Before the
Federal Communications Commission
Washington, DC 20554

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| In the Matter of | ) | |
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| Federal-State Joint Board on Universal Service | ) | CC Docket No. 96-45 |
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| Kingsgate Telephone, Inc. Petition for Waiver of the Definition of "Study Area" In the Appendix—Glossary of Part 36 | ) | |

**OPPOSITION OF WINDSTREAM CORPORATION TO ETS TELEPHONE COMPANY, INC. PETITION FOR WAIVER**

Windstream Corporation, on behalf of its incumbent local exchange carrier ("ILEC") affiliates (hereinafter "Windstream"), herein opposes the petition of ETS Telephone Company, Inc. ("ETS") seeking a waiver that would enable ETS to continue to receive federal universal service high-cost support as an ILEC in areas that are wholly within the ILEC study areas of Windstream and several other companies. ETS has presented no good cause to justify grant of its waiver request;[1] on the contrary, ETS is seeking the perpetuation of an egregious waste of universal service funding that has gone on for nearly two decades. ETS' petition fails to satisfy any of the three prongs in the standard for study area waivers required by the Commission's *Skyline Order*: (1) grant of the waiver must not adversely affect the Universal Service Fund; (2) no state commission having regulatory authority over the relevant area opposes the waiver; and (3) the waiver must be in the public interest.[2] Thus, ETS' petition should be denied, and the flow of federal universal service support to ETS as an ILEC should end immediately.

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[1] *See* 47 C.F.R. § 1.3 (permitting waivers "for good cause shown").

[2] *M&L Enterprises, Inc., d/b/a Skyline Telephone Company Petition for Waiver of Sections 36.611, 36.612, and 69.2(hh) of the Commission's Rules*, CC Docket No. 96-45, Order, FCC 04-86 (rel. April 12, 2004) ("*Skyline Order*"). Therefore, ETS' petition also fails to satisfy the

## I. GRANT OF THE WAIVER WOULD ADVERSELY AFFECT THE UNIVERSAL SERVICE FUND BY PERPETUATING THE IMPROPER DISTRIBUTION OF ILEC SUPPORT TO ETS.

First, the waiver request of ETS should be denied because a waiver would adversely affect the Universal Service Fund by perpetuating the disbursement of excessive and improper support to ETS. ETS is a certified as a competitive local exchange carrier ("CLEC") by the Texas Public Utility Commission.[3] Nevertheless, as the result of an Order issued by the Common Carrier Bureau in 1996, ETS currently receives more than $2 million per year in ILEC high-cost support to serve select portions of the ILEC service areas of Windstream, AT&T, Verizon, CenturyLink, and Consolidated. Since 2003 (as far back as disbursement information is readily available from USAC's website) ETS has received *$42.5 million* in federal high-cost support to serve areas that are entirely within the ILEC service areas of other companies that themselves receive no or minimal high-cost support to serve. Windstream, for one, serves or is willing to serve the entire area within its study area for which ETS seeks to retain support. Thus, continuing to support ETS as an ILEC within Windstream's study area adversely affects the

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standards for evaluating petitions for study area waiver set forth in the Commission's *USF/ICC Transformation Order*: (1) the state commission having regulatory authority over the transferred exchanges does not object to the transfer, and (2) the transfer must be in the public interest. *See Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform – Mobility Fund*; WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17762, ¶ 265 (2011) ("*USF/ICC Transformation Order*").

[3] *Application of Kingsgate Telephone, Inc. for Facilities-Based Certificate of Operating Authority within Harris County*, PUC Docket No. 14651, Order (Dec. 8, 1995). *See also* CLEC Report of En-Touch Systems [sic], *available at* http://www.puc.texas.gov/industry/communications/directories/clec/report_clec.aspx?ID=CLSQL01DB1245201000001 (last reviewed October 20, 2014).

Universal Service Fund by dedicating scarce funding toward an unnecessary and expensive cause.

During the past 18 years, ETS (formerly known as Kingsgate, currently doing business as enTouch) has provided service entirely within the ILEC service areas of other companies, including Windstream. ETS specializes in the provision of bundled voice, broadband, digital television, home automation and security services to more than 25 master planned communities and businesses in the greater Houston area.[4] ETS states that it "has invested significant capital to build telecommunications infrastructure in unserved areas that were included in other ILECs' study areas, but were in fact unserved by them."[5] In fact, ETS has negotiated exclusive arrangements to provide service in new, greenfield developments in suburban Houston. As a CLEC, ETS does not have the regulatory obligations that ILECs operating in Texas have, including Carrier of Last Resort (COLR) obligations and service quality, pricing, billing, unbundling, resale and imputation requirements.[6] Thus, ETS is able to pick and choose where it wishes to provide services and at what price, while Windstream or another ILEC bears the COLR obligation to provide service to requesting customers throughout its study area(s), including those master planned communities and businesses served by ETS.[7]

Not surprisingly, then, ETS chooses to provide services in places that, while largely greenfield in origin, bear significant revenue potential and are not fundamentally high-cost. For example, out of the 330 census blocks within Windstream's study area that ETS is seeking to

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[4] *See* "About enTouch," *available at* http://www.entouch.net/about-us/.

