

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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

**CENTURYLINK OPPOSITION TO ETS TELEPHONE COMPANY, INC.’S
PETITION FOR WAIVER**

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CENTURYLINK

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I. INTRODUCTION AND SUMMARY.

CenturyLink submits these comments in response to the petition of ETS Telephone Company, Inc. (ETS) for a waiver of the definition of the study area boundary rules codified in part 36 of the Federal Communications Commission’s (Commission) rules. Although styled as a petition for a waiver of the definition of “study area,” ETS’s petition (the petition) asks for much more than just a waiver of the definition of “study area.”¹ The petition asks that ETS be permitted to continue to operate as an incumbent local exchange carrier (ILEC) throughout ETS’s existing study area. ETS also seeks a broad waiver of any Commission rule to the extent deemed necessary to permit ETS to continue to receive high-cost universal service support throughout its study area, subject only to the generally applicable reforms being implemented by the Commission.

CenturyLink opposes ETS’s petition. The petition asks for relief that is inconsistent with the very purpose of the study area freeze, which is to prevent the establishment of high-cost exchanges within existing service territories as separate study areas merely to maximize high-

¹ Petition of ETS Telephone Company, Inc., CC Docket No. 96-45, at page 1 (filed Sept. 17, 2014) (“ETS Petition”).

cost support.² The requested relief is also inconsistent with the Commission’s universal service policy of competitive neutrality. Furthermore, the requested relief would perpetuate an ongoing violation of the Commission’s rules for ETC designation, which has provided ETS with an unfair competitive advantage in CenturyLink’s territory. Finally, the Commission precedent cited by ETS does not support the petition, rather, the cited precedent demonstrates how ETS’s petition is an outlier that differs from previous waiver requests that have been granted. ETS has provided no special circumstances nor any good cause justification for a waiver of the definition of “study area” nor the definition of “ILEC” in the Commission’s rules so that ETS can continue to receive high-cost universal service support as a rate-of-return carrier.

The record in this proceeding related to ETS and its puzzling status as an ILEC with its own study area is well summarized in the Commission’s June 3, 2014 Order (*WCB Order*).³ ETS’s petition is clearly not a garden-variety request for a study area waiver. The vast majority of such waiver requests involve the agreed transfer of territory, and responsibility to serve that territory as an ILEC, from one service provider to another. For reasons that are not entirely clear on the record, ETS came to be treated by the Commission as a rate-of-return ILEC that receives millions of dollars of high-cost universal service support annually in a “study area” that falls within the boundaries of multiple price cap carrier study areas, including the study area of CenturyLink’s ILEC affiliate, Central Telephone Company of Texas, Inc. d/b/a CenturyLink (Central Telephone). Regardless of any complexity in the history of how ETS achieved this feat,

² See *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, 19 FCC Rcd. 6761, FCC 04-86, ¶ 11 (rel. April 12, 2004) (“*Skyline Order*”).

³ *Federal-State Joint Board on Universal Service; Kingsgate Telephone, Inc. Petition for Waiver of the Definition of “Study Area” in the Appendix—Glossary of Part 36*, Order, 29 FCC Rcd. 5919, CC Docket No. 96-45, ¶¶ 3-5 (rel. June 3, 2014). (“*WCB Order*”).

the appropriate outcome here is a simple one, and that outcome should be the Commission's denial of ETS's petition in all respects with regard to Central Telephone's study area.⁴

CenturyLink's comments in opposition to ETS's petition are based on the law and the facts as they apply to Central Telephone's impacted study area. However, many of CenturyLink's comments are generally applicable to the merits of the petition as it applies to the study areas of the other affected ILECs (AT&T, Windstream and Consolidated). Indeed, CenturyLink requests that the Commission take specific notice of the prior Opposition of AT&T, Inc. filed in this proceeding on June 16, 2008. AT&T's comments were filed in opposition to ETS's previous petition seeking a ruling that the Commission's *Skyline Order* did not apply to ETS (which would mean that ETS would not have to file a request for a waiver of the definition of "study area"). AT&T's 2008 comments provide a detailed discussion of Texas law and the record at the Public Utility Commission of Texas (PUCT) as they relate to ETS's ability to operate as a competitive LEC (CLEC) while receiving federal universal service support as though ETS is an ILEC.

