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Via Electronic Filing and Overnight Mail

REDACTED

Ms. Ann Cole
Director
Division of the Commission Clerk and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399

**Re: Docket No. 140026 - Petition for Designation as Eligible
Telecommunications Carrier (ETC) by NetTALK.COM, Inc.**

Dear Ms. Cole:

On behalf of NetTALK.COM, Inc. ("NetTALK"), I am writing to provide additional support for NetTALK's petition for designation as an eligible telecommunications carrier ("ETC") pursuant to section 364.10, F.S., and 47 C.F.R. § 54.201. In particular, I am providing additional background on the legal basis for NetTALK's ETC application, as well as the information requested concerning the nature of NetTALK's facilities used and operated to provide two-way telecommunications services in Florida.

I. Additional Legal Background Regarding NetTALK's ETC Application

In my letter dated May 20, 2014, NetTALK demonstrated that it meets the definition of a "telecommunications company" as that term is defined in section 364.01(13), F.S., and that the Company therefore meets the requirements of section 364.10 to be designated by the Florida Commission as an ETC. NetTALK also indicated why the section 364.02(12) definition of "services" does not preclude NetTALK from being designated as an ETC, and that, as a telecommunications services carrier, NetTALK was making the same arguments made by Cox when it obtained ETC designation from the Florida Commission in Dockets Nos. 120165-TP and 120175-TP.

On our call with Commission Staff and attorneys on June 3, 2014, a concern was raised that section 364.013 could act as a bar to NetTALK's ETC designation. However, section 364.013 is limited by other sections of the chapter. Section 364.013 provides in relevant part:

364.013 Emerging and advanced services.—Broadband service and the provision of voice-over-Internet-protocol (VoIP) are exempt from commission jurisdiction and shall be free of state regulation, *except as delineated in this chapter*, regardless of the provider, platform, or protocol.

Section 364.013, F.S. (emphasis added). In fact, the ETC designation process *is* specifically delineated in Section 364.10 as a specific area in which the Commission retains jurisdiction and the Commission is therefore squarely within its jurisdiction to carry out that process.

Section 364.10 establishes the Commission’s authority to implement 47 C.F.R. § 54.201:

364.10 Lifeline service.—

(1)(a) An eligible telecommunications carrier shall provide a Lifeline Assistance Plan to qualified residential subscribers, as defined in the eligible telecommunications carrier’s published schedules. For the purposes of this section, the term “eligible telecommunications carrier” means a telecommunications company, as defined by s. 364.02, *which is designated as an eligible telecommunications carrier by the commission pursuant to 47 C.F.R. § 54.201*.

§ 364.10, F.S (emphasis added). Section 364.10 specifically and separately delineates the Commission’s authority to designate ETCs pursuant to 47 C.F.R. § 54.201, which extends to providers of “voice telephony service,¹” to the extent they meet the other requirements of section 364.10 (*e.g.*, qualifying as a Florida “telecommunications company”). Section 364.10 therefore provides the Commission jurisdiction to act on NetTALK’s application, to the extent the Commission concludes that other sections of the statute do not provide such authority, as NetTALK has argued in previous letters.

This reading of section 364.10 is also consistent with the section 364.02(12) definition of “service,” which provides a further explicit carve-out from section 364.013: “Notwithstanding s. 364.013, and the exemption of services pursuant to this subsection, *the commission may* arbitrate, enforce, or approve interconnection agreements, and *resolve disputes as provided by* 47 U.S.C. ss. 251 and 252, or *any other applicable federal law or regulation.*” The Commission has authority to designate a telecommunications company that happens to utilize VoIP protocol as an ETC because it has authority to implement the federal ETC process under section 364.02(12) and, in fact, exercised that authority when it designated Cox as an ETC.²

¹ *Lifeline and Link Up Reform and Modernization*, Report And Order and Further Notice of Proposed Rulemaking, WC Docket No. 11-42, ¶ 47 (rel. Feb. 6, 2012) (citing *Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, ¶ 63 (rel. Nov. 18, 2011)).

² See *Application for designation as an eligible telecommunications carrier (ETC) by Cox Florida Telecom, LP.*, Notice of Proposed Agency Action, Order Granting Eligible Telecommunications Carrier Status, Docket No. 120165-P (Sept. 28, 2012).

The Commission need not be concerned about opening the floodgates to more ETC applications. In order to become a Florida ETC, a carrier must qualify as a “telecommunications company” under Florida law, which requires that they become certificated, classify their offerings as “telecommunications services,” and be facilities-based. § 364.02(13), F.S. Many if not most VoIP providers could not meet these qualifications, which would also make them subject to common carrier regulation at the federal level and in other states.

The California Public Utilities Commission (“CPUC”), when granting Cox ETC’s designation in that state, faced an almost identical statute that limited the Commission’s jurisdiction over VoIP services, but with the exception of express delegations under federal law.³ The CPUC accepted the approach advocated by NetTALK here that, if a carrier is willing to hold itself as a common carrier and meets all other necessary requirements, states can still designate them as ETCs, even in the face of statutory VoIP limitations:

Pub. Util Code § 710 expressly grants the Commission authority to act under delegation of federal law. We conclude that Pub. Util. Code § 710 does not preclude the Commission from designating Cox as an ETC.

...

At the same time, we note that, in the settlement, Cox agrees that it is a common carrier by virtue of its holding of a CPCN from this Commission and by virtue of it offering services for which the underlying technology is VoIP to the public on a nondiscriminatory basis and holds itself out to serve indifferently all potential users. Further, Cox acknowledges that it offers “telephone exchange service” and “exchange access service.” Accordingly because it meets these elements in § 214(e)(6), Cox is subject to the jurisdiction of this Commission, and this Commission may grant the ETC status.⁴

In the same vein, the Florida statutes incorporate the Commission’s role in the ETC process and provide ample jurisdiction for the Florida Commission to designate NetTALK as an ETC because NetTALK holds itself out as a facilities-based, certificated common carrier offering telecommunications services in Florida.