[5] Petition of ETS Telephone Company, Inc., CC Docket No. 96-45, at 6 (filed Sept. 14, 2014) ("*ETS Petition*").

[6] TEX. UTIL. CODE ANN., CH. 54, Subch. G (West 2007 & Supp. 2014 ) (ILEC statutory provider of last resort obligation).

[7] *See* P.U.C. SUBSTR. R. § 26.54(c)(1)(C) and (D) (requiring ILECs to complete 99 percent of service orders within 30 days and 100 percent within 90 days).

retain support to serve, only 10 census blocks, representing 44 locations, stand to receive high-cost support—totaling $19,600 per year—under the Connect America Cost Model. Despite impediments created by ETS' exclusive arrangements with developers, Windstream has deployed fiber in or near the developments served by ETS and stands able and willing to serve these communities, entirely within its ILEC study area. Therefore, the continued, erroneous support of ETS as an ILEC in these areas would be wasteful and detrimental to the Universal Service Fund.[8]

## II. THE TEXAS PUBLIC UTILITY COMMISSION HAS NOT EXPRESSED SUPPORT FOR ETS' WAIVER PETITION.

In addition, ETS' waiver request should be denied because ETS has not obtained the support of the Texas PUC. ETS notes in its waiver request only that it "met with the PUC staff this summer and they *are aware* that ETS would be filing this Petition."[9] It is fair to assume that had the PUC offered any support or encouragement, ETS would have noted such in its filing. At any rate, the Commission must not consider ETS' waiver request unless and until the Texas PUC expresses its support for the request, and must dismiss it if the Texas PUC opposes it.

Moreover, it is questionable whether ETS' petition is complete and procedurally proper. Because Windstream's ILEC subsidiary in the relevant areas is a "rural telephone company" as defined by 47 U.S.C. § 153, ETS may need to obtain a redefinition of Windstream's "service

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[8] ETS may be eligible for high-cost support as a competitive ETC, though that support is calculated based on the support received by the ILECs in the service areas and has been capped and subject to a phasedown pursuant to the Commission's *USF/ICC Transformation Order*. *See USF/ICC Transformation Order*, 26 FCC Rcd at 17831, ¶¶ 512-16. ETS receives much more than it would receive had it been treated as a competitive ETC. Using the 4th Quarter 2011 USAC projections, which was the last quarter before Windstream's support was frozen, ETS received $14.20 per line per month for its lines in Windstream's territory, while Windstream received $1.42 per line per month in the Sugarland exchange, where ETS operates. Since AT&T receives no federal USF for its Texas operations, ETS would receive no support for its lines in the AT&T service area.

[9] *ETS Petition* at 4.

area" (by definition its entire study area) in order to receive federal universal service high-cost support while serving less than Windstream's entire service area. Such a move would require explicit approval by the Texas PUC pursuant to 47 C.F.R. § 54.207, which ETS has not received.

## III. GRANT OF ETS' WAIVER WOULD NOT SERVE THE PUBLIC INTEREST.

Finally, the Commission should deny ETS' request because a waiver that allows it to continue receiving high-cost support would not serve the public interest.[10] The Commission is in the middle of a massive restructuring of the high-cost program to rationalize the distribution of limited support and reduce waste and inefficiency. Generally, the Commission is trying to move toward a system in which carriers receive funding for granular areas based on model-derived costs in those areas, rather than historical costs.[11] With regard to rate-of-return ILECs—which ETS claims to be—the Commission is working to adopt near-term reforms to identify and remedy situations where carriers are receiving excessive support. These include a methodology to limit reimbursement for capital and operations expenses, a reduction in support where carriers' local rates are too low, and a rule to eliminate support for rate-of-return companies in any study area that is completely overlapped by an unsubsidized competitor.[12]

In the context of this broader reform, it is at best tone-deaf for ETS to be seeking to preserve, for as long as possible, support it has been receiving on the erroneous assumption that it is an ILEC. ETS has received many millions of dollars to serve locations that are within Windstream's study area and that Windstream is serving or would gladly serve for very little federal high-cost support because, in fact, the vast majority of the locations are not high-cost.

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[10] In fact, the Commission may wish to consider whether it should recover improper support received by ETS at least since 2004 when the Commission adopted the *Skyline Order*.

[11] *See, e.g., USF/ICC Transformation Order*, 26 FCC Rcd at 17738, ¶ 195.

[12] *Id.*, 26 FCC Rcd at 17738-39, ¶¶ 196-200.

Perpetuating this waste of high-cost support would contravene the goals of the Commission to rationalize the high-cost program and use limited funding to advance broadband deployment in rural and high-cost areas. The public interest demands denial of ETS' petition.

## CONCLUSION

For the foregoing reasons, the Commission should deny the petition of ETS and end the flow of ILEC support to the company.

Respectfully submitted,

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