The *Skyline Order* articulates the Commission's general standards for granting a waiver:

Generally, Commission rules may be waived for good cause shown. As noted by the Court of Appeals for the D.C. Circuit, however, agency rules are presumed valid. The Commission, however, may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest. In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. Waiver of the Commission's rules is therefore appropriate only if special circumstances warrant a deviation from the general rule, and such a deviation will serve the public interest.⁵

⁴ CenturyLink takes no position on whether there should be some retroactive treatment of ETS's status as an ILEC and of ETS's prior receipt of universal service support.

⁵ *Skyline Order*, at ¶ 7.

The Commission’s specific standards for evaluating a petition for study area waiver are (1) the state commission with regulatory authority over the transferred exchanges does not object to the transfer and (2) the transfer must be in the public interest.⁶ The *WCB’s Order* requires the decision on ETS’s petition “to be based on the factual circumstances and regulatory framework that exists today.”⁷ Taking ETS’s petition as filed, and given the current facts, regulations and law, the Commission should deny ETS’s petition.

II. ETS HAS FAILED TO DEMONSTRATE THAT THE PUCT DOES NOT OPPOSE THIS PETITION.

ETS has the burden to support its petition and demonstrate that it meets the standards for a waiver. CenturyLink is unaware of ETS ever having sought the PUCT’s formal approval for a “transfer” of territory from an ILEC to ETS. In its petition ETS asserts that the PUCT informed the Commission in a letter dated April 26, 1996 that the PUCT had no objection to any necessary waiver to establish a study area waiver for ETS.⁸ Although the petition states that the letter was filed in this docket on April 29, 1996, ETS chose not to attach a copy of the letter to its most recent petition. It is unclear what the PUCT may have believed it was “not objecting to” back in 1996. The *WCB Order* establishes that what is most relevant is the PUCT’s current position on ETS’s requested relief, which the PUCT has not yet announced. In response to the *WCB Order*, ETS has made no serious effort to obtain the PUCT’s formal approval of ETS’s request to create

⁶ See generally *Connect America Fund, et al.*, WC Docket No. 10-90, *et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd.17663 (rel. Nov. 18, 2011) (*USF/ICC Transformation Order*) (subsequent regulatory history omitted), *aff’d sub nom.*, *In re: FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014), *reh’g denied* (10th Cir., Orders, Nos. 11-9900, *et al.*, Aug. 27, 2014). (*USF/ICC Transformation Order*). See also *WCB Order*, n19.

⁷ *WCB Order*, at ¶ 9.

⁸ ETS Petition, at page 4.

a new study area. CenturyLink asserts that ETS merely notifying the PUCT Staff that this petition would be filed⁹ does not satisfy the first prong of the study area waiver test.

III. ETS'S PETITION IS NOT IN THE PUBLIC INTEREST.

ETS's petition fails the public interest prong of the study area waiver test for multiple reasons, including that the requested relief is inconsistent with the Commission's universal service support policy, and that ETS has failed to follow Commission rules regarding eligibility for receipt of high-cost universal service support. ETS's petition fails the public interest prong of the waiver test and should be denied for the following reasons: 1) the Central Telephone area that ETS purportedly serves is, and always has been, within the pre-existing and recognized Texas study area of Central Telephone; 2) Central Telephone has been, and continues to be the Carrier of Last Resort (COLR)¹⁰ for the area and stands ready, willing and able to provide service; and 3) Central Telephone has provided service for the area without the benefit of any federal or state high-cost universal service support.¹¹

As demonstrated by the map of ETS's study area attached to the petition,¹² ETS's study area appears to consist of a fiber route semi-circle around the western and northern periphery of the Houston metro area. The fiber route semi-circle portions of the study area are extremely narrow and simply follow major roads or highways and connect approximately 22 larger areas

⁹ *Id.*

¹⁰ TEX. UTIL. CODE ANN., CH. 54, Subch. G (West 2007 & Supp. 2014) (ILEC statutory provider of last resort obligation).