Although Staff has mentioned that Cox had “hybrid” TDM and VoIP facilities, neither the Staff Recommendation nor the Commission’s order in that case relied upon the fact that Cox had such “hybrid” facilities for its assertion of jurisdiction. In addition, Cox now receives ETC subsidies on all its services, regardless of what protocol it relies upon to provide its telecommunications services. The Commission therefore did not limit its ETC certification only to Cox’s TDM-based services. In light of this history, if the Commission were to treat NetTALK

³ *Application of Cox California Telcom, Designation as an Eligible Telecommunications Carrier, Decision Approving Settlement Regarding Request for Eligible Telecommunications Carrier Status, Decision 13-10-002, at 6, 2013 WL 5651911 (2013) (“Cox California Order”). A copy of the Cox California Order is attached hereto as Exhibit A.*

⁴ *Cox California Order, at 6.*

differently than Cox, it would be clearly be acting in a discriminatory manner.⁵ The more straightforward approach is the approach of the CPUC that relies on the fact that NetTALK holds itself out as a certificated common carrier offering telecommunications services.

II. NetTALK Has Florida Facilities Sufficient to Meet the Facilities Requirement of Section 364.02(13)

Section 364.02(13), Florida Statutes, defines a “telecommunications company” as a corporation “offering two-way telecommunications service to the public for hire within this state by the use of a telecommunications facility.” § 364.02(13), F.S. NetTALK is headquartered in Miami, Florida and has significant facilities across the state of Florida. NetTALK also offers telecommunications services using TDM facilities because NetTALK’s Florida network is also interconnected through TDM interconnections to Florida incumbent LECs, providing interconnection to the Public Switched Telephone Network (“PSTN”) in multiple markets.

[BEGIN CONFIDENTIAL]



⁵ See *In Re: Joint Application for Telemarketing Corp. of Louisiana d/b/a Ldds Communications, Inc. to Merge with Metromedia Communications Corporation and Resurgens Communications, Group, Inc.*, 93 FPSC 8:560, 1993 WL 13647591 (Fla. P.S.C. 1993) (quoting *Florida League of Cities, Inc. v. Department of Environmental Regulation*, 603 So.2d 1363 (Fla. 1992)). Moreover, the Florida Supreme Court has struck down PSC decisions that were imposed without a rational basis. See *Wytrwal v. Bevis*, 300 So. 2d 13, 15 (Fla. 1974).

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NetTALK provides local exchange service and long distance services throughout the Miami, Tampa, and soon Orlando markets. A Confidential diagram demonstrating the reach of NetTALK's facilities across Florida, including its TDM interconnections, is attached hereto as Exhibit B.

NetTALK's services offer a unique opportunity to expand new and innovative telecommunications services options to low-income residents across the state of Florida, consistent with the intent of the ETC and universal service programs. NetTALK is a certificated, facilities-based telecommunications carrier that fully meets the requirements of Florida law to be designated as an ETC.

We appreciate the efforts of Staff and counsel to date to address this application and are available to provide any additional information that may be required. Please do not hesitate to contact me at 202.659.6655 with any questions or concerns relating to this response.

Sincerely,

/s/ James C. Falvey

James C. Falvey

cc: Adam Teizman (via e-mail)
Charles W. Murphy (via e-mail)
Beth Salak (via e-mail)
Bob Casey (e-mail)
Catherine Beard (via e-mail)
Kenneth Hosfeld (via e-mail)
Patrick Hardy (via e-mail)

Exhibit A

2013 WL 5651911 (Cal.P.U.C.)
Slip Copy

Application of **Cox California Telcom, LLC (U5684C)** for
Designation as an **Eligible Telecommunications Carrier**.

Application 12-09-014

Decision 13-10-002

California Public Utilities Commission

October 3, 2013

**DECISION APPROVING SETTLEMENT REGARDING REQUEST FOR ELIGIBLE TELECOMMUNICATIONS
CARRIER STATUS**

Before Peevey, President, and Florio, Sandoval, Ferron and Peterman, Commissioners.

BY THE COMMISSION:

1. Introduction

*1 This decision approves and adopts the Settlement Agreement that is incorporated as Attachment 1 to this decision, thereby resolving the application of **Cox California Telcom, LLC (Cox)** seeking an order from the California Public Utilities Commission (Commission) designating **Cox** as an **Eligible Telecommunications Carrier (ETC)**.

Cox seeks ETC designation for purposes of providing LifeLine service to qualifying low-income customers in California and receiving corresponding support from the federal universal service fund and the California LifeLine fund.¹ **Cox** does not seek ETC designation for purposes of obtaining federal high-cost support.

To the extent that **Cox** increases the scope of its service area in the future, **Cox** requests that its ETC designation cover any additional non-rural territories that **Cox** serves as a consequence of that increase in scope.

The Commission has authority to grant requests for designation of ETC status pursuant to Resolution T-17002 and in accordance with the federal delegation of authority set forth in the Communications Act in 47 U.S.C. § 214(e)(2) which states in part: A State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph [214(e)](1) as an **eligible telecommunications carrier** for a service area designated by the State commission.²

Only ETCs designated pursuant to § 214 (e) of the Federal Communications Act are eligible to receive Federal Lifeline support.

In approving the Settlement Agreement, we conclude that the Commission has the requisite authority to designate **Cox** as an ETC in accordance with the terms and conditions set forth in the Settlement Agreement found in Attachment 1. We also find that **Cox** satisfies the applicable federal and state requirements governing ETCs. The approvals granted herein are limited to **Cox**, and do not apply to any other telephone service provider.

Under the terms of the Settlement Agreement, **Cox's** basic and LifeLine services will be subject to all consumer protections applicable to traditional telephone service regardless of the technology **Cox** uses. We accordingly designate **Cox** as an ETC in accordance with the terms and conditions in the Settlement Agreement, as discussed below.

