329]

137. Consistent with the findings we make above, we disagree with GTE's assertion that the use of the phrases "a carrier that receives such support" and "any such support . . ." instead of the phrase "such eligible carrier" in section 254(e) indicates that Congress intended to

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[324] Recommended Decision, 12 FCC Rcd at 171-72. Before designating an additional eligible carrier for an area served by a rural telephone company, a state commission must find that the designation "is in the public interest." 47 U.S.C. § 214(e)(2).

[325] 47 U.S.C. § 253(a).

[326] 47 U.S.C. § 253(b).

[327] *See* California PUC comments at 9-10 (stating that it has already imposed carrier of last resort (COLR) obligations upon eligible carriers). *See also infra* this section for our discussion concluding that COLR regulation is unnecessary in light of the requirements of section 214(e).

[328] *See, e.g.,* 47 U.S.C. § 253(b).

[329] State adoption of a second set of eligibility criteria for a state universal service mechanism would have no effect upon the statutory eligibility criteria for the federal universal service mechanisms. Section 254(f) provides that: "A State may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms." 47 U.S.C. § 254(f).

require carriers to meet criteria in addition to the eligibility criteria in section 214(e).[330] We conclude that the quoted language indicates only that a carrier is not entitled automatically to receive universal service support once designated as an eligible telecommunications carrier. For example, 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. Indeed, the language of section 254(e), which states that "only an eligible telecommunications carrier designated under section 214(e) shall be *eligible* to receive" universal service support, suggests that a carrier is not automatically entitled to receive universal service support once designated as eligible.[331] The language of section 254(e) does not imply, however, that the Commission or the states may expand upon the criteria for being designated as an eligible carrier.

138. We further reject GTE's contention that our interpretation would convert section 214(e) into an entitlement and would allow an eligible carrier to receive universal service support "regardless of whether the [eligible carrier] abides by the federal funding mechanism, and regardless of whether the [eligible carrier] makes any real contribution to preserving and advancing universal service."[332] We disagree with GTE to the extent that it suggests that a carrier, once designated as an eligible carrier, is not required to continue to comply with federal universal service requirements.[333] As discussed immediately above, a carrier's continuing status as an eligible carrier is contingent upon continued compliance with the requirements of section 214(e) and only an eligible carrier that succeeds in attracting and/or maintaining a customer base to whom it provides universal service will receive universal service support. Moreover, contrary to the suggestion of GTE, an eligible carrier is "preserving and advancing universal service"[334] by providing each of the core services designated for support to low-income consumers or in rural, insular, or high cost areas,[335] and by offering those services in accordance with the specific

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[330] *See* GTE reply comments at 8. Section 254(e) provides, in relevant part: "A carrier that receives such support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended. Any such support should be explicit and sufficient to achieve the purposes of this section."

[331] 47 U.S.C. § 254(e) (emphasis added).

[332] GTE reply comments at 6-9 (*citing* 47 U.S.C. § 254(i), which states that the Commission and the states should ensure that universal service is available at rates that are just, reasonable, and affordable). *See infra* section VII.C. for a description of GTE's competitive bidding proposal.

[333] GTE reply comments at 7 (suggesting that designation as eligible carrier would be converted into entitlement granted regardless of whether eligible carrier abides by federal funding mechanism or makes contributions to preserving and advancing universal service).

[334] GTE reply comments at 7.

[335] The core services are defined *supra* in section IV.

eligibility criteria contained in section 214(e).

139. Additionally, we are not persuaded by GTE's argument that our interpretation of section 214(e) precludes adoption of its proposed competitive bidding mechanism and, therefore, violates the Commission's duty to consider this proposal fully.[336] First, the authority cited by GTE does not compel us to consider a proposal that is incompatible with the statute.[337] Second, as we explain below,[338] we find that we may be able to craft a competitive bidding mechanism that is compatible with the statute, including section 214(e), and we intend, consistent with the Joint Board's recommendation and as suggested by GTE, to continue to explore this option further.[339]

140. GTE contends that, even if the Commission may not add eligibility criteria, the Commission may nonetheless impose additional obligations on eligible carriers by conditioning the acceptance of federal universal service support upon compliance with particular obligations, as the Commission now does in the Lifeline Assistance program.[340] Moreover, GTE asserts that several recommendations of the Joint Board imply that the Joint Board believed that the Commission and the states have authority to impose additional eligibility criteria. For example, GTE cites as support for this view the Joint Board's recommendation that the Commission rely on service quality data collected by states to ensure that the first universal service principle -- that "quality services" be available -- is realized.[341] We reject GTE's argument because it appears to seek the imposition of additional eligibility criteria by recharacterizing the criteria as "conditions." Moreover, its reference to our existing Lifeline Assistance program is not relevant for purposes of construing section 214(e). The Commission created the existing Lifeline Assistance program in 1985 pursuant to its authority in sections 1, 4(i), 201, and 205. None of

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[336] GTE reply comments at 11-13 n.22 (*citing* Commission's duty to consider fully all reasonable alternatives in *Brookings Mun. Tel. v. FCC*, 822 F.2d 1153, 1169 (D.C. Cir. 1987)).

[337] *Brookings Mun. Tel. v. FCC*, 822 F.2d at 1169 (D.C. Cir. 1987) ("[A]n agency has a duty to consider responsible alternatives to its chosen policy and to give a reasoned explanation for its rejection of such alternatives. Of course, . . . the duty extends only to significant and *viable* alternatives. . . .") (citations omitted) (emphasis added).

[338] *See infra* section VII.E.

[339] Recommended Decision, 12 FCC Rcd at 265-66; GTE reply comments at 43-46 (urging the Commission to issue a further notice of proposed rulemaking to "build upon the existing public record and create a sufficient record on the specifics of a workable auction mechanism").

[340] *See* GTE reply comments at 10.

[341] GTE reply comments at 10-11 (*citing* Recommended Decision, 12 FCC Rcd at 140). The first universal service principle is contained in section 254(b)(1), which states that "[q]uality services should be available at just, reasonable, and affordable rates." 47 U.S.C. § 254(b)(1).

these provisions provide specific guidance on the interpretation of section 214(e).[342] In addition, contrary to GTE's suggestion, the Joint Board's consideration of whether to impose service quality standards did not reference the possibility of adopting additional criteria under section 214(e).[343] Rather, the Joint Board relied on the first universal service principle in section 254(b)(1) when it considered the Commission's authority to incorporate minimum service standards into the definitions of services designated for support pursuant to section 254(c)(1).[344]

141. The terms of section 214(e) do not allow us to alter an eligible carrier's duty to serve an entire service area. Consequently, we cannot, as WinStar requests, modify the requirements of section 214(e) for carriers whose technology limits their ability to provide service throughout a state-defined service area.[345] We note, however, that any carrier may, for example, use resale to supplement its facilities-based offerings in any given service area.[346]

142. Additional Obligations as a Condition of Eligibility. Several commenters maintain that, in order to create an equitable and sustainable federal universal service system and to prevent competitive carriers from attracting only those customers that order the most profitable services, the Commission must subject all eligible carriers to the regulatory requirements that govern ILECs, including pricing, marketing, service provisioning, and service quality requirements, as well as carrier of last resort (COLR) obligations.[347] We reject proposals to impose these additional obligations as a condition of being designated an eligible telecommunications carrier pursuant to section 214(e) because section 214(e) does not grant the

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[342] We note that we are changing the Lifeline Assistance program in this Order pursuant to section 254 and sections 1, 4(i), 201, and 205. In doing so, however, we are designating a bundle of services for universal service support that are collectively referred to as Lifeline service. Thus, provision of Lifeline service is not an additional obligation of eligible carriers, but instead is a supported service that must be provided by eligible carriers. *See infra* section VIII.

[343] *See* Recommended Decision, 12 FCC Rcd at 140-41.

[344] *See* Recommended Decision, 12 FCC Rcd at 140-41. We note that the Joint Board declined to recommend that the Commission exercise its authority under section 254(b)(1) and (c)(1) to impose additional service quality standards. *See supra* section IV.E.

[345] WinStar comments at 12-13 (stating that its 39 GHz technology allows it to offer service only to customers within line-of-sight of its facilities).

[346] Section 214(e) expressly allows an eligible telecommunications carrier to offer service using a "combination of its own facilities and resale of another carrier's services . . ." 47 U.S.C. § 214(e)(1).

[347] *See, e.g.*, Ameritech comments at 8; Ameritech comments, app. A at 37-42; Cincinnati Bell comments at 7-8; Evans Tel. Co. comments at 12-13; GTE comments at 50; Roseville Tel. Co. comments at 16; SBC comments at 19-20; USTA comments at 23-24; CWA reply comments at 9-10; USTA reply comments at 14. In addition, SBC and USTA argue that, irrespective of the obligations of ILECs, all eligible carriers should assume quality of service obligations. *See* SBC comments at 20; USTA at 23 (*citing* 47 U.S.C. § 254(b)(1)).

Commission authority to impose additional eligibility criteria.

143. We emphasize that, even if we had the legal authority to impose additional obligations as a condition of being designated an eligible telecommunications carrier, we agree with the Joint Board that these additional criteria are unnecessary to protect against unreasonable practices by other carriers.[348] As the Joint Board explained, section 214(e) prevents eligible carriers from attracting only the most desirable customers by limiting eligibility to common carriers[349] and by requiring eligible carriers to offer the supported services and advertise the availability of these services "throughout the service area."[350] For this reason, we reject GTE's suggestion that we require carriers to offer the services designated for support on an unbundled basis.[351] Similarly, we agree with the Joint Board's analysis and conclusion that exit barriers comparable to those imposed on ILECs are unnecessary because section 214(e)(4) already imposes exit barriers similar to the protections imposed by traditional state COLR regulation.[352] We conclude that additional exit barriers are not only incompatible with the requirements of section 214(e)(1), but also that they are not warranted: parties have neither demonstrated that the exit barriers set forth in section 214(e)(4) are significantly different from the restrictions contained in traditional state COLR requirements,[353] nor have they demonstrated that the section

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[348] Recommended Decision, 12 FCC Rcd at 170-71. We note that, in the *Local Competition Order*, we concluded that states may not unilaterally impose on non-ILECs the additional obligations imposed on ILECs by section 251(c). *Local Competition Order*, 11 FCC Rcd at 16,109-10. We stated that we did not anticipate imposing such additional obligations on a non-ILEC absent a clear and convincing showing that the non-ILEC occupies a position in the telephone exchange market comparable to the position held by an ILEC, that the non-ILEC has substantially replaced an ILEC, and that such treatment would serve the public interest, convenience, and necessity and the purposes of section 251. *Local Competition Order*, 11 FCC Rcd at 16,109-10.