¹¹ Although Central Telephone receives some interstate access support (IAS) for its Texas study area, the ETS study area is in IAS Zone 1 for which Central Telephone does not receive any IAS support. Moreover, Central Telephone does not receive any high-cost loop support in its Texas study area. Similarly, although in 2000 the PUCT established a high-cost universal service fund that provides support at the exchange level, the narrow strip of ETS's study area that overlaps with Central Telephone's study area crosses an exchange that does not receive any Texas high-cost universal service support.

¹² ETS Petition, Exhibit 1.

that vary in size and apparently consist of the “communities” that ETS serves. ETS’s study area looks like a poster child for a gerrymandered congressional district, and the petition makes clear that since the issuance of the *Kingsgate Order* in 1996 ETS has continually added “previously unserved territories” to its study area without seeking a study area waiver.¹³ The portion of ETS’s study area that overlaps with Central Telephone’s study area is only a narrow strip that follows major roads and cuts through a small portion of Central Telephone’s Humble Exchange, as shown in Exhibit 1 of ETS’s petition. Central Telephone has served for many years, and currently serves, customer locations within the ETS study area that overlaps Central Telephone’s pre-existing study area.¹⁴ CenturyLink does not know whether ETS actually provides service to any customer within the Central Telephone portion of ETS’s study area.

The *Skyline Order* makes clear that ETS’s definition of “unserved” is not what the Commission considers “unserved” in the context of a request for a study area waiver or a waiver of any rules that would support classifying a new carrier as an “ILEC.”¹⁵ This should have been apparent to ETS back in 1996 when, as *Kingsgate Telephone*, ETS started providing service in the Houston metro area, given that all of ETS’s requested study area was within the pre-existing and recognized study areas of well-established ILECs with significant operations nearby if not in the actual territory at issue. The average industry participant in the local exchange business (even back in 1996) understands that merely because certain territory is not presently developed

¹³ ETS Petition, at 2, citing *Request for Clarification filed by the National Exchange Carrier Association, Inc., and Petitions for Waiver Filed by Alaska Telephone Company, Ducor Telephone Company, and Kingsgate Telephone, Inc., Concerning the Definition of “Study Area” Contained in the Part 36 Appendix-Glossary of the Commission’s Rules*, Memorandum Opinion and Order, AAD 95-175, AAD 96-29, AAD-96-51, 11 FCC Rcd.8156, 8160, ¶ 9 (Com. Car. Bur. 1996) (“*Kingsgate Order*”).

¹⁴ CenturyLink takes issue with any representation, even in 1996, that any portion of its Central Telephone Texas study area was “unserved.”

¹⁵ *Skyline Order*, at ¶¶ 4, 7.

and is not presently being served by the ILEC, if the territory is within the study area of an ILEC then the ILEC is generally obligated as the COLR to serve that territory when it is developed and if service is requested.

ETS's requested relief, which ultimately seeks the retention of high-cost universal service support as though ETS were an ILEC, is inconsistent with the Commission's universal service policy.¹⁶ It violates the universal service policy of competitive neutrality to allow ETS to receive high-cost universal service support in an area that the ILEC serves without the benefit of any universal service support. Initially the competitive neutrality principle resulted in portability of support and an "identical support" rule, which generally limited a competitive Eligible Telecommunications Carrier (ETC) to no more support on a per-line basis than the underlying ILEC received. ETS's receipt of high-cost universal service support in an area where Central Telephone receives no high-cost support would violate the identical support rule. The identical support rule has been eliminated,¹⁷ and support for wireline competitive ETCs is being phased down and eliminated (transitioned to the Connect America Fund). If ETS were to be treated as the CLEC that it is and if it were designated as a competitive ETC (notwithstanding its failure to comply with the requirements of section 54.207 of the Commission's rules, discussed below) ETS would not be entitled to *any* federal high-cost universal service support.