2. Background

Cox California Telcom, LLC (Cox) is a certificated provider of local exchange service and long distance service in California and has a California Public Utilities Commission (CPUC or Commission)-issued Certificate of Public Convenience and Necessity (CPCN) to offer telephone service in designated areas of California as a Competitive Local Exchange Carrier (CLEC). Cox initially requested Eligible Telecommunications Carrier (ETC) designation through Advice Letter 1082. Cox utilizes two types of technologies to provide retail telephone service, namely, circuit-switched and Voice over Internet Protocol (VoIP). The Division of Ratepayer Advocates (DRA) expressed concern that the Commission may lack authority to designate Cox as an ETC, and that the Commission should clarify its jurisdiction over Internet Protocol (IP)-based telephone services prior to designating Cox as an ETC.

DRA notes that Senate Bill (SB) 1161, which amended § 710 of the Public Utilities Code effective January 1, 2013, prohibits the Commission from regulating VoIP or IP-enabled services unless expressly delegated by federal law or statute.

Following meetings with Commission staff with respect to Commission authority to grant Cox's ETC request, Cox withdrew Advice Letter 1082 and filed the instant application requesting ETC designation on September 25, 2012. DRA filed a protest on October 29, 2012. The Greenlining Institute, Inc. (Greenlining) also filed a response in support of the application. Cox filed a reply to the DRA Protest on November 8, 2012.

A prehearing conference (PHC) was held on January 28, 2013. The Utility Reform Network (TURN) entered an appearance at the PHC. The assigned Commissioner issued a scoping memo on February 26, 2013, confirming the preliminary categorization of this proceeding as ratesetting, as made in Resolution ALJ 176-3302, dated October 11, 2012. No evidentiary hearings were deemed necessary. The proceeding was to be resolved upon the filing of written briefs as scheduled herein.

The California Association of Competitive Telephone Companies (CALTEL), AT&T California (AT&T), Time Warner Cable and Verizon California, Inc. each sought and were granted party status based on their concern that language in the Scoping Memo indicated that the Commission might address issues relating to SB 1161 and VoIP that could have industry-wide implications.

On March 14, 2013, CALTEL filed a motion to amend the Scoping Memo, arguing that various issues in the Scoping Memo constituted a generic investigation which was prejudicial and violated CALTEL's members' due process rights, as well as rights of other affected entities who had no notice that such issues of general applicability might be decided through one carrier's ETC application. The assigned Commissioner issued a ruling on April 17, 2013, denying the motion to amend the Scoping Memo.

On March 22, 2013, in response to a request by Cox on behalf of itself, TURN and Greenlining, the Administrative Law Judge (ALJ) suspended the briefing schedule to allow parties to engage in settlement discussions. On May 22, 2013, a settlement conference was conducted in which all parties in this proceeding participated.

A Joint Motion was filed, dated June 3, 2013, sponsored by Cox, TURN, and Greenlining, seeking adoption of a Settlement Agreement. A response in opposition to the motion was filed by DRA. TURN and Greenlining filed a joint reply to DRA's opposition on July 18, 2013. A separate reply in opposition to DRA's opposition was filed by Cox.

Because the terms and conditions of the proposed settlement agreement are carefully crafted to apply only to Cox, AT&T did not object to the proposed settlement. However, AT&T objects to any effort to apply the proposed settlement to any other party. AT&T argues that any application of the proposed settlement agreement to an entity other than Cox, without notice and opportunity to comment, would be a denial of due process. AT&T reserved the right to object to and oppose any effort to apply any of the settlement terms to any entity other than Cox.

3. Parties' Positions

Cox believes that under § 214(e)(2), the Commission must designate a common carrier as an ETC for purposes of receiving federal universal service support if it (a) offers service designated by the Federal Communications Commission (FCC) for federal universal service support; and (b) advertises the availability of such services using media of general distribution.

In November 2011, the FCC adopted the Intercarrier Compensation — Universal Service Fund (ICC-USF) Order and in February 2012, the FCC adopted a second order that deals solely with the federal LifeLine program (FCC Lifeline Order). In these and related decisions, the FCC modified and clarified the federal LifeLine program to expressly include a technology-neutral approach to designating voice telephony service. Cox asserts that it meets those federal requirements as well as the requirements in CPUC Resolution T-17002, even though they are no longer identical with or required by FCC Rules. Cox also claims that it complies with Commission precedent on designating ETCs.

Cox argues that general industry-wide regulatory issues related to VoIP and IP-enabled services are not included in, or necessary for, the Commission's decision to grant Cox's request. In other words, consistent with prior Commission orders, the Commission need not make broad determinations as to its authority to apply California regulations to IP-based services in order to designate Cox as an ETC.

Cox asserts that as a certificated provider of competitive local exchange service in California, and by offering Basic Service and LifeLine service that utilize VoIP to the public on a nondiscriminatory basis, Cox fulfills the role of common carrier. Cox further argues that because the FCC has ruled that the federal universal service program supports voice telephony alternatives to traditional phone service, any limitations in CPUC regulatory authority cannot and do not apply to an ETC designation.

Cox also claims that the authority granted by Decision (D.) 10-11-033 sets no limitation on the type of technology used to offer LifeLine service as long as the Basic Service elements are part of the service delivered to the low-income customers. Cox claims that it offers the requisite Basic Service elements as required by the CPUC.

The service elements currently required by the FCC are already reflected in the CPUC's definition of Basic Service and the requirements for California Lifeline service included in General Order (GO) 153. Since Cox is providing and will continue to provide Basic Service and Lifeline service as defined in GO 153, Cox asserts that it complies with the FCC Rule 54.401(a) (2) (which refers to the service elements in FCC 54.101(a)). Carriers providing LifeLine service in California must provide the services listed in GO 153, Appendix A. Cox currently complies with GO 153 and agrees to continue to do so prospectively.