[349] The Communications Act requires common carriers to furnish "communications service upon reasonable request therefore," 47 U.S.C. § 201(a), and states that "[i]t shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services . . . ." 47 U.S.C. § 202(a).

[350] 47 U.S.C. § 214(e)(1).

[351] GTE comments at 16, 49-50.

[352] Recommended Decision, 12 FCC Rcd at 171. Pursuant to section 214(e)(4) of the Act, an eligible carrier seeking to exit a service area served by more than one eligible carrier must notify the relevant state commission of that carrier's intent to relinquish its designation as an eligible carrier. The Act then requires the state commission, before permitting the carrier to cease providing service, to ensure that the remaining carriers will serve the relinquishing carrier's customers. The state commission must also require notice sufficient to permit any remaining eligible carrier to purchase or construct adequate facilities. 47 U.S.C. § 214(e)(4).

[353] *See, e.g.*, New Mexico Stat. Ann. § 63-9A-6.2 ("any telecommunications company which has a certificate of public convenience and necessity permitting it to provide message telecommunications service . . . shall not be allowed to terminate or withdraw from providing message telecommunications service . . . without an order of the

214(e) requirements are insufficient to protect subscribers. Moreover, we are reluctant to impose additional exit barriers or other additional requirements on carriers seeking to offer local service based on our finding that such additional requirements would raise potential competitors' expected costs of entry and thus discourage competition. Finally, for the reasons stated above, we reject other suggestions that we impose additional criteria for designation as an eligible telecommunications carrier because the proponents of these suggestions have presented insufficiently persuasive justifications for their inclusion.[354]

144. We further conclude that adopting the eligibility criteria imposed by the statute without elaboration is consistent with the Joint Board's recommended principle of competitive neutrality because, once the forward-looking and more precisely targeted high cost methodology is in place, all carriers will receive comparable support for performing comparable functions. Several ILECs assert that the Joint Board's recommendation not to impose additional criteria is in conflict with its recommended principle of competitive neutrality because some carriers, such as those subject to COLR obligations or service quality regulation, perform more burdensome and costly functions than other carriers that are eligible for the same amount of compensation.[355] The statute itself, however, imposes obligations on ILECs that are greater than those imposed on other carriers,[356] yet section 254 does not limit eligible telecommunications carrier designation only to those carriers that assume the responsibilities of ILECs. We find that the Joint Board correctly concluded that the imposition of additional eligibility criteria would "chill competitive entry into high cost areas."[357] We agree with the Joint Board's finding and conclude that the imposition of additional criteria, to the extent that they would preclude some carriers from being designated eligible pursuant to section 214(e), would violate the principle of competitive neutrality.

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commission upon a finding there is another telecommunications company in place capable of providing service without interruption.").

[354] *See* MFS comments at 7 (suggesting that Commission require eligible carriers to adhere to technical standards that Rural Utility Service imposes upon its borrowers); Ohio PUC reply comments at 3-4 (suggesting that, as condition of eligibility, Commission require non-rural carriers to provide interconnection under section 251(c)(2), unbundled network elements under section 251(c)(3), and wholesale services under section 251(c)(4)); CWA reply comments at 8 (suggesting that Commission foreclose carriers that violate National Labor Relations Act from receiving universal service support for twelve-month period following National Labor Relations Board decision of labor-law violation). *See also supra* our discussion in section IV regarding the merits of MFS's suggestion.

[355] Ameritech comments at 7-8, 9; GTE comments at 13-14, 48; SBC comments at 22; CWA reply comments at 10; GTE reply comments at 17.

[356] *Compare* 47 U.S.C. § 251(c) (imposing duties on incumbent local exchange carriers only) *with* 47 U.S.C. § 251(a), (b) (imposing duties on all telecommunications carriers and all local exchange carriers).

[357] Recommended Decision, 12 FCC Rcd at 170.

145. Treatment of Particular Classes of Carriers. We agree with the Joint Board's analysis and recommendation that any telecommunications carrier using any technology, including wireless technology, is eligible to receive universal service support if it meets the criteria under section 214(e)(1).[358] We agree with the Joint Board that any wholesale exclusion of a class of carriers by the Commission would be inconsistent with the language of the statute and the pro-competitive goals of the 1996 Act.[359] The treatment granted to certain wireless carriers under section 332(c)(3)(A) does not allow states to deny wireless carriers eligible status.[360] We also agree with the Joint Board that non-ILECs and carriers subject to price cap regulation should be eligible for support.[361] We agree with the Joint Board that price cap regulation is an important tool for smoothing the transition to competition and that its use should not foreclose price cap companies from receiving universal service support.[362] We find that requiring price cap carriers to cover their costs of providing universal service through internal cross-subsidies, as Time Warner suggests, would violate the statutory directive that support for universal service be "explicit."[363] Consequently, in our decision here and in the *Access Charge Reform Order*, we adopt a plan to eliminate implicit subsidies as we identify and make explicit universal service support.[364] Because we have determined that we will not exclude price cap companies from eligibility, we agree with the Joint Board that we need not delineate the difference between price cap carriers and other carriers, as proposed in the Further Comment Public Notice.[365]

146. We do not adopt, at this time, a rule stating that a wireless carrier may receive support only if the wireless carrier is a customer's primary carrier and the customer pays

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[358] *See* Recommended Decision, 12 FCC Rcd at 170 (stating that eligibility is not limited to a specific use of technology). *Accord* Vanguard comments at 2; Centennial reply comments at 13; Motorola reply comments at 16-17.

[359] Recommended Decision, 12 FCC Rcd at 169-70.

[360] *See* Centennial reply comments at 13; Recommended Decision, 12 FCC Rcd at 171-72.

[361] Recommended Decision, 12 FCC Rcd at 171-72.

[362] Recommended Decision, 12 FCC Rcd at 172.

[363] 47 U.S.C. § 254(e).

[364] *Access Charge Reform Order* at section IV.A.

[365] Recommended Decision, 12 FCC Rcd at 172. *See also* Further Comment Public Notice at 5 (seeking comment on the definition of price cap carriers).

unsubsidized rates for its wireline service, as suggested by NYNEX.[366] In addition, in light of our decision above that, under the modified existing high cost mechanism all business and residential connections will be supported, we conclude that such a rule is not necessary at this time.[367] We also note that, to the extent that NYNEX's proposal is designed to prevent wireless carriers from receiving support for customers that they do not serve, such a rule is unnecessary because federal laws against fraud already prohibit wireless carriers, or any other carriers, from receiving universal service support for customers that they do not serve.[368]

147. We note that not all carriers are subject to the jurisdiction of a state commission.[369] Nothing in section 214(e)(1), however, requires that a carrier be subject to the jurisdiction of a state commission in order to be designated an eligible telecommunications carrier. Thus tribal telephone companies, CMRS providers, and other carriers not subject to the full panoply of state regulation may still be designated as eligible telecommunications carriers.

148. Advertising. We agree with the Joint Board's analysis and recommendation that we not adopt, at this time, nationwide standards to interpret the requirement of section 214(e)(1)(B) that eligible carriers advertise, throughout their service areas, the availability of, and charges for, the supported services using media of general distribution.[370] We agree with the Joint Board that, in the first instance, states should establish any guidelines needed to govern such advertising.[371] We agree with the Joint Board that the states, as a corollary to their obligation to designate eligible telecommunications carriers, are in a better position to monitor the effectiveness of carriers' advertising throughout their service areas. We also agree with the Joint Board that competition will help ensure that carriers inform potential customers of the

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[366] *See* NYNEX comments at 5-6 (asserting that, because there is no dedicated loop for wireless service, wireless carrier could claim it was providing universal service to customer even if customer did not use, or own, mobile phone); CWA reply comments at 10-11.

[367] *See supra* section IV and *infra* section VII.

[368] *See, e.g.*, 18 U.S.C. § 1001 (imposing criminal penalties for, *inter alia*, making fraudulent statements to any agency of the United States); 47 U.S.C. § 502 (establishing conditions under which fines for violation of Communications Act generally are allowed), 47 U.S.C. § 503(b) (establishing conditions under which forfeiture penalties for violation of Act or Commission rules generally are allowed). *Accord* PCIA reply comments at 32.

[369] *See* letter from L. Marie Guillory, Regulatory Counsel, NTCA to William F. Caton, Secretary, FCC (May 7, 1997) (describing meeting on April 16, 1997).

[370] Recommended Decision, 12 FCC Rcd at 174-75. *See* NPRM at para. 46 (seeking comment on whether Commission should adopt guidelines defining steps sufficient to meet section 214(e)(1)'s advertising requirement).

[371] Recommended Decision, 12 FCC Rcd at 174-75.

services they offer.[372] Although we decline to adopt nationwide standards for interpreting section 214(e)(1)(B), we encourage states, as they determine whether to establish guidelines pursuant to that section, to consider the suggestion of Roseville Tel. Co. that the section 214(e)(1)(B) requirement that carriers advertise in "media of general distribution" is not satisfied by placing advertisements in business publications alone, but instead compels carriers to advertise in publications targeted to the general residential market.[373] In response to the comments of CPI, we conclude that no further regulations are necessary to define the term "throughout."[374] The dictionary definition -- "in or through all parts; everywhere" -- requires no further clarification.[375]

149. Relinquishment of Eligible Carrier Designation. We conclude that no additional measures are needed to implement section 214(e)(4), the provision that reserves to the states the authority to act upon an eligible carriers's request to relinquish its designation as an eligible carrier.[376] We note that we received no recommendation from the Joint Board with respect to this issue and that no commenter responded to the question asked in the Commission's NPRM that invited commenters to identify Commission regulations that are inconsistent with section 214(e)(4).[377]

b. Section 214(e)(1) Facilities Requirement

150. Section 214(e)(1) requires that, in order to be eligible for universal service support, a common carrier must offer the services supported by federal universal service support mechanisms throughout a service area "*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).*"[378] In interpreting the facilities requirement, we first address the meaning of the term "facilities" and then address the meaning of the phrase "own facilities."