In the *USF/ICC Transformation Order* the Commission also indicated that it would evaluate the public interest benefits of a study area waiver petition based on, among other factors, whether a waiver would result in a "reduction in cost per line due to an increased number

¹⁶ See *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, First Report and Order, 12 FCC Rcd. 8776, at ¶ 47 (rel. May 8, 1997). ("In [the universal service] context, competitive neutrality means that universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another.")

¹⁷ *USF/ICC Transformation Order*, 26 FCC Rcd. 17663, at ¶ 502.

of lines.”¹⁸ That “guideline” assumes the traditional consolidation of two geographically separate study areas, and not an overlap of study area as in this case, but that guideline indicates that a favorable public interest factor is whether a waiver would decrease the amount of universal service support in an area. ETS’s petition is contrary to that public interest consideration, as the petition seeks a continuation of universal service support that is not necessary for the ILEC to provide service to the area. In that sense, ETS’s petition is also inconsistent with the forward-looking policy of the Commission to eliminate support where there is an unsubsidized provider of service.¹⁹ Providing high-cost universal support to ETS in the Central Telephone study area does not advance any of the universal service policies in Section 254(b) and is inconsistent with long-standing universal service policies concerning competitive neutrality and efficient use of support for the purposes that it is intended.

IV. ETS SHOULD NOT BE ALLOWED TO CIRCUMVENT THE ACT’S ETC REQUIREMENTS.

ETS’s entire purpose for creating its own study area is so that it could receive its own level of high-cost universal service support,²⁰ divorced from whatever amount of support the underlying ILEC receives, or even whether the underlying ILEC receives support. The real issue in this proceeding, as the petition makes clear by the breath-taking scope of the relief requested (a waiver of *any* Commission rule necessary for ETS to continue receiving high-cost support) is whether ETS should continue receiving high-cost universal service support.

¹⁸ *USF/ICC Transformation Order*, 26 FCC Rcd. 17762 at ¶ 265.

¹⁹ *USF/ICC Transformation Order*, 26 FCC Rcd. 17767, 17729, at ¶¶ 170, 281.

²⁰ CenturyLink is unaware of the cost justification ETS originally provided to NECA for the per line support amounts it receives.

In this context, it is noteworthy that Central Telephone is a Rural Telephone Company as that term is defined by the Act.²¹ Under no circumstances should ETS be allowed to establish a new study area, as if it is an ILEC, within the existing study area of a Rural Telephone Company like Central Telephone and receive high-cost universal service support while bypassing the Commission's requirements to become an ETC that are applicable to a CLEC – which is what ETS is – that wants to receive such support in the study area of a Rural Telephone Company. In order for ETS to be classified as an eligible telecommunications company (ETC) and receive *any* high-cost universal service support in the study area of Central Telephone, section 54.207 of the Commission's rules requires ETS to either establish its ETC service area as the entirety of Central Telephone's study area or obtain from both the PUCT and the Commission a formal redefinition of Central Telephone's study area (mere non-opposition by the PUCT is not enough), and since 1996 ETS has failed to do either. That failure alone by ETS argues against a finding that it would be in the public interest to grant ETS's petition with respect to Central Telephone. The requirements of section 54.207 of the Commission's rules stem from 47 U.S.C. § 214(e)(5),²² and reflect important congressional policies designed to protect a Rural Telephone Company from unfair competition.²³ Accordingly, it would not be in the public interest to grant ETS's petition and allow it to continue the status quo.

²¹ Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 15 and 47 U.S.C.), 47 USC Section 153 (44)(d); *see also* Common Carrier Bureau's Notice of List of Carriers Filing Rural Certification Letters and Notifications of Changes in Status, CC Docket No. 96-45, DA 00-1705 (rel. August 1, 2000).

²² "For purposes of universal service obligations, the service area of a rural telephone company *shall* be that company's study area unless and until the study area is redefined by the Commission and the applicable state."

²³ *See Recommended Decision, In the Matter of the Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, 12 FCC Rcd. 87, 179-180, ¶¶ 172-173 (Rel. Nov. 8, 1996).