When Cox filed its application, the CPUC had not yet issued a decision on Basic Service requirements in Rulemaking (R.) 09-06-019. Since then, the Commission has issued D.12-12-038, establishing updated requirements for Basic Service. The Commission is currently considering reforms to Lifeline requirements in R.11-03-013. Cox agrees to comply with any new or modified applicable Lifeline service requirements. Pursuant to Resolution T-17002, Appendix A(I), at the time of its application filing, Cox did not need to make any tariff changes to comply with the Commission's requirements. Cox has agreed to make any tariff changes, however, if necessary to comply with any decision adopted in R.09-06-019.

Greenlining expressed support for the Cox application, arguing that low-income customers would benefit as a result of having more choices for LifeLine service providers as a result of Cox's offerings.

DRA contends that as a result of the passage of SB 1161, it is unclear whether the Commission has jurisdiction to designate Cox, or any other entity, as an ETC under § 214(e)(2). SB 1161, which amended § 710 of the Public Utilities Code effective January 1, 2013, prohibits the Commission from regulating VoIP or IP-enabled services unless expressly delegated by federal law or statute. Cox utilizes VoIP to provide voice telephony service to approximately half of its voice customers.

Beyond SB 1161 and Pub. Util. Code § 710, DRA also questions whether Cox is a "common carrier" under federal law.

In 2002, the FCC issued its Declaratory Ruling *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd. 4798, March 14, 2002 (hereinafter "Cable Modem Ruling"), classifying cable modem service as an Information Service, rather than a Telecommunications Service, thus precluding common carrier regulation. The FCC found that cable modem service was an internet access service offering "a single, integrated service...combin[ing] computer processing, information provision, and computer interactivity with data transport." The FCC defined cable modem service as "providing high speed access to the Internet...that is linked together by a globally unique address space based on the Internet Protocol (IP), ... [and] is able to support communications using... IP-compatible protocols." The United States Supreme Court, in *National Cable & Telecommunications Association, et al. v. Brand X*, 545 U.S. 967 (Brand X), upheld the FCC's Cable Modem Ruling. In addition, 47 USC § 153(24) defines Information Service as "storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."³

In view of the FCC findings in the Cable Modem Ruling, DRA draws the inference that the Commission must determine that VoIP services offered over a cable modem are information services, and that cable companies are therefore ineligible to be ETCs. DRA questions whether the Commission's authority to designate ETC status, as prescribed under federal statute, applies to voice telephony services provisioned using VoIP and IP-enabled technology.

TURN also raised questions about whether appropriate consumer protections could be enforced in view of possible limitations on the Commission's regulatory authority over VoIP-provisioned telephone service.

4. Terms of the Settlement Agreement

The Settlement Agreement, reproduced as Attachment 1 to this decision, presents sponsoring parties' recommendation to designate Cox as an ETC, subject to the terms and conditions set forth therein. The Settlement Agreement provides, among other things, that:

-- Cox is a certificated carrier that utilizes circuit-switched and VoIP technology to provide Basic Service and LifeLine service throughout its service territory;

-- Cox provides Basic Service and LifeLine service pursuant to its tariff on file with the Commission;

-- Cox operates as a common carrier as it offers Basic Service and LifeLine service to the public on a nondiscriminatory basis and it holds itself out to serve indifferently all potential users;

-- Cox will comply with current and future laws applicable to providers participating in the state and/or federal LifeLine programs, including without limitation applicable Commission decisions and General Orders (i.e. GO 153, GO 133-C and GO 168);

-- The Commission will have the authority to address and resolve inquiries and complaints that it receives related to Basic Service and LifeLine service provided by Cox;

-- Cox will comply with GO 96-B (or its successor) with respect to the rules therein governing detariffing Basic Service and LifeLine service, withdrawing such services and/or modifying rates for such services, unless applicable law in the future provides otherwise (in which case, Cox will comply with such applicable law);

-- Designating Cox as an ETC is consistent with Resolution T-17002, Decision 12-12-038, Pub. Util. Code §§ 285 and 710 and the Commission's universal service goal of a 95% service penetration rate in low-income households;

-- Cox's Application includes all requisite information and is consistent with the requirements set forth in Resolution T-17002; and

-- Designating Cox as an ETC is in the public interest.

DRA is the only party who actively opposes the Settlement Agreement, claiming it is neither consistent with the law nor in the public interest. DRA claims that the Settlement Agreement does not resolve the issues raised in the Scoping Memo and does not clarify whether consumer protection laws would apply in order to protect low income customers that Cox would serve under the ETC designation. We note that as a CPCN holder, Cox is bound to the terms of its CPCN which require compliance with the California Public Utilities Code, and all of the Commission's rules, decisions, and orders.

DRA argues that unless Cox agrees to treat all of Cox's voice communications, regardless of the technology used to transport such communications, as public utility "telephone corporation" service under California law, or the Commission so finds, no current consumer protection laws will likely apply to Cox. Beyond SB 1161 and Pub. Util. Code § 710, DRA also questions whether Cox is a "common carrier" under federal law.

5. Discussion

As explained below, we approve and adopt the Settlement Agreement, shown as Attachment 1 to this decision. Cox's request for ETC status is thus granted in accordance with the terms and conditions of the Settlement Agreement.

California has a strong public policy favoring settlements. This policy supports many worthwhile goals, such as reducing litigation expenses, conserving scarce resources of parties and the Commission, and allowing parties to reduce the risk that litigation will produce unacceptable results. We have adopted specific rules regarding approval of settlements, as follows: The Commission will not approve stipulations or settlements whether contested or uncontested, unless the stipulation or settlement is reasonable in light of the whole record, consistent with law, and in the public interest.⁴

We have reviewed the Settlement Agreement presented in Attachment 1, and find that it complies with commission Rule 12.1(d) in that it is consistent with applicable state and federal law, reasonable in light of the whole record, and in the public interest.