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[372] Recommended Decision, 12 FCC Rcd at 174-75.

[373] *See* Roseville Tel. Co. comments at 16.

[374] CPI reply comments at 13 n.24.

[375] *See, e.g.,* WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY (1984).

[376] *See* 47 U.S.C. § 214(e)(4).

[377] NPRM at para. 49. *See also, e.g.,* 47 C.F.R. § 63.60-.100.

[378] 47 U.S.C. § 214(e)(1)(A) (emphasis added). Hereinafter we will refer to this requirement as the "section 214(e) facilities requirement."

151. Defining the Term "Facilities" in Section 214(e)(1). We note that the Joint Board made no recommendation regarding the type of facilities a carrier must provide to satisfy the facilities requirement of section 214(e)(1).[379] We interpret the term "facilities," for purposes of section 214(e), to mean any physical components of the telecommunications network that are used in the transmission or routing of the services designated for support under section 254(c)(1).[380] As discussed immediately below, we conclude that this interpretation strikes a reasonable balance between adopting a more expansive definition of "facilities," which would undermine the Joint Board's recommendation to exclude resellers from eligible status, and adopting a more restrictive definition of "facilities," which we fear would thwart competitive entry into high cost areas.

152. We adopt this definition of "facilities," in part, to remain consistent with the Joint Board's recommendation that "a carrier that offers universal service solely through reselling another carrier's universal service package" should not be eligible to receive universal service support.[381] We reject the suggestion of some commenters that we adopt a more expansive definition of facilities, based on our conclusion that such an interpretation would render meaningless the facilities requirement of section 214(e) by permitting any carrier, including a "pure" reseller, to meet the definition.[382] By encompassing only physical components of the telecommunications network that are used to transmit or route the supported services, this definition, in effect, excludes from eligibility a "pure" reseller that claims to satisfy the facilities requirement by providing its own billing office or some other facility that is not a "physical component" of the network, as defined in this Order.[383] We find that our determination to define "facilities" in this manner is consistent with congressional intent to require that at least some portion of the supported services offered by an eligible carrier be services that are not offered through "resale of another carrier's services."[384] For these reasons, we reject EXCEL's suggestion that a carrier that establishes a billing office would meet the definition of "facilities" for purposes of section 214(e).[385]

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[379] *Compare, e.g.,* Cathey, Hutton comments at 7 (asserting that "facilities" should be defined as loop *and* switching facilities only) *with* EXCEL comments at 9 (asserting that billing offices should qualify as "facilities").

[380] For example, we would include within this definition: local loops, switches, transmission systems, and network control systems.

[381] Recommended Decision, 12 FCC Rcd at 173.

[382] *See, e.g.,* MFS reply comments at 13 n.32 (suggesting "*de minimis*" use of facilities would satisfy section 214(e)).

[383] *See, e.g.,* EXCEL comments at 9 (asserting that billing offices should qualify as "facilities").

[384] 47 U.S.C. § 214(e)(1)(A).

[385] *See* EXCEL comments at 9.

153. We also decline to adopt a more restrictive definition of the term "facilities," as some commenters suggest.[386] For example, we reject the suggestion that we define "facilities" as both loop *and* switching facilities based on our concern that such a restrictive definition would erect substantial entry barriers for potential competitors seeking to enter local markets and, therefore, would unduly restrict the class of carriers that may be designated as eligible telecommunications carriers.[387] Rather, we conclude that the definition of "facilities" that we adopt will serve the goals of universal service and competitive neutrality to the extent that it does not dictate the specific facilities that a carrier must provide or, by implication, the entry strategy a carrier must use and, therefore, will not unduly restrict the class of carriers that may be designated as eligible.

154. Whether the Use of Unbundled Network Elements Qualifies as a Carrier's "Own Facilities". We conclude that a carrier that offers any of the services designated for universal service support, either in whole or in part, over facilities that are obtained as unbundled network elements pursuant to section 251(c)(3) and that meet the definition of facilities set forth above,[388] satisfies the facilities requirement of section 214(e)(1)(A).[389]

155. In making this decision, we first look to the language of section 214(e)(1)(A), which references two classes of carriers that are eligible for support -- carriers using their "own facilities" and carriers using "a combination of [their] own facilities and resale of another carrier's services."[390] Neither the statute nor the legislative history defines the term "own" as that term appears within the phrase "own facilities" in section 214(e)(1)(A).[391] In addition, neither category in section 214(e)(1)(A) explicitly refers to unbundled network elements. Notwithstanding the lack of an express reference to unbundled network elements in section

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[386] *See, e.g.*, Cathey, Hutton comments at 7 (asserting that "facilities" should be defined as loop *and* switching facilities only).

[387] *See, e.g.*, Cathey, Hutton comments at 7.

[388] We note that, because the definition of "facilities" we adopt above differs from the statutory definition of "network element," not all unbundled network elements will meet the facilities requirement of section 214(e). *See* 47 U.S.C. § 153(29). Thus, for example, operations support systems functions (OSS) as defined in the *Local Competition Order*, would not meet the definition of "facilities" that we adopt herein. *See Local Competition Order*, 11 FCC Rcd at 15,763-68. *See also* 47 C.F.R. § 51.319(f).

[389] *Accord, e.g.*, Comptel comments at 13-14 (urging Commission to find that carriers that purchase access to unbundled network elements are eligible for universal service support). Section 251(c)(3) requires ILECs "to provide, to any requesting telecommunications carrier . . . nondiscriminatory access to network elements on an unbundled basis . . . . " 47 U.S.C. § 251(c)(3).

[390] 47 U.S.C. § 214(e)(1)(A).

[391] *See generally* 47 U.S.C. § 153; Joint Explanatory Statement at 141-42.

214(e), however, we conclude that it is unlikely that Congress intended to deny designation as eligible to a carrier that relies, even in part, on unbundled network elements to provide service, given the central role of unbundled network elements as a means of entry into local markets.[392] Because the statute is ambiguous with respect to whether a carrier providing service through the use of unbundled network elements is providing service through its "own facilities" or through the "resale of another carrier's services," we look to other sections of the Act and to legislative intent to resolve the ambiguity.

156. In so doing, we conclude that Congress did not intend to deny designation as eligible to a carrier that relies exclusively on unbundled network elements to provide service in a high cost area, given that the Act contemplates the use of unbundled network elements as one of the three primary paths of entry into local markets.[393] We have consistently held that Congress did not intend to prefer one form of local entry over another.[394] As we recognized in the *Local Competition Order*, "[t]he Act contemplates three paths of entry into the local market -- the construction of new networks, the use of unbundled elements of the incumbent's network, and resale. The 1996 Act requires us to implement rules that eliminate statutory and regulatory barriers and remove economic impediments to each."[395] In the Recommended Decision, the Joint Board explicitly stated that "[c]ompetitive neutrality" is "embodied in" section 214(e).[396] Indeed, the Joint Board recommended "that the Commission reject arguments that only those telecommunications carriers that offer universal service wholly over their own facilities should be eligible for universal service [support]."[397] Further, we agree with CompTel that the Joint Board's recommendation that a carrier may meet the eligibility criteria of section 214(e) "without regard to the technology used by that carrier" demonstrates that this interpretation is

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[392] *Local Competition Order*, 11 FCC Rcd at 15,509. If we were to determine that unbundled network elements are *neither* a carrier's "own facilities" *nor* "resale of another carrier's services," then a carrier that offers universal service by using facilities that it has constructed along with *a single unbundled network element* would be excluded from eligible status because the carrier would not be using the precise "combination" allowed under section 214(e) -- namely, a combination of "its own facilities" and "resale of another carrier's services." 47 U.S.C. § 214(e)(1). We cannot reconcile this result with the Joint Board's principle of competitive neutrality or the goals of universal service and section 254.

[393] 47 U.S.C. § 251(c)(3).

[394] *See, e.g., Local Competition Order*, 11 FCC Rcd at 15,509 ("Section 251 neither explicitly nor implicitly expresses a preference for one particular entry strategy.").

[395] *Local Competition Order*, 11 FCC Rcd at 15,509.

[396] Recommended Decision, 12 FCC Rcd at 101.

[397] Recommended Decision, 12 FCC Rcd at 173.

consistent with the Joint Board's approach.[398]

157. We conclude that the phrase "resale of another carrier's services" does not encompass the provision of service through unbundled network elements. The term "resale" used in section 251 refers to an ILEC's duty to offer, at wholesale rates, "any telecommunications service that the carrier provides at retail"[399] as well as the duty of every LEC not to prohibit "the resale of its telecommunications services."[400] Section 251 makes it clear that an ILEC's duty to offer retail services at wholesale rates is distinct from an ILEC's obligation to provide "nondiscriminatory access to network elements on an unbundled basis."[401] We find that the statute's use, in section 214(e)(1), of the term used in subsections 251(b)(1) and 251(c)(4) -- "resale" -- suggests that Congress contemplated that the provision of services via unbundled network elements was different from the "resale of another carrier's services." In addition, to interpret the phrase "resale of another carrier's *services*" to encompass the provision of a telecommunications service through use of unbundled network elements obtained from an ILEC would require the Commission to find that the provision of nondiscriminatory access to an unbundled network element by an ILEC is the provision of a "telecommunications service" -- an interpretation that is not consistent with the Act. A "network element" is defined as a "*facility* or *equipment* used in the provision of a telecommunications service" that also "includes features, functions, and capabilities that are provided by means of such facility or equipment . . . ."[402] A "network element" is not a "telecommunications service."[403]

158. We conclude that, when a requesting carrier obtains an unbundled element, such element -- if it is also a "facility" -- is the requesting carrier's "own facilit[y]" for purposes of Section 214(e)(1)(A) because the requesting carrier has the "exclusive use of that facility for a period of time."[404] The courts have recognized many times that the word "own" -- as well as its

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[398] CompTel comments at 14 (*citing* Recommended Decision, 12 FCC Rcd at 170 n.513)

[399] 47 U.S.C. § 251(c)(4).