V. COMMISSION PRECEDENT DOES NOT SUPPORT ETS'S PETITION.

ETS cites to “prior Commission decisions and policy” for support of its requested waivers.²⁴ Without exception, every one of the prior Commission decisions cited by ETS is distinguishable from one or more key facts of the present case, and most of the decisions are not based on facts similar at all to the present case other than they involved requests for similar waivers. Four of the six prior Commission decisions that ETS cited involved the creation of a new study area where there was no pre-existing ILEC study area.²⁵ In all four of those decisions, there was no opposition to the requested study area waiver, which is not the case here. In addition, three of those four cases were decided before the *Skyline Order* was issued, and any study area waiver granted prior to the *Skyline Order* is of questionable precedential value to ETS.

²⁴ ETS Petition, n.9 at page 5.

²⁵ *Westgate Communications LLC D/B/A Weavtel Petition for Waiver of Sections 69.2(hh) and 69.601 of the Commission's Rules; Beaver Creek Telephone Company Petition for Waiver of Sections 69.2(hh) and 69.601 of the Commission's Rules*, Order, 20 FCC Rcd. 13573 (Wireline Comp. Bureau 2005) (“The record demonstrates that the areas in which WeavTel and Beaver Creek intend to construct and operate new exchanges are not within the study area of any incumbent LEC.” ¶ 13); *Wilderness Valley Telephone Company, Inc., Petition for Waiver of Sections 69.605(c) and 69.3(e)(11) of the Commission's Rules*, Order on Reconsideration, AAD 96-99, DA 98-603, 13 FCC Rcd.6573 (Acct. Aud. Div. rel. Mar. 31, 1998) and *See Wilderness Valley Telephone Company, Inc., Petition for Waiver of Sections 69.605(c) and 69.3(e)(11) of the Commission's Rules*, Order AAD 96-99, 13 FCC Rcd.4511 (Acct. Aud. Div. rel. Feb. 26, 1998) (“Wilderness Valley represents that none of the surrounding local exchange carriers, US West, GTE of Minnesota, or Peoples Telephone Company, exhibited interest in serving the area.” ¶ 5, and “Wilderness Valley is a newly-formed entity authorized to serve previously unassigned and unserved territory.” ¶ 8); *American Samoa Government and the American Samoa Telecommunications Authority*, Order, 14 FCC Rcd. 9974 (Acct. Aud. Div. 1999) (American Samoa had been the exclusive service provider to the area. ¶¶ 18 – 19); *South Park Telephone Company, Petition for Waiver of Sections 36.611 and 36.612 of the Commission's Rules*, Order, AAD 97-41, DA 97-2730, 13 FCC Rcd.198 (Acct. Aud. Div. 1997) (“South Park is a new telephone company seeking to provide telephone exchange service to rural customers in a previously unserved area.” ¶ 8. There is no discussion of whether South Park’s study area does or does not overlap with the existing study area of an ILEC, although the proposed study area was clearly unserved by “neighboring carriers” and was a high-cost “rural” area (¶¶ 5-6), which is not true for the Central Telephone part of ETS’s study area.)

The two remaining Commission study area waiver decisions that ETS cited in its petition superficially appear to involve circumstances similar to ETS's and relief that is similar to what ETS is seeking: treatment as an ILEC and creation of a unique study area that will overlap²⁶ an ILEC's existing study area in order for the petitioner to participate in NECA tariffs and pools and receive high-cost universal service support. However, both decisions are distinguishable from the facts of ETS's petition. ETS relies on the *Sandwich Isles II* decision in a number of places in its petition.²⁷ The *Sandwich Isles II* case involved a study area waiver request by Sandwich Isles Communications, Inc. (Sandwich Isles) in order to be designated as an ILEC in a newly created study area that consisted of portions of the Hawaiian home lands. Similar to this case, in 1998 Sandwich Isles was classified as an ILEC and granted its own study area based, in part, on a Bureau interpretation of "unserved area." As a result of an application for review filed by Verizon Hawaii, Inc., the Commission subsequently reversed the Bureau's waiver decision based on the *Skyline Order* precedent.²⁸ In December 2004, Sandwich Isles filed a petition for waiver of the definition of "study area" and of "ILEC" in order to establish its own study area in the Hawaiian home lands and to be treated as an ILEC in order to participate in NECA tariffs and pools and to receive universal service support, and the Commission granted the petition in May 2005.