In assessing settlements, we consider individual settlement provisions but, in light of the strong public policy favoring settlements, we do not base our conclusion on whether any single provision is an optimal result. Rather, we determine whether the settlement as a whole produces a just and reasonable outcome.

Settlements represent compromises of opposing parties' positions. In the context of the attached Settlement Agreement, parties representing opposing interests reached a compromise that is acceptable in light of their divergent interests. This fact provides evidence that the overall result is reasonable. Although this is not an all-party settlement, consumer interests are represented through the sponsorship of TURN and Greenlining. Additionally, where specific issues were identified and resolved in the Settlement Agreement the results are reasonable and consistent with the record.

By resolving issues specific to Cox, the Settlement Agreement is not prejudicial to any other provider that may later seek an ETC designation from the Commission. The Settlement Agreement is binding only on Cox and the other settling parties. The Settlement Agreement does not constitute a precedent regarding any principle or issue in any other proceeding. As such, the Commission will need to resolve the request of any other provider's ETC request on the merits of that request, whether filed via advice letter or application.

Designating Cox as an ETC will enable it to continue to provide LifeLine service to all of its existing LifeLine customers, as well as future LifeLine customers without interruption.

We conclude that the Settlement is consistent with applicable law. Section 214(e)(2) delegates to the Commission the authority to designate common carriers as ETCs and the Commission has the authority to make such designations and determine whether such designation is in the public interest. Under the terms of the Settlement Agreement set forth in Attachment 1 and as a CPCN holder, Cox is a common carrier in that it offers, by tariff on file with the Commission, Basic Service and LifeLine service to the public on a nondiscriminatory basis and it holds itself out to serve indifferently all potential users.

Pub. Util Code § 710 expressly grants the Commission the authority to act under delegation of federal law (See § 710(a).) We conclude that Pub. Util. Code § 710 does not preclude the Commission from designating Cox as an ETC. Under § 214(e)(2), “[u]pon request and consistent with the public interest, convenience, and necessity, the State commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an **eligible telecommunications** carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of paragraph (1)” specifying the requirements for common carriers to serve as an ETC. Cox satisfies both federal and state requirements as a common carrier with a CPUC-issued CPCN whose service as an ETC is consistent with the public interest, convenience and necessity. We note DRA’s concerns regarding § 214(e)(6) of the Communications Act, which reads as follows:

In the case of a common carrier providing telephone exchange service and exchange access that is not subject to the jurisdiction of a State Commission, the Commission shall upon request designate such a common carrier that meets the requirements of paragraph (1) as an **eligible telecommunications** carrier for a service area designated by the Commission consistent with applicable Federal and State law.

DRA raises legitimate questions regarding Cox’ status, in light of the fact that it offers both traditional wireline service and VoIP. At the same time, we note that, in the settlement, Cox agrees that it is a common carrier by virtue of its holding of a CPCN from this Commission and by virtue of it offering services for which the underlying technology is VoIP to the public on a nondiscriminatory basis and it holds itself out to serve indifferently all potential users. Further, Cox acknowledges that it offers “telephone exchange service” and “exchange access service.” Accordingly because it meets these elements in § 214(e) (6), Cox is subject to the jurisdiction of this Commission, and this Commission may grant the ETC status.

TURN and Greenlining agree with DRA that the regulatory status of Cox’s LifeLine and Basic Services is uncertain. They believe that (1) the FCC’s classification of those services (or lack thereof) could change or (2) Cox could change its position. Nonetheless, TURN and Greenlining argue that in the face of this uncertainty, the Settlement Agreement provides critical protections to current and future Cox customers and is in the public interest. TURN and Greenlining believe that the Settlement Agreement appropriately bridges the gap between regulatory uncertainty and Commission authority. We agree.

Under the Settlement Agreement, Cox agrees to comply with all of the Commission’s requirements for traditional LifeLine service regardless of the technology that Cox uses. Thus, given Cox’ status as a certificated carrier and given that Cox offers services over which this Commission retains authority, we need not reach the question of whether approval of the settlement would constitute a prohibited exercise of jurisdiction under Pub. Util. Code § 710.

Further, we note that the Commission has expressly identified issues relating to VoIP providers participating in LifeLine for consideration in R.11-03-013. The Settling Parties agree that R.11-03-013 is the proper proceeding to resolve industry-wide issues related to LifeLine, Pub. Util. Code § 710 and any related matters. Under the terms of the Settlement Agreement, Cox agrees to comply with applicable law governing both ETCs and LifeLine service, and thus will be subject to any rules adopted in R.11-03-013 applicable to LifeLine providers.

Resolution T-17002, requires ETC applicants to demonstrate that they will (1) provide supported services within its designated service territory and to certify it will provide service on a timely basis to customers passed by the ETC’s facilities and (2) provide service “within a reasonable time” to customers who are not passed by the ETC’s facilities “if service can be provided at reasonable cost[.]”

Cox asserts that it currently provides and will continue to provide LifeLine service as designated in GO 153.

The second requirement in Resolution T-17002, however, now reflects a FCC rule that the FCC recently repealed in its ICC-USF Order. For example, the Resolution requires ETC applicants to certify they will undertake certain steps in providing service to potential customers located in an area where the applicant does not have network coverage, which are requirements formerly required in FCC Rule 54.202(a)(1)(i)(B). However, that rule no longer exists in the FCC's recently adopted FCC Rule 54.202(a).

Cox nonetheless complies with a similar requirement applicable to facilities-based competitive local carriers (CLCs) in California, as found in D.96-02-072, Appendix E, which states:

Facilities-based CLCs shall at a minimum serve all customers who request service and whose premises are within 300 feet of the CLC's transmission facilities used to provide service so long as the CLC can reasonably obtain access to the point of demarcation on the customer's premises, but the CLC shall not be required to build out facilities beyond such 300 feet.