[400] 47 U.S.C. § 251(b)(1).

[401] 47 U.S.C. § 251(c)(3), (c)(4).

[402] 47 U.S.C. § 153(29) (emphasis added).

[403] 47 U.S.C. § 153(29). Section 153(46), in defining "telecommunications service," makes a clear distinction between "service" and "facilities" -- a "telecommunications service" is "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46).

[404] *Local Competition Order*, 11 FCC Rcd at 15,635; *see also* BLACK'S LAW DICTIONARY 1106 (6th ed. 1990) ("ownership" is "a collection of rights to use and enjoy property" that may be "shared with one or more persons when the time of enjoyment is deferred or limited or when the use is restricted").

numerous derivations -- is a "generic term" that "varies in its significance according to its use" and "designate[s] a great variety of interests in property."[405] The word "ownership" is said to "var[y] in its significance according to the context and the subject matter with which it is used."[406] The word "owner" is a broad and flexible word, applying not only to legal title holders, but to others enjoying the beneficial use of property.[407] Indeed, property may have more than one "owner" at the same time, and such "ownership" does not merely involve title interest to that property.[408]

159. Additionally, we note that section 214(e)(1) uses the term "own facilities" and does not refer to facilities "owned by" a carrier. We conclude that this distinction is salient based on our finding that, unlike the term "owned by," the term "own facilities" reasonably could refer to property that a carrier considers its own, such as unbundled network elements, but to which the carrier does not hold absolute title.

160. In the context of section 214(e)(1)(A), unbundled network elements are the requesting carrier's "own facilities" in that the carrier has obtained the "exclusive use" of the facility for its own use in providing services, and has paid the full cost of the facility, including a reasonable profit, to the ILEC.[409] The opportunity to purchase access to unbundled network elements, as we explained in the *Local Competition Order*, provides carriers with greater control over the physical elements of the network, thus giving them opportunities to create service offerings that differ from services offered by an incumbent.[410] This contrasts with the abilities of

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[405] BLACK'S LAW DICTIONARY 1105 (6th ed. 1990); 73 C.J.S. *Property* § 24 (1972) (citing cases).

[406] 73 C.J.S. *Property* § 26 (1972), *quoted in Blumenfield v. United States*, 306 F.2d 892 (8th Cir. 1962).

[407] *See, e.g., Colley v. Carleton*, 571 S.W.2d 572 (Tex. 1978) (The term "owner," as used in section of compensation statute dealing with partial taking, includes lessee for years as well as any other person who has interest in property); *Bowen v. Metropolitan Bd. of Zoning Appeals in Marion County*, 317 N.E.2d 193, 200 (Ind. 1974) ("The only reasonable sense in which ‘owner' could be said to be used on application form for zoning variance is in the sense of owner of the right to use the property, and would include lessee under 99 year lease."); *United States v. Ninety-Nine Diamonds*, 139 F. 961, 970-971 (8th Cir. 1905), *quoting Camp v. Rogers*, 44 Conn. 291, 298 (1877) ("A person who hired a carriage for a limited time was held to have a special property interest in it, and to be the owner within the meaning of a statute which provided a remedy against one who ‘shall drive against another vehicle and injure its owner.'").

[408] 73 C.J.S. *Property* §§ 25-26 (1972); *Judd v. Landin*, 1 N.W.2d 861 (Minn. 1942); *United States v. Ninety-Nine Diamonds*, 139 F. 961 (8th Cir. 1905) ("The fact that the term ‘owner' is not limited in its signification to one who holds a perfect title to property must not be overlooked. The word has other meanings, and must have its appropriate signification in each case in view of the subject, object, and terms of the legislation in which it is found. Thus, there may be many joint owners of the same property, yet each would undoubtedly be an owner.").

[409] *See* 47 U.S.C. § 252(d)(1).

[410] *Local Competition Order*, 11 FCC Rcd at 15,631-32, 15,667.

wholesale purchasers, which are limited to offering the same services that an incumbent offers at retail.[411] This greater control distinguishes carriers that provide service over unbundled network elements from carriers that provide service by reselling wholesale service and leads us to conclude that, as between the two terms, carriers that provide service using unbundled network elements are better characterized as providing service over their "own facilities" as opposed to providing "resale of another carrier's services."

161. In addition, we conclude that our interpretation of the term "own facilities" is consistent with the goals of universal service and that any contrary interpretation would frustrate the goals of the Act and lead to absurd results. For example, it is appropriate for Congress to deny pure resellers universal service support because pure resellers receive the benefit of universal service support by purchasing wholesale services at a price based on the retail price of a service -- a price that already includes the universal service support payment received by the incumbent provider.[412]

162. Unlike a pure reseller, a carrier that provides service using unbundled network elements bears the full cost of providing that element, even in high cost areas. Section 252(d)(1)(A)(i) requires that the price of an unbundled network element be based on cost;[413] a carrier that purchases access to an unbundled network element incurs all of the forward-looking costs associated with that element. As discussed below, we conclude that universal service support should be provided to the carrier that incurs the costs of providing service to a customer.[414] Because a carrier that purchases access to an unbundled network element incurs the costs of providing service, it is reasonable for us to find that such a carrier should be entitled to universal service support for the elements it obtains.

163. We conclude that interpreting the term "own facilities" to include unbundled network elements is the most reasonable interpretation of the statute, given Congress's intent that all three forms of local entry must be treated in a competitively neutral manner. For example, suppose that the cost of providing service to a customer in a high cost area, on a forward-looking basis, is $50.00 per month, and suppose that the universal service support payment for serving that customer is $20.00. This would leave $30.00 for the carrier to collect from the subscriber. A carrier that builds all the facilities it uses to provide service to that customer would be entitled to the $20.00 payment and would, assuming that it bills the customer $30.00, fully recover its $50.00 per-month costs. Under the pricing rule in section 252(d)(3), a carrier that serves the same customer by reselling wholesale service would receive a discount off of the *retail* rate of

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[411] *Local Competition Order*, 11 FCC Rcd at 15,631-32, 15,667.

[412] The eligibility of resellers is discussed *infra* this section.

[413] 47 U.S.C. § 252(d)(1)(A)(i).

[414] *See infra* section VII.

$30.00.[415] For example, a reseller might receive a 20 percent discount, which would result in a wholesale price of $24.00 per month, thus allowing it to charge, depending on its costs of doing business, a retail price of $30.00. As a result, both the carrier that constructs its facilities and the carrier that serves customers through resale benefit, directly or indirectly, from the full $20.00 per-customer universal service support payment. With regard to these two methods of providing service, therefore, the universal service high cost system is "competitively neutral."

164. If the term "own facilities" is interpreted *not* to include service provided through unbundled network elements, however, a carrier providing service using unbundled network elements would suffer a substantial cost disadvantage compared with carriers using other entry strategies. Under this interpretation, a carrier providing service using unbundled network elements to the same customer would pay the ILEC the full $50.00 forward-looking monthly cost to serve that customer, yet it would be unable to collect the $20.00 per-month support payment because it would not qualify as an "eligible carrier."[416] As a result, the costs this carrier must recover from its customer would be well above the amount that a carrier serving a customer using facilities it constructed, or a carrier serving a customer using wholesale service, must recover from its customer. Such a structure would create a strong disincentive for this type of entry and is not consistent with the Joint Board's principle of "competitive neutrality." In effect, excluding a competitive local exchange carrier (CLEC) that uses exclusively unbundled network elements from being designated an eligible carrier could make it cost-prohibitive for CLECs choosing this entry strategy to serve high cost areas because ILECs serving those areas will receive universal service support. We cannot reconcile these implications with the "pro-competitive" goals of the 1996 Act and the goals of universal service and section 254. As a result, the most reasonable interpretation of section 214(e)(1)(A) is that the phrase "own facilities" includes the provision of service through unbundled network elements, and that a carrier, as described above, that uses exclusively unbundled network elements to serve customers would be entitled to receive the $20.00 support payment, subject to the cap that we describe below,[417] that would allow it to compete with carriers utilizing other entry strategies.

165. To hold otherwise would threaten the central principles of the universal service

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[415] 47 U.S.C. § 252(d)(3) (requiring wholesale rates to be based on retail rates excluding avoided costs).

[416] For example, if we were to conclude that unbundled network elements were not included within the term "own facilities," a cable operator that provides universal service through a mixture of unbundled network elements (such as switching capabilities) and cable lines that it constructed and maintains would not be an eligible carrier because it would not, in this situation, resell "another carrier's services."

[417] We conclude below that a CLEC serving a customer in a high cost area exclusively through the use of unbundled network elements will receive the lesser of the total amount of support given to the ILEC or the price of the unbundled network elements to which it obtains access. We also conclude that the ILEC will receive the difference between the unbundled network element price and the support amount. *See infra* section VII; *see also infra* further discussion this section.

system and the 1996 Act. In the *Local Competition Order*, we explicitly stated that, in enacting section 251(c)(3), Congress did not intend to restrict the entry of CLECs that use exclusively unbundled network elements.[418] Indeed, entry by exclusive use of unbundled elements might be common in high cost areas -- for example, a carrier considering providing service to a single high-volume customer or only to a portion of a high cost area might be encouraged to offer service using unbundled elements throughout an entire service area if it could compete with the incumbent and other entrants that may already be receiving a payment from the universal service fund.

166. If we interpreted the term "own facilities" not to include the use of unbundled network elements, the end result would be that the entry strategy that includes the exclusive use of unbundled network elements would be the *only* form of entry that would not benefit from, either directly or indirectly, universal service support. A carrier that has constructed all of its facilities would certainly be eligible for support under section 214(e)(1), as would an entrant that offers service through a mix of facilities that it had constructed and resold services. A pure reseller indirectly receives the benefit of the support payment, because, as discussed above, the retail rate of the resold service already incorporates the support paid to the underlying incumbent carrier. Such an environment -- in which some forms of entry are eligible for support but one form of entry is not -- is not "competitively neutral."[419] In addition, this outcome would create an artificial disincentive for carriers using unbundled elements to enter into high cost areas. Thus, a carrier may be discouraged from offering the supported services throughout a service area via unbundled elements *solely* because support may be available to its competitors and not to itself. By effectively precluding this form of entry and its attendant benefits, consumers in high cost areas would be denied the fullest range of telecommunications services that Congress sought to bring "to all regions of the Nation."[420]

167. Several commenters urge us to adopt an interpretation of the term "own facilities" that would exclude the use of unbundled network elements.[421] These commenters assert that, in light of the Joint Board's recommendation that support be "portable," a narrow interpretation of

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[418] *Local Competition Order*, 11 FCC Rcd at 15,666-67 (Congress did not intend to limit this form of entry by imposing a facilities-ownership requirement in conjunction with section 251(c)(3) because it "would seriously inhibit the ability of potential competitors to enter local markets through the use of unbundled elements, and thus would retard the development to local exchange competition.").