²⁶ It is unclear from these decisions whether, as part of creating a new study area for the petitioner, the FCC has altered the underlying ILEC's study area so that there ultimately is no overlap, or whether the FCC has created a new study area that does overlap with the ILEC's study area.

²⁷ *Sandwich Isles Communications, Inc., Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix- Glossary and Sections 36.611 and 69.2(hh) of the Commission's Rules*, Order, 20 FCC Rcd.8999 (Wir. Comp. Bur. 2005) ("*Sandwich Isles II*").

²⁸ *Sandwich Isles II*, at ¶¶ 2-4, Procedural History.

While there are superficial similarities between *Sandwich Isles II* and the instant case, there are key differences. First, no ILEC opposed Sandwich Isles' waiver request.²⁹ Second, the Hawaiian Islands are an insular, forested and mountainous area that is significantly different from, and more costly to serve than, the flat suburbs surrounding metro Houston.³⁰ The Hawaiian home lands consist of 200,000 acres of territory set aside for native Hawaiians to homestead, and there are Hawaiian home lands dispersed in numerous areas on each of the Hawaiian Islands, which are largely rural in nature.³¹

The record in *Sandwich Islands II* also reflects that the ILEC (GTE) was "not offering service throughout much of the Hawaiian home lands. The record reflects that, at least in the 1990s, GTE was not providing service to residents, or was at best providing multi-party service in the Hawaiian home lands."³² At best, GTE was providing service to less than one percent of the 200,000 acres of Hawaiian home lands, which does not suggest that GTE was ready, willing or able to serve the remaining 99 percent.³³ This is substantially different than ETS's study area that consists of pockets of greenfield developments, connected by a thin line, within the study areas of ILECs, where there has been no showing (historically or otherwise) that those greenfield areas would not be served by the ILEC.

²⁹ *Id.*, at ¶ 13.

³⁰ According to U.S. Census Bureau data, the estimated 2013 population of the Houston metro area (consisting of Houston, The Woodlands, and Sugar Land) was approximately 6.3 million. <http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>

In contrast, the estimated 2013 population for the entire State of Hawaii was approximately 1.4 million. <http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>

³¹ A map of the Hawaiian home lands is available on the website of the Office of Hawaiian Affairs. http://www.ohadatabook.com/2010_HHL.pdf

³² *Sandwich Isles II*, at ¶ 21 (footnote omitted).

³³ *Id.*, at ¶ 15 and n.52.

In addition, there was extensive evidence in the *Sandwich Isles II* record regarding the complete lack of wireline service, or inadequate wireline service, prior to Sandwich Isles offering service in the Hawaiian home lands.³⁴ The Bureau in *Sandwich Isles II* considered the study area requested by Sandwich Isles to be truly “unserved” even though a *de minimis* portion of it was within the study area of an ILEC.³⁵ None of these characteristics apply to the small strip of Central Telephone’s Humble Exchange, an exchange of only 105 square miles that Central Telephone was actively serving prior to ETS’s 1996 study area waiver petition. Central Telephone is currently serving customer locations in the extremely small ETS study area that runs through the Humble Exchange. The *Sandwich Isles II* decision is based on facts that are significantly different from the instant case.

Finally, ETS also cites to the Common Carrier Bureau’s 1997 decision to grant a study area waiver to Rural Telephone Service Company.³⁶ Rural Telephone Service Company was an existing ILEC that sought to expand its study area into an adjacent rural area by overbuilding in the study area of United Telephone Company of Kansas (United). United was in the process of selling its access lines in that rural area to another ILEC, and subsequently sold its access lines to Rural Telephone Service Company.

The Bureau’s decision in *Rural Telephone* can best be understood by focusing on two things: 1) a finding that the petitioner would improve the service available to end users; and, more importantly 2) the date of the decision. First, the Bureau found that “Rural’s installation of advanced telecommunications facilities will improve service to the telephone subscribers in the

³⁴ *Sandwich Isles II*, at n. 74, 76.