We conclude that under the terms of the Settlement Agreement, Cox satisfies the requirements of Resolution T-17002.

The FCC requires an applicant for ETC designation to demonstrate its ability to remain functional in emergency situations. This demonstration includes information about back-up facilities, the ability to re-route traffic around damaged facilities and the ability to handle traffic spikes. Cox asserts that it has designed its network to be resilient in emergencies, and has included back-up power in its network designs to help ensure that its customers retain service even when commercial power is unavailable.

Designating Cox as an ETC so that it may continue to participate in and seek reimbursement from the California LifeLine program is consistent with Commission policy that carriers providing Basic Service must offer LifeLine. Designating Cox as an ETC will help ensure that current and future Cox customers receive LifeLine service and will promote competition.

Although DRA opposes the Settlement Agreement, we find no reasonable basis to reject the Settlement based on DRA's objections. DRA relies upon the FCC's Cable Modem Ruling and the Supreme Court's Brand X decision, as referenced above. The Supreme Court's Brand X case upheld the FCC's decision to classify certain broadband Internet services as information services, not as telecommunications services subject to FCC regulation. Since Cox affirms that it operates as a common carrier, the Commission may rely on Cox's representations about its common carrier status for purposes of the Commission designating Cox as an ETC under 47 U.S.C. § 214(e)(2).

Accordingly, we conclude that the Brand X decision does not support DRA's argument in the context of telecommunications services offered by Cox.

Under § 214(e) and FCC Rules, an ETC must provide the services supported by the universal service program throughout its designated service area, using its own facilities or by reselling another carrier's facilities. In its ICC-USF Order, the FCC re-defined services that ETCs must provide to be deemed eligible for federal universal service support. The relevant FCC Rule states:

Eligible voice telephony services must provide voice grade access to the public switched network or its functional equivalent; minutes of use for local service provided at no additional charge to end users; access to the emergency services provided by local government or other public safety organizations, such as 911 and enhanced 911, to the extent the local government in an eligible carrier's service area has implemented 911 or enhanced 911 systems; and toll limitation services to qualifying low-income consumers as provided in subpart E of this part.⁵

Under § 214(e)(1)(B), an ETC is required to "advertise the availability of [its] services and the charges therefore using media of general distribution." Cox advertises broadly, using not only its affiliate's cable operations, but newspapers, billboards, direct

mail and other media intended to reach a wide audience in its service area in California. Cox agrees to continue to advertise the availability of its telephone service in all appropriate media in a manner reasonably designed to reach those likely to qualify for the service in both English and Spanish. Cox agrees to comply with any additional advertising requirements that may be adopted by the FCC or by the Commission.

Again, based on these considerations, we find no basis for DRA's objections to the Settlement based upon the Brand X decision.

In the ICC-USF Order, the FCC eliminated its former list of supported services and amended FCC Rule 54.101(a) to specify that "voice telephony service" is supported by the federal universal service mechanisms. Providers eligible for federal Lifeline support must now provide voice grade access to the public switched network or its functional equivalent, minutes of use for local service provided at no additional charge to end users, access to the 911/E911 and toll limitation services.

In its "IP-in-the-middle" proceeding,⁶ the FCC addressed whether "phone-to-phone" Internet protocol telephony services were telecommunications services. The FCC had previously declined to decide regulatory status of all phone-to-phone IP telephony absent a more complete record focused on individual service offerings. The FCC ruled in that proceeding that AT&T's phone-to-phone IP telephony was a telecommunications service: "[e]nd-user customers do not order a different service, pay different rates, or place and receive calls any differently than they do through AT&T's traditional circuit switched long distance service; the decision to use its Internet backbone to route certain calls is made internally by AT&T."⁷

As noted in the "IP-in-the-middle" proceeding, some IP-enabled services are telecommunications services, particularly when the use of circuit-switched or IP-enabled technology in providing generic telecommunications service is at the discretion of the provider.

In offering Basic Service and LifeLine service in California, Cox does not distinguish between using circuit-switched and packet-switched technologies. Cox's Basic Service and LifeLine service, whether circuit- or packet-switched, are offered under one tariff.

For all of the reasons discussed above, we find that the Settlement Agreement, provided as Attachment 1, meets the criteria for approval and adoption. Accordingly, we approve and adopt the Settlement Agreement and grant Cox's request for ETC designation in accordance with the terms and conditions set forth in the adopted Settlement Agreement.

We emphasize that our adoption of the Settlement Agreement is limited in its applicability to the signatories thereto, and does not constitute a precedent regarding any issues relating to any other carrier or party.

6. Comments on Proposed Decision

The proposed decision of ALJ Pulsifer in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were filed on September 3, 2013, and reply comments were filed on September 9, 2013, by various parties. We have incorporated the comments, as appropriate, in finalizing this decision.

7. Assignment of Proceeding

Catherine J.K. Sandoval is the assigned Commissioner and Thomas R. Pulsifer is the assigned ALJ in this proceeding.