[419] If we were to determine that unbundled network elements are "resale of another carrier's services," then a carrier that offers universal service exclusively through the use of unbundled network elements would be excluded from eligible status because section 214(e) requires an eligible carrier to provide service, at least in part, over its own facilities. 47 U.S.C. § 214(e).

[420] 47 U.S.C. § 254(b)(3).

[421] *See, e.g.*, Lufkin-Conroe reply comments at 15-16.

the section 214(e) facilities requirement is necessary to ensure that ILECs receive adequate funds to construct, maintain, and upgrade their telecommunications networks.[422] We are not persuaded by these arguments because we find that the pricing rule in section 252(d)(1) that applies to unbundled network elements assures that the costs associated with the construction, maintenance, and repair of an incumbent's facilities, including a reasonable profit, would already be recovered through the payments made by the carrier purchasing access to unbundled network elements.[423] The carrier purchasing access to those elements will, in turn, receive a universal service support payment.[424] To the extent that these commenters' arguments are premised on their contention that unbundled network element prices do not compensate ILECs for their embedded costs, and that ILECs are constitutionally entitled to recovery of their embedded costs, we will address that issue in a later proceeding in our *Access Charge Reform* docket.[425]

168. Although the states have the ultimate responsibility under section 214(e) for deciding whether a particular carrier should be designated as eligible, we are fully authorized to interpret the statutory provisions that govern that determination. This language appears in a federal statute, establishing a federal universal service program. It is clearly appropriate for a federal agency to interpret the federal statute that it has been entrusted with implementing. Moreover, we believe it is particularly important for us to set out a federal interpretation of the "own facilities" language in section 214, particularly as it relates to the use of unbundled network elements. We note that the "own facilities" language in section 214(e)(1)(A) is very similar to language in section 271(c)(1)(A), governing Bell operating company (BOC) entry into interLATA services.[426] While we are not interpreting the language in section 271 in this Order, given the similarity of the language in these two sections, we would find it particularly troubling to allow the states unfettered discretion in interpreting and applying the "own facilities" language in section 214(e). In order to avoid the potential for conflicting interpretations from different states, we believe it is important to set forth a single, federal interpretation, so that the "own facilities" language is consistently construed and applied.

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[422] SBC comments at 21 (*citing* Recommended Decision, 12 FCC Rcd at 238); Lufkin-Conroe reply comments at 15-16.

[423] *See* 47 U.S.C. § 252(d)(1) (requiring, *inter alia*, that rates for unbundled network elements be based on cost and reasonable profit).

[424] *See infra* section VII where we conclude that providers who provide serving using exclusively unbundled network elements may not receive universal service support in excess of the cost to them of those elements.

[425] *Access Charge Reform Order* at section I.

[426] *Compare* section 214(e)(1)(A), "using its *own facilities or a combination of its own facilities and resale* of another carrier's services" *with* section 271(c)(1)(A), "telephone service may be offered . . . either exclusively over their *own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale* of the telecommunications services of another carrier." 47 U.S.C. §§ 214(e)(1)(A), 271(c)(1)(A) (emphasis added).

169. Level of Facilities Required to Satisfy the Facilities Requirement. We adopt the Joint Board's analysis and conclusion that a carrier need not offer universal service *wholly* over its own facilities in order to be designated as eligible because the statute allows an eligible carrier to offer the supported services through a combination of its own facilities and resale.[427] Although the Joint Board did not reach this issue, we find that the statute does not dictate that a carrier use a specific level of its "own facilities" in providing the services designated for universal service support given that the statute provides only that a carrier may use a "combination of its own facilities and resale" and does not qualify the term "own facilities" with respect to the amount of facilities a carrier must use. For the same reasons, we find that the statute does not require a carrier to use its own facilities to provide each of the designated services but, instead, permits a carrier to use its own facilities to provide at least one of the supported services.[428] By including carriers relying on a combination of facilities and resale within the class of carriers eligible to receive universal service support, and by declining to specify the level of facilities required, we believe that Congress sought to accommodate the various entry strategies of common carriers seeking to compete in high cost areas. We conclude, therefore, that, if a carrier uses its own facilities to provide at least one of the designated services, and the carrier otherwise meets the definition of "facilities" adopted above, then the facilities requirement of section 214(e) is satisfied. For example, we conclude that a carrier could satisfy the facilities requirement by using its own facilities to provide access to operator services, while providing the remaining services designated for support through resale.

170. In arriving at this conclusion, we compare Congress's use of qualifying language in the section 271(c)(1)(A) facilities requirement with the absence of such language in the section 214(e) requirement. Section 271(c)(1)(A) provides that a BOC that is seeking authorization to originate in-region, interLATA services must, *inter alia*, enter into interconnection agreements with competitors that offer "telephone exchange service either exclusively over their own facilities or *predominantly* over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier."[429] By contrast, section 214(e) does not mandate the use of any particular level of a carrier's own facilities.[430]

171. Several ILECs assert that eligible carriers that furnish only a *de minimis* level of facilities should not be entitled to receive universal service support.[431] ILECs are concerned that,

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[427] Recommended Decision, 12 FCC Rcd at 173.

[428] *See* EXCEL comments at 8.

[429] 47 U.S.C. § 271(c)(1)(A) (emphasis added).

[430] 47 U.S.C. § 214(e)(1)(A).

[431] Lufkin-Conroe reply comments at 15-16.

unless a carrier is required to provide a substantial level of its own facilities throughout a service area, a CLEC may be able to receive a level of support in excess of its actual costs, and thereby gain a competitive advantage over ILECs.[432] For example, ILECs argue that, because the prices of unbundled network elements may be averaged over smaller geographic areas than universal service support, the cost that a competitive carrier will incur for serving a customer using unbundled network elements will not match the level of universal service support the CLEC will receive for serving that customer.[433]

172. This asymmetry could arise because of the procedures currently used to calculate the cost of serving a customer. Because it is administratively infeasible to calculate the precise cost of providing service to each customer in a service area, and because rate averaging and the absence of competition generally have allowed it, the cost of providing service has been calculated over a geographic region, such as a study area,[434] and the total cost of providing service in that area has been averaged over the number of customers in that area.[435] This average cost provides the basis for calculating universal service support in that area.[436] To illustrate, the average cost of providing service in a study area might be $50.00 per customer, but the cost of providing service might be $10.00 in urban portions of the area, $40.00 in the suburban portions, and $100.00 in outlying regions. Although the cost of providing the supported services will be calculated at the study-area level in 1998, the cost of unbundled network elements is calculated by the states, possibly over geographic areas smaller than study areas.[437] Thus, the total support given to a carrier per customer in a study area might be $20.00, but the price of purchasing access to unbundled network elements to serve a customer in that study area might be $10.00, $60.00, or $100.00, depending on where the customer is located. Consequently, a CLEC might pay $10.00 to purchase access to an unbundled network element in order to serve a customer in a

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[432] *See, e.g.*, SBC comments at 21.

[433] *See, e.g.*, NYNEX comments at 32-33.

[434] A "study area" is usually an ILEC's existing service area in a given state. The study area boundaries are fixed as of November 15, 1984. MTS and WATS Market Structure: Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, *Decision and Order*, 50 Fed. Reg. 939 (*1985 Lifeline Order*) (adopting with minor modifications the Joint Board recommendations issued in MTS and WATS Market Structure: Amendment of the Commission's Rules and Establishment of a Joint Board, *Recommended Decision and Order*, 49 Fed. Reg. 48,325 (1984)).

[435] These calculations are performed by carriers that submit this data to NECA, which, in turn, submits it to the Commission as part of its duties pursuant to part 36 of our rules. *See generally* 47 C.F.R. § 36.601 *et seq*.

[436] *See infra* section VII.B for a more detailed explanation of the calculation of high cost support.

[437] The *Local Competition Order* required states to create a minimum of three rate zones for calculating the price of unbundled network elements. *Local Competition Order*, 11 FCC Rcd at 15,882-83. This requirement is now stayed, pending review in the U. S. Court of Appeals for the Eighth Circuit. *See supra* note 7.

city, but receive $20.00 in universal service support.

173. We emphasize that the uneconomic incentives described above are largely connected with the modified existing high cost mechanism that will be in place until January 1, 1999.[438] We also conclude, based on the reasons set forth immediately below, that the situation described by the ILECs will occur, at most, infrequently during this period. We conclude that the ILECs' concerns should be significantly alleviated when the forward-looking and more precisely targeted methodology to calculate high cost support becomes effective. Specifically, in our forthcoming proceeding on the high cost support mechanism that will take effect January 1, 1999, we intend to address fully any potential dissimilarities between the level of disaggregation of universal service support and the level of disaggregation of unbundled network element prices.[439] Nevertheless, we agree with the ILECs that we should limit the ability of competitors to make decisions to enter local markets based on artificial economic incentives created under the modified existing mechanism.

174. To this end, we take the following actions to reduce the incentives that a CLEC may have to enter a rural or non-rural market in an attempt to exploit the asymmetry described above. First, we conclude that a carrier that serves customers by reselling wholesale service may not receive universal service support for those customers that it serves through resale alone.[440] In addition, we conclude below that a CLEC using exclusively unbundled network elements to provide the supported services will receive a level of universal service support not exceeding the price of the unbundled network elements to which it purchases access.[441]

175. In markets served by non-rural carriers, we conclude that the risk of the anticompetitive behavior described above is minimal because, as of January 1, 1999, universal service support for non-rural high cost carriers will be determined using a forward-looking methodology that will more precisely target support. We doubt that carriers will incur the costs necessary to meet the eligibility requirements of section 214(e) in order to exploit this opportunity when the support mechanisms will soon change. Further, the incentive for a CLEC to enter an area served by a non-rural carrier to gain an unfair advantage is diminished because the level of universal service support per customer in these areas is small relative to the start-up costs of attracting customers and the cost of providing service to those customers using

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[438] We discuss below other uneconomic incentives arising from the asymmetry between the price of unbundled network elements and the level of universal service support. *See infra* section VII.