Findings of Fact

1. Cox is a certificated provider of local exchange service and long distance service in California pursuant to its CPUC-issued CPCN.
2. Consistent with D.10-11-033, Cox requires ETC designation for purposes of providing LifeLine service to qualifying low-income customers in California and receiving corresponding support from the federal universal service fund and the California LifeLine fund.
3. Cox provides Basic Service and LifeLine service pursuant to its tariff on file with the Commission.
4. Cox operates as a common carrier offering Basic Service and LifeLine service to the public on a nondiscriminatory basis and it holds itself out to serve indifferently all potential users.
5. Cox will comply with current and future laws applicable to providers participating in the state and/or federal LifeLine programs and to holders of CPCNs, including without limitation applicable Commission decisions and General Orders (i.e. GO 153, GO 133-C and GO 168).
6. Cox, TURN, and Greenlining conferred and entered into a Settlement Agreement, as set forth in Attachment 1 of this decision.
7. Under the terms of the Settlement Agreement set forth in Attachment 1 and as a CPCN holder, the Commission will have the authority to address and resolve inquiries and complaints that it receives related to Basic Service and LifeLine service provided by Cox.
8. Under the terms of the Settlement Agreement set forth in Attachment 1 and as a CPCN holder, Cox will comply with GO 96-B (or its successor) with respect to the rules therein governing detariffing Basic Service and LifeLine service, withdrawing such services and/or modifying rates for such services, unless applicable law in the future provides otherwise (in which case, Cox will comply with such applicable law).
9. Designating Cox as an ETC is consistent with Resolution T-17002, Decision 12-12-038, Pub. Util. Code §§ 285 and 710 and the Commission's universal service goal of a 95% service penetration rate in low-income households.
10. Resolution T-17002, requires an ETC applicant to demonstrate that it will:
 - (a) provide supported services within its designated service territory and to certify it will "provide service on a timely basis" to customers passed by the ETC's facilities; and
 - (b) provide service "within a reasonable time" to customers who are not passed by the ETC's facilities "if service can be provided at reasonable cost[.]"
11. Cox does not distinguish between circuit-switched and packet-switched telephone services. The customer is merely ordering telephone service. Cox's Basic service and LifeLine service, whether circuit- or packet-switched, is offered under one tariff.
12. Cox's Application includes all requisite information and is consistent with the requirements set forth in Resolution T-17002.
13. Designating Cox as an ETC subject to compliance with the terms and conditions set forth in the Settlement Agreement attached to this decision is in the public interest.

Conclusions of Law

1. The request of Cox for ETC designation should be approved in accordance with the terms and conditions set forth in the Settlement Agreement attached to this decision.
2. The Settlement Agreement meets the legal requirements for approval based on the standards set forth in Rule 12.1 of the Rules of Practice and Procedure in that it is reasonable in light of the whole record, consistent with applicable state and federal law, and in the public interest.
3. Although the Settlement Agreement is not an all-party settlement, consumer interests are represented through the sponsorship of TURN and Greenlining. Additionally, where specific issues were identified and resolved in the Settlement Agreement the results are reasonable and consistent with the record.
4. The Commission has delegated authority from the FCC for designating ETC status to a common carrier, as found in 47 U.S.C. § 214(e)(2).
5. SB 1161, which added Section 710 of the Public Utilities Code effective January 1, 2013, prohibits the Commission from regulating VoIP or IP-enabled services unless expressly delegated by federal law or statute.
6. The approval of Cox's request for ETC status in accordance with the terms and conditions set forth in the Attachment to this decision is consistent with the requirements of Section 710 of the Public Utilities Code and consistent with the Commission's jurisdiction expressly delegated by applicable federal law and statute.
7. Approval of the Settlement Agreement is limited in its applicability only to Cox and the other signatories to the agreement, and does not constitute prejudgment nor provide any precedent that would apply to any other carrier.
8. To the extent that Cox increases the scope of its service area in the future, the ETC designation granted herein will cover any additional non-rural territories that Cox serves as a consequence of that increase in scope.
9. Designating Cox as an ETC is consistent with D.10-11-033 and D.12-12-038.

ORDER

IT IS ORDERED that:

1. The request of Cox California Telcom, LLC (Cox) for an order from the California Public Utilities Commission designating Cox as an **Eligible Telecommunications** Carrier is granted in accordance with the terms and conditions set forth in the Settlement Agreement attached to this decision and the Certificate of Public Convenience and Necessity issued to Cox.
2. The Settlement Agreement attached to this decision is hereby approved and adopted.
3. The applicability of the Settlement Agreement is limited to the signatories thereto.
4. Application 12-09-014 is closed.

This order is effective today.

Dated October 3, 2013, at San Francisco, California.

ATTACHMENT 1

SETTLEMENT AGREEMENT OF COX, GREENLINING AND TURN

SETTLEMENT AGREEMENT

In accordance with Article 12 of the Rules of Practice and Procedure of the California Public Utilities Commission ("Commission"), Cox California Telcom, LLC, The Utility Reform Network ("TURN") and the Greenlining Institute ("Greenlining") (each individually, a "Party" and, collectively, the "Parties") have agreed on the terms of this Settlement Agreement that they now submit for approval. This Settlement Agreement recommends that the Commission grant Cox's application to be designated as an **eligible telecommunications** carrier ("ETC") without conducting further briefing in this proceeding.

I. Background.

A. As stated in its Application, pursuant to the certificate of public convenience and necessity ("CPCN") that the Commission issued, Cox provides local exchange services in its service territory in California. Cox commenced providing basic service and LifeLine service, both of which are defined by the Commission, in 1997 and continues to provide both services in its service territory.

B. In Decision 10-11-033, the Commission adopted a rule that does not allow providers participating in the California LifeLine program to claim amounts from the California LifeLine fund that could be reimbursed from the federal Lifeline program.

C. In Decision 12-12-038, the Commission adopted a new definition of basic service and concluded that the Commission may adopt further modifications in R.1 1-03-013 for the provision of LifeLine service.

D. Pursuant to Decision 10-11-033 and Resolution T-17002, Cox submitted an advice letter requesting ETC designation, on July 2, 2012, and the Division of Ratepayer Advocates protested such advice letter. Thereafter, Cox withdrew its advice letter and filed its Application in this proceeding.

E. Pursuant to the pre-hearing conference conducted in this proceeding, the Assigned Commissioner issued a Scoping Memo adopting a schedule such that an evidentiary hearing will be not conducted and parties would file opening and reply briefs on issues identified in the Scoping Memo. Thereafter, the Parties to this agreement commenced settlement negotiations for purposes of settling issues identified for consideration in the Scoping Memo.