[439] *See also infra* section VII.

[440] *See supra* this section and *infra* section VII.

[441] We further conclude *infra* that a CLEC will get the lesser of the unbundled network element price for the loop or the ILEC's per-line payment from the high cost loop support and LTS, if any. *See infra* section VII.D.1. *See also* section VII.D.2. for a discussion of portable support in areas served by rural ILECs.

unbundled network elements.[442]

176. We also expect that state commissions, in the process of making eligibility determinations, will play an important part in minimizing the risk of anticompetitive behavior as described above. Under section 214(e)(3), a state commission must make a finding that designation of more than one eligible carrier is in the public interest in a service area that is served by a rural telephone company.[443] Accordingly, under section 214(e)(3), a state commission may consider whether a competitive carrier seeking designation as an eligible carrier will be able to exploit unjustly the asymmetry between the price of unbundled network elements and the level of universal service support. Under section 251(f), rural telephone companies are not required to provide, *inter alia*, nondiscriminatory access to unbundled network elements pursuant to section 251(c)(3) until the relevant state commission determines that a bona fide request under section 251(c) for such access "is not unduly economically burdensome, is technically feasible, and is consistent with section 254 (other than subsections (b)(7) and (c)(1)(D) thereof)."[444] Thus, state commissions may also consider whether a CLEC's request for nondiscriminatory access to unbundled network elements is consistent with universal service, and will be able to take into account the arguments of ILECs to the extent that they are not addressed by the measures discussed herein.

177. Location of Facilities for Purposes of Section 214(e). Although we conclude above that the term "facilities" includes any physical components of the telecommunications network that are used in the transmission or routing of the supported services, we find that the

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[442] The total amount of explicit per-loop support for the BOCs, which provide service to over 75% of the nation's presubscribed access lines, ranges, according to our estimates, between approximately $.04 and approximately $.73 per customer. The highest level of universal service support that a CLEC could receive, according to our estimates, is $13.55, which occurs in the study area of United Telephone in Texas. In Texas, GTE receives $.28 per customer per month and SWBT receives no universal service support. This level of universal service support compares with a price range of $15.00 to $25.49 per month for each loop leased as an unbundled network element in Texas. *Arbitration Award*, Consolidated Dockets Nos. 16189, 16196, 16226, 16285, and 16290 (Public Utility Commission of Texas Nov. 7, 1996) at 40 (adopting an interim rate of $15.00 for SWBT); *Arbitration Award*, Docket Nos. 16300/16355 (Public Utility Commission of Texas Dec. 12, 1996) at 164 (adopting an interim rate of $25.49 for GTE). The amount of universal service support that a carrier receives per customer in a high cost area can be approximated by dividing a carrier's total support in a state by the number of loops the carrier has in that state. For example, BellSouth received $11,317,044.94 for 1,291,819 loops in South Carolina in 1995. This calculation yields a support level of approximately $.73 per loop per month. *See NECA Annual Filing*, Study Area Detail at 33 (1996). The $.04 rate occurs for U S West in Idaho and BellSouth in Kentucky. *Id.* at 7, 15. *See also* STATISTICS FOR COMMUNICATIONS COMMON CARRIERS, tbl. 2.3 (1995-96 ed.)

[443] *See supra* section VI.B.2.a.

[444] 47 U.S.C. § 251(f)(1)(B). *See also* 47 U.S.C. § 253(f) (allowing state commission to require telecommunications carrier to meet eligibility criteria of section 214(e) in order to be permitted to provide service in service area served by rural telephone company).

statute does not mandate that the facilities be physically located in that service area. For example, a switch located in San Antonio, Texas that is used to provide the supported services throughout the service area encompassing Dallas, Texas would be considered "facilities" for purposes of determining a carrier's eligibility to receive universal service support for the service area encompassing Dallas. We find that it is reasonable to draw a distinction between particular facilities based on the relationship of those facilities to the provision of specific services as opposed to their physical location within a service area both for reasons of promoting economic efficiency as well as competitive neutrality. Specifically, we find that, for example, allowing a carrier the flexibility to offer supported services in the service area encompassing San Antonio and in the service area encompassing Dallas through a single switch is economically efficient because it does not create artificial incentives to deploy redundant facilities when those facilities are not otherwise economically justified. In addition, we conclude that our determination not to impose restrictions based solely on the location of facilities used to provide the supported services is competitively neutral in that it will accommodate the various technologies and entry strategies that carriers may employ as they seek to compete in high cost areas.

178. Eligibility of Resellers. We adopt the Joint Board's analysis and conclusion that section 214(e)(1) precludes a carrier that offers the supported services solely through resale from being designated eligible in light of the statutory requirement that a carrier provide universal service, at least in part, over its own facilities.[445] EXCEL contends that the Joint Board's recommendation to exclude resellers is based on the flawed assumption that the meaning of the term "facilities" is commonly understood, and thus asserts that we should not adopt the Joint Board's recommendation.[446] We reject this assertion because, under any reasonable interpretation of the term "facilities," a "pure" reseller uses none of its own facilities to serve a customer. Rather, a reseller purchases *service* from a facilities owner and resells that *service* to a customer. We also are not persuaded by commenters' arguments that, unless a reseller receives support directly from federal universal service mechanisms, it will be forced to absorb higher costs incurred in providing services in high cost areas and, ultimately, to increase prices charged to customers in those areas.[447] As explained above, resellers should not be entitled to receive universal service support directly from federal universal service mechanisms because the universal service support payment received by the underlying provider of resold services is reflected in the price paid by the reseller to the underlying provider.[448]

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[445] Recommended Decision, 12 FCC Rcd at 172-73.

[446] See EXCEL comments at 7-8 (*citing* Infrastructure Sharing Provisions in the Telecommunications Act of 1996, *Notice of Proposed Rulemaking*, CC Docket 96-237, FCC 96-456 (rel. Nov. 22, 1996) which sought comment on meaning of "telecommunications facilities").

[447] EXCEL comments at 5-6, 14-15; TRA reply comments at 11.

[448] *See supra* section VI.B.2.b.

179. We conclude that no party has demonstrated that the statutory criteria for forbearance have been met[449] and therefore we agree with the Joint Board that we cannot exercise our forbearance authority to permit "pure" resellers to become eligible for universal service support, as some commenters have proposed.[450] In order to exercise our authority under section 10(a) of the Act to forbear from applying a provision of the Act, we must determine that: (1) enforcement of the provision "is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;" (2) enforcement of such provision "is not necessary for the protection of consumers;" and (3) "forbearance from applying such provision . . . is consistent with the public interest."[451] In addition, we must consider "whether forbearance . . . will promote competitive market conditions."[452] If pure resellers could be designated eligible carriers and were entitled to receive support for providing resold services, they, in essence, would receive a double recovery of universal service support because they would recover the support incorporated into the wholesale price of the resold services in addition to receiving universal service support directly from federal universal service support mechanisms. Making no finding with respect to the first two criteria, we conclude that it is neither in the public interest nor would it promote competitive market conditions to allow resellers to receive a double recovery. Indeed, allowing such a double recovery would appear to favor resellers over other carriers, which would not promote competitive market conditions. Allowing resellers a double recovery also would be inconsistent with the principle of competitive neutrality because it would provide inefficient economic signals to resellers.

180. TRA cites the Commission's decision not to impose a facilities requirement with respect to section 251(c)(3) in the *Local Competition Order* to support its contention that the Commission should forbear from the facilities requirement in section 214(e).[453] TRA specifically cites the Commission's finding that any facilities requirement the Commission could construct "would likely be so easy to meet it would ultimately be meaningless."[454] In addition to our finding that the statutory forbearance criteria have not been met, we also reject this assertion because, unlike section 251(c)(3), which does not explicitly require a carrier to own facilities in

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[449] 47 U.S.C. § 160.

[450] Recommended Decision, 12 FCC Rcd at 173. *See, e.g.*, EXCEL comments at 11-13; Telco comments at 8-10; TRA comments at 15-16. *See also* 47 U.S.C. § 160.

[451] 47 U.S.C. § 160(a).

[452] 47 U.S.C. § 160(b).

[453] TRA comments at 12 (*citing Local Competition Order*, 11 FCC Rcd at 15,670).

[454] TRA comments at 12 (*citing Local Competition Order*, 11 FCC Rcd at 15,670).

order to obtain access to unbundled network elements, section 214(e)(1)(A) expressly mandates the use of a carrier's "own facilities" in the provision of the services designated for universal service support.[455]

c. Requirements of Section 254(e) Pertaining to Intended Uses of Universal Service Funds

181. We adopt the Joint Board's recommendation that no additional guidelines are necessary to interpret section 254(e)'s requirement that a carrier that receives universal service support shall only use that support for the facilities and services for which it is intended.[456] We agree with the Joint Board's conclusion that the optimal approach to minimizing misuse of universal service support is to adopt mechanisms that will set universal support so that it reflects the costs of providing universal service efficiently.[457] We conclude that we will adopt the Joint Board's recommended approach to minimizing the misuse of support by taking steps to implement forward-looking high cost support mechanisms and implementing the rules set forth in our accompanying *Access Charge Reform Order*.[458] We also agree with the Joint Board that competitive markets, which we anticipate will develop over time, will minimize the incentives and opportunities to misuse funds.[459] We adopt the Joint Board's recommendation that we rely upon state monitoring of the provision of supported services to ensure that universal service support is used as intended until competition develops.[460] We agree with the Joint Board and the North Dakota PSC that, if it becomes evident that federal monitoring is necessary to prevent the misuse of universal service support because states are unable to undertake such monitoring, the Commission, in cooperation with the Joint Board, will consider the need for additional action.[461] In addition, we agree with the Joint Board that no additional rules are necessary to ensure that only eligible carriers receive universal service support because a carrier must be designated as an eligible carrier by a state commission in order to receive funding.[462] Finally, as discussed below,

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[455] *Compare Local Competition Order*, 11 FCC Rcd at 15,670 (interpreting section 251(c)(3)) *with* 47 U.S.C. § 214(e) and interpretation herein.