II. Settlement Agreement Terms.

A. The Parties agree that the basis for and the terms of this Settlement Agreement apply only to Cox with respect to the Application it filed in A. 12-09-014.

B. Cox offers LifeLine service using circuit-switched and VoIP technologies pursuant to the tariff Cox has on file with the Commission.

C. When it provides basic service and LifeLine service, regardless of the technology Cox utilizes, Cox will comply with state laws, those currently in effect and those adopted in the future, that are applicable to providers participating in the state and/or federal LifeLine programs, including without limitation applicable Commission decisions and General Orders (i.e. GO 153, GO 133-C and GO 168). For clarity, when using VoIP technology to provide basic service or LifeLine service, Cox will comply

with laws applicable to those services, notwithstanding arguments made to the Commission and the Legislature regarding those decisions and rules' applicability to VoIP and IP-enabled services.

D. For basic service and LifeLine service provided by Cox, regardless of the underlying technology, the Parties agree that the Commission will have authority to address and resolve inquiries and complaints that it receives related to those services.

E. With respect to basic service and LifeLine service that it provides, regardless of the underlying technology, Cox will comply with General Order 96-B (or its successor) with respect to the rules therein governing detariffing such services, withdrawing such service and/or modifying rates for such service, unless there are any Commission decision(s) and/or other change(s) in laws applicable to ETCs, in which case, Cox will comply with such decision(s) and laws. If any such rules require Cox to file an application, then Cox will serve a copy of such application on TURN and Greenlining.

F. The Parties agree that for purposes of the Commission considering Cox's Application under 47 U.S.C. § 214(e)(2), Cox operates as a common carrier as it offers basic service and LifeLine services to the public on a nondiscriminatory basis. The Parties agree that Cox is a common carrier with respect to its basic service and LifeLine service because it holds itself out to serve indifferently all potential users.

G. The Commission has jurisdiction to receive and act on ETC designations in California. The Parties agree that Cox's Application includes all requisite information and is consistent with the requirements set forth in Resolution T-17002. Based on facts specific to Cox as set forth in its Application and the commitments Cox has agreed to herein, each Party stipulates that the Commission has the jurisdiction to designate Cox as an ETC.

H. Each Party agrees that designating Cox as ETC is consistent with Resolution T-17002, Commission Decisions regarding LifeLine and basic service, including D. 10-11-033 and D.12-12-038, the Commission's universal service goal to achieve 95% penetration rate for phone service in low-income households, Public Utilities Code Section 285 (requiring providers of interconnected VoIP service to collect and remit public policy program surcharges on their California intrastate revenues), and Public Utilities Code Section 710.

I. Each Party agrees that it is in the public interest to designate Cox as an ETC in California, so that it may receive eligible USF and California LifeLine support and continue to provide LifeLine service to eligible customers in its service areas.

J. Cox will not oppose the Commission's instituting a rulemaking or oppose any party that petitions the Commission to institute a rulemaking to address issues such as those posed in the Scoping Memo regarding VoIP and IP-enabled service offerings and those not resolved in this proceeding; provided however, if the Commission institutes such a rulemaking, no Party will be prohibited from participating in such proceeding in any manner it may deem appropriate.

K. TURN and Greenlining each agree that the issues that each such party respectively raised in this proceeding have been addressed for the purpose of settlement and each of these parties supports the Commission granting Cox an ETC designation.

L. The Parties agree that the Commission's adoption of this Settlement should not be construed as an admission or waiver by any Party regarding any fact, matter of law, or issue thereof that pertains to the subject of this Settlement. In accordance with the Commission's Rules of Practice and Procedure, Rule 12.5, the Parties intend that the Commission's adoption of this Settlement be binding on each Party, including its legal successors, predecessors, assigns, partners, joint ventures, shareholders, members, representatives, agents, attorneys, parent or subsidiary companies, affiliates, officers, directors, and/or employees. Adoption of this Settlement does not constitute approval of, or precedent regarding, any principle in any future proceeding, unless the Commission expressly provides otherwise.

III. General.

A. Reasonable and in the Public Interest. The Parties agree to use their best efforts to obtain Commission approval of the Agreement. The Parties will request that the Commission approve the Agreement without change and find the Agreement to be reasonable, consistent with the law and in the public interest. The Parties will take no action in opposition to this Agreement.

B. Entire Agreement. All rights and remedies of the Parties are limited to those available before the Commission. This Settlement Agreement is being presented as integrated package such that Parties are agreeing to this Settlement Agreement as a whole, as opposed to agreeing to specific elements to this Settlement Agreement. If the Commission adopts this Settlement Agreement with modifications, all Parties must consent to the modifications or any Party may void this Settlement Agreement, but only after such Party provides the other Parties to the agreement with the opportunity to meet and confer in good faith regarding the proposed modifications.

C. Counterparts. This Settlement Agreement may be executed in one or more counterparts, and each of which when so executed and delivered will be an original and all of which together will constitute one and the same instrument.

IN WITNESS WHEREOF, the Parties have caused this Settlement Agreement to be executed as of the Effective Date.

Dated: May 30, 2013

Respectfully submitted.

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Footnotes

- 1 Cox requested and has been granted approval to continue recovering all Lifeline support from the California Lifeline fund on an interim basis until such time as the Commission acts on Cox's pending application. (See Letter from Executive Director Paul Clanon, dated October 29, 2012.)
- 2 47 U.S.C. § 214(e)(2). All section references herein are to the Communications Act of 1934, as amended, unless otherwise specified.
- 3 DRA Protest at 4-5.
- 4 Rule 12.1(d) of the Commission's Rules of Practice and Procedure (Rules).
- 5 47 C.F.R. § 54.101(a).
- 6 *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361 (April 21, 2004).
- 7 *Id.* at ¶ 12.

End of Document

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Exhibit B

(Confidential)