[456] Recommended Decision, 12 FCC Rcd at 174. *See also* NPRM at para. 41 (seeking comment on this issue).

[457] Recommended Decision, 12 FCC Rcd at 174.

[458] *See infra* section VII; *Access Charge Reform Order* at section IV.A.

[459] Recommended Decision, 12 FCC Rcd at 174.

[460] Recommended Decision, 12 FCC Rcd at 174.

[461] Recommended Decision, 12 FCC Rcd at 174; North Dakota PSC comments at 2.

[462] Recommended Decision, 12 FCC Rcd at 174. We note that below we adopt a rule stating that the administrator of the universal service support mechanisms shall not disburse funds to a carrier providing service to

because the services included in the Lifeline program are supported services,[463] we note that only eligible carriers may receive universal service support for these services, as required by section 254(e).[464]

C. Definition of Service Areas

1. Background

182. Section 214(e)(5) defines the term "service area" as "a geographic area established by a State commission for the purpose of determining universal service obligations and support mechanisms."[465] For areas served by a rural telephone company,[466] section 214(e)(5) provides that the term "service area" means the rural telephone company's study area[467] "unless and until the Commission and the States, after taking into account the recommendations of a Federal-State Joint Board instituted under section 410(c), establish a different definition of service area for such company."[468]

183. The Joint Board concluded that the states have primary responsibility for designating non-rural service areas.[469] In arriving at this conclusion, the Joint Board also strongly encouraged the states to designate service areas that are not unreasonably large.[470] The Joint Board recommended that rural telephone companies' existing study areas be used as service areas for the purposes of section 214(e)(5).[471] Finally, the Joint Board found that it would be

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customers until the carrier has provided, to the administrator, a true and correct copy of the decision of a state commission designating that carrier as an eligible telecommunications carrier. *See infra* section VI.E.

[463] We have determined that Lifeline service includes the services designated for high cost support as well as toll limitation service. *See infra* section VIII.

[464] *See infra* section VIII.

[465] 47 U.S.C. § 214(e)(5).

[466] The term "rural telephone company" is defined at 47 U.S.C. § 153(37). This definition is reproduced *supra* at a note to section VI.B.1.

[467] The term "study area" is defined *supra* at a note to section VI.B.2.b.

[468] Hereinafter we refer to a service area served by a rural telephone company as a "rural service area" and all other service areas as "non-rural service areas."

[469] Recommended Decision, 12 FCC Rcd at 179.

[470] Recommended Decision, 12 FCC Rcd at 179.

[471] Recommended Decision, 12 FCC Rcd at 179.

consistent with the Act for the Commission to base the actual level of support a carrier receives on a high cost area that is a sub-unit of a state-designated service area.[472]

2. Discussion

a. Non-Rural Service Areas

184. State Adoption of Non-Rural Service Areas. We adopt the Joint Board's finding that subsections 214(e)(2) and 214(e)(5) require state commissions to designate the area throughout which a non-rural carrier must provide universal service in order to be eligible to receive universal service support.[473] We agree with the Joint Board that, although this authority is explicitly delegated to the state commissions, states should exercise this authority in a manner that promotes the pro-competitive goals of the 1996 Act as well as the universal service principles of section 254.[474] We also adopt the Joint Board's analysis and recommendation that states designate service areas that are not unreasonably large.[475] Specifically, we conclude that service areas should be sufficiently small to ensure accurate targeting of high cost support and to encourage entry by competitors.[476] We also agree with the Joint Board's determination that large service areas increase start-up costs for new entrants, which might discourage competitors from providing service throughout an area because start-up costs increase with the size of a service area and potential competitors may be discouraged from entering an area with high start-up costs.[477] As such, an unreasonably large service area effectively could prevent a potential competitor from offering the supported services, and thus would not be competitively neutral, would be inconsistent with section 254, and would not be necessary to preserve and advance universal service.

185. We agree with the Joint Board that, if a state commission adopts as a service area for its state the existing study area of a large ILEC, this action would erect significant barriers to entry insofar as study areas usually comprise most of the geographic area of a state, geographically varied terrain, and both urban and rural areas. We concur in the Joint Board's finding that a state's adoption of unreasonably large service areas might even violate several

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[472] Recommended Decision, 12 FCC Rcd at 181-82.

[473] Recommended Decision, 12 FCC Rcd at 180-81.

[474] Recommended Decision, 12 FCC Rcd at 180-81.

[475] Recommended Decision, 12 FCC Rcd at 180-82.

[476] Recommended Decision, 12 FCC Rcd at 181.

[477] Recommended Decision, 12 FCC Rcd at 181.

provisions of the Act.[478] We also agree with the Joint Board that, if a state adopts a service area that is simply structured to fit the contours of an incumbent's facilities, a new entrant, especially a CMRS-based provider, might find it difficult to conform its signal or service area to the precise contours of the incumbent's area, giving the incumbent an advantage.[479] We therefore encourage state commissions not to adopt, as service areas, the study areas of large ILECs. In order to promote competition, we further encourage state commissions to consider designating service areas that require ILECs to serve areas that they have not traditionally served. We recognize that a service area cannot be tailored to the natural facilities-based service area of each entrant, and we note that ILECs, like other carriers, may use resold wholesale service or unbundled network elements to provide service in the portions of a service area where they have not constructed facilities. Specifically, as noted by the Joint Board, section 254(f) prohibits states from adopting regulations that are "inconsistent with the Commission's rules to preserve and advance universal service."[480] As noted by the Joint Board, state designation of an unreasonably large service area could also violate section 253 if it "prohibit[s] or ha[s] the effect of prohibiting the ability of an entity to provide any interstate or intrastate telecommunications service,"[481] and is not "competitively neutral" and "necessary to preserve and advance universal service."[482]

b. Rural Service Areas

186. Authority to Alter Rural Service Areas. We find that, in contrast with non-rural service areas, the Act requires the Commission and the states to act in concert to alter the service areas for areas served by rural carriers. Section 214(e)(5) states:

> In the case of an area served by a rural telephone company, 'service area' means such company's 'study area' unless and until *the Commission and the States*, after taking into account the recommendations of a Federal-State Joint Board instituted under section 410(c), establish a different definition of service area for such company.[483]

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[478] Recommended Decision, 12 FCC Rcd at 181.

[479] *See* Teleport comments at 5; WorldCom comments at 15; APC reply comments at 4.

[480] 47 U.S.C. § 254(f).

[481] 47 U.S.C. § 253(a).

[482] 47 U.S.C. § 253(b).

[483] 47 U.S.C. § 214(e)(5) (emphasis added). A "rural telephone company" is defined at 47 U.S.C. § 153(37); this definition is reproduced *supra* at a note to section VI.B.1. The term "study area" is defined *supra* at a note to section VI.B.2.b.

187. We conclude that the plain language of section 214(e)(5) dictates that neither the Commission nor the states may act alone to alter the definition of service areas served by rural carriers. In addition, we conclude that the language "taking into account" indicates that the Commission and the states must each give full consideration to the Joint Board's recommendation and must each explain why they are not adopting the recommendations included in the most recent Recommended Decision or the recommendations of any future Joint Board convened to provide recommendations with respect to federal universal service support mechanisms. Furthermore, although the Joint Board did not address this issue, we conclude that the "pro-competitive, de-regulatory" objectives of the 1996 Act would be furthered if we minimize any procedural delay caused by the need for federal-state coordination on this issue.[484] Therefore, we conclude that we should determine, at this time, the procedure by which the state commissions, when proposing to redefine a rural service area, may obtain the agreement of the Commission.

188. Under the procedures we adopt, after a state has concluded that a service area definition different from a rural telephone company's study area would better serve the universal service principles found in section 254(b), either the state or a carrier must seek the agreement of the Commission. Upon the receipt of the proposal, the Commission will issue a public notice on the proposal within 14 days. If the Commission does not act upon the proposal within 90 days of the release date of the public notice, the proposal will be deemed approved by the Commission and may take effect according to the state procedure.[485] If the Commission determines further consideration is necessary, it will notify the state commission and the relevant carriers and initiate a proceeding to determine whether it can agree to the proposal. A proposal subject to further consideration by the Commission may not take effect until both the state commission and this Commission agree to establish a different definition of a rural service area, as required by section 214(e)(5). Similarly, if the Commission initiates a proceeding to consider a definition of a rural service area that is different from the ILEC's study area, we shall seek the agreement of the relevant state commission by submitting a petition to the relevant state commission according to that state commission's procedure. No definition of a rural service area proposed by the Commission will take effect until both the state commission and this Commission agree to establish a different definition. In keeping with our intent to use this procedure to minimize administrative delay, we intend to complete consideration of any proposed definition of a service area promptly.

189. Adoption of Study Areas. We agree with the Joint Board that, at this time, retaining the study areas of rural telephone companies as the rural service areas is consistent with

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

[485] Although the Commission intends to fully coordinate the two proceedings, it is important to note that approval of a service area change would not indicate Commission approval of a study area waiver.

section 214(e)(5) and the policy objectives underlying section 254.[486] We agree with the Joint Board that, if competitors, as a condition of eligibility, must provide services throughout a rural telephone company's study area, the competitors will not be able to target only the customers that are the least expensive to serve and thus undercut the ILEC's ability to provide service throughout the area.[487] In addition, we agree with the Joint Board that this decision is consistent with our decision to use a rural ILEC's embedded costs to determine, at least initially, that company's costs of providing universal service because rural telephone companies currently average such costs at the study-area level.[488] Some wireless carriers have expressed concern that they might not be able to provide service throughout a rural telephone company's study area because that study area might be noncontiguous.[489] In such a case, we note that this carrier could supplement its facilities-based service with service provided via resale. In response to the concerns expressed by wireless carriers, however, we also encourage states, as discussed more fully below, to consider designating rural service areas that consist of only the contiguous portions of ILEC study areas. Further, we agree with TCA that any change to a study area made by the Commission should result in a corresponding change to the corresponding rural service area.[490] Thus, we encourage a carrier seeking to alter its study area to also request a corresponding change in its service area, preferably as a part of the same regulatory proceeding. If the carrier is not initiating any proceedings with this Commission,[491] it should seek the approval of the relevant state commission first, and then either the state commission or the carrier should seek Commission agreement according to the procedures described above. We agree with the Joint Board that this differing treatment of rural carriers sufficiently protects smaller carriers and is consistent with the Act.[492]

190. We also conclude, based on additional information presented to us in response to the Recommended Decision, that universal service policy objectives may be best served if a state defines rural service areas to consist only of the contiguous portion of a rural study area, rather than the entire rural study area. We conclude that requiring a carrier to serve a non-contiguous service area as a prerequisite to eligibility might impose a serious barrier to entry, particularly

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[486] Recommended Decision, 12 FCC Rcd at 179-80.

[487] Recommended Decision, 12 FCC Rcd at 179-80.

[488] Recommended Decision, 12 FCC Rcd at 180.

[489] Nextel comments at 9; Vanguard comments at 4.

[490] *See* TCA comments at 4.

[491] We note that we sought comment in the NPRM on whether to amend our rules to revise existing study area boundaries. NPRM at para. 45. Any potential changes in the method used to redefine study areas might result in a change in the procedure to obtain a waiver, or, might result in the need for fewer waivers.

[492] *See, e.g.,* 47 U.S.C. § 251(f)(1).

for wireless carriers.[493] We find that imposing additional burdens on wireless entrants would be particularly harmful to competition in rural areas, where wireless carriers could potentially offer service at much lower costs than traditional wireline service.[494] Therefore, we encourage states to determine whether rural service areas should consist of only the contiguous portions of an ILEC's study area, and to submit such a determination to the Commission according to the procedures we describe above. We note that state commissions must make a special finding that the designation is in the public interest in order to designate more than one eligible carrier in a rural service area,[495] and we anticipate that state commissions will be able to consider the issue of contiguous service areas as they make such special findings.

191. We reject Cox's suggestion that carriers could cooperate with each other to provide service throughout a service area.[496] Given that section 214(e)(1) requires an eligible carrier to provide service "throughout" a service area, we find that the statute does not permit a cooperative arrangement, such as that advocated by Cox, because neither individual carrier could satisfy this explicit condition of eligibility.[497]

c. Support Areas

192. We agree with the Joint Board's analysis and conclusion that it would be consistent with the Act for the Commission to base the actual level of universal service support that carriers receive on the cost of providing service within sub-units of a state-defined service area, such as a wire center or a census block group (CBG).[498] We reject Bell Atlantic's argument that the language in section 214(e)(5) gives the states exclusive authority to establish non-rural service areas "for the purpose of determining universal service obligations and support

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[493] *See* Cox comments at 7 (describing gaps of 70 to 80 miles between parts of Nebraska company's study area); Nextel comments at 9 (explaining that some wireless service providers are licensed within prescribed geographic regions).

[494] *See* Nextel comments at 1-2 (stating that in many circumstances wireless service providers offer only cost-efficient alternative for delivery of communications to rural and high cost areas); Vanguard comments at 2-3 (stating that wireless providers are well-suited to provide universal service in high cost areas, referring to Vanguard's provision of service to consumers who live in areas with extreme terrain in the Ohio Valley, and Vanguard's provision of service connecting fire watch towers in remote areas for Pennsylvania Park Service); *see also* Ameritech comments, app. A at 16 (noting that minimum efficient scale of wireless technology is lower for wireless than for wireline service).

[495] 47 U.S.C. § 214(e)(2).

[496] *See* Cox comments at 8.

[497] 47 U.S.C. § 214(e)(1).

[498] Recommended Decision, 12 FCC Rcd at 181-82. *See infra* discussion in section VII.

mechanisms."[499] As the Joint Board concluded, the quoted language refers to the designation of the area throughout which a carrier is obligated to offer service and advertise the availability of that service, and defines the overall area for which the carrier may receive support from federal universal service support mechanisms.[500] Bell Atlantic is therefore incorrect when it argues that the approach recommended by the Joint Board ignores the phrase "and support mechanisms."[501] The universal service support a carrier will receive will be based on the Commission's determination of the cost of providing the supported services in the service area designated by a state commission.[502]

193. We conclude that, consistent with our decision to use a modification of the existing high cost mechanisms until January 1, 1999, the Commission will continue to use study areas to calculate the level of high cost support that carriers receive.[503] Because we are continuing to use study areas to calculate high cost support until January 1, 1999, if a state commission follows our admonition to designate a service area that is not unreasonably large, that service area will likely be smaller than the federal support areas during that period. We conclude that the decision to continue to use study areas to calculate the level of high cost support is nonetheless consistent with the Act for two reasons. First, as the Joint Board found, the Act does not prohibit the Commission from calculating support over a geographic area that is different from a state-defined service area.[504] Second, so long as a carrier does not receive support for customers located outside the service area for which a carrier has been designated eligible by a state commission, our decision is consistent with section 214(e)(5)'s requirement that the area for which a carrier should receive universal service support is a state-designated service area. We agree with the Joint Board, however, that calculating support over small geographic areas will promote efficient targeting of support.[505] We therefore adopt the Joint Board's recommendation and conclude that, after January 1, 1999, we will calculate the amount of support that carriers receive over areas no larger than wire centers.[506] We will further define

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[499] Bell Atlantic comments at 14 (*citing* 47 U.S.C. § 214(e)(5)).

[500] Recommended Decision, 12 FCC Rcd at 181.

[501] *See* Bell Atlantic comments at 14.

[502] Sprint PCS comments at 9; SBC comments at 31. *See also* Letter from Jay C. Keithly, Sprint, to William F. Caton, FCC at exhibit 2 (Oct. 14, 1996); letter from Whitney Hatch, GTE to William F. Caton, FCC at 4-5 (Sept. 18, 1996).

[503] The term "study area" is defined *supra* at a note to section VI.B.2.b.

[504] Recommended Decision, 12 FCC Rcd at 181-82.

[505] Recommended Decision, 12 FCC Rcd at 181.

[506] *See infra* section VII.

support areas as part of our continuing effort to perfect the method by which we calculate forward-looking economic costs.

D. Unserved Areas

1. Background

194. Section 214(e)(3) provides that, if no common carrier is willing to provide the services supported by universal service support mechanisms to a community or portion of a community that requests such services, "the Commission, with respect to interstate services, or a State, with respect to intrastate services, shall determine which common carrier or carriers are best able to provide such services to the requesting unserved community or portion thereof and shall order such carrier or carriers to provide such services for that unserved community or portion thereof."[507] Any carrier ordered to provide service to an unserved community is to be designated as the eligible telecommunications carrier for that community or portion of a community.[508] The Joint Explanatory Statement states that section 214(e)(3) "makes explicit the implicit authority of the Commission, with respect to interstate services, and a State, with respect to intrastate services, to order a common carrier to provide [the supported services]."[509]

195. Because of the lack of information in the record, the Joint Board recommended that the Commission not adopt particular rules implementing section 214(e)(3).[510] Although the Joint Board supported the use of competitive bidding,[511] it concluded that it could not recommend a particular competitive bidding proposal because no proposal before it was sufficiently detailed to support a recommendation.[512]

2. Discussion

196. We agree with the Joint Board that we should not adopt rules at this time governing how to designate carriers for unserved areas.[513] We conclude, as did the Joint Board,

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[507] 47 U.S.C. § 214(e)(3).

[508] 47 U.S.C. § 214(e)(3).

[509] Joint Explanatory Statement at 141.

[510] Recommended Decision, 12 FCC Rcd at 184.

[511] Recommended Decision, 12 FCC Rcd at 265.

[512] Recommended Decision, 12 FCC Rcd at 184.

[513] Recommended Decision, 12 FCC Rcd at 184.

that the record remains inadequate for us to fashion a cooperative federal-state program to select carriers for unserved areas, as proposed in the NPRM.[514] We conclude that, consistent with the Joint Board's recommendation, if, in the future, it appears that a cooperative federal-state program is needed, we will then revisit this issue and work with state commissions and the Joint Board to create a program. We seek information that will allow us to determine whether additional measures are needed. Therefore, we strongly encourage state commissions to file with the Common Carrier Bureau reports detailing the status of unserved areas in their states. In order to raise subscribership to the highest possible levels, we seek to determine how best to provide service to currently-unserved areas in a cost-effective manner. We seek the assistance of state commissions with respect to this issue.

197. We reject the arguments of TCA that the issue of how universal service should be made available in unserved areas is one for state commissions alone: section 214(e)(3) clearly apportions to the Commission the responsibility for designating a carrier to provide interstate services to unserved areas.[515] We also agree with the Joint Board that a properly structured competitive bidding system could have significant advantages.[516] We conclude, however, that the record is insufficient, at this time, to support the use of competitive bidding to select carriers for unserved areas.[517] We conclude below that the possibility of using competitive bidding warrants further inquiry and we intend, in cooperation with the Joint Board and the state commissions, to undertake this inquiry shortly.[518]

E. Implementation

198. The administrator of the universal service support mechanisms shall not disburse funds to a carrier providing service to customers until the carrier has provided, to the administrator, a true and correct copy of the decision of a state commission designating that carrier as an eligible telecommunications carrier. A state commission seeking to alter a rural service area has the choice of either filing itself, or requiring an affected eligible

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[514] *See* NPRM at para. 47. No specific program using competitive bidding to select carriers for unserved areas was proposed to the Joint Board, *see* Recommended Decision, 12 FCC Rcd at 182-84, and no program was proposed in response to the Recommended Decision.

[515] 47 U.S.C. § 214(e)(3) ("If no common carrier will provide [the supported services] to an unserved community . . . *the Commission, with respect to interstate services*, or a State commission, with respect to intrastate services, shall determine which common carrier or carriers are best able to provide such service . . . and shall order such carrier or carriers to provide such service . . . .") (emphasis added).

[516] Recommended Decision, 12 FCC Rcd at 265.

[517] Recommended Decision, 12 FCC Rcd at 184.

[518] *See infra* section VII.C.

telecommunications carrier to file, a petition with the Commission seeking the latter's agreement with the newly defined rural service area. We delegate authority to the Common Carrier Bureau to propose and act upon state proposals to redefine a rural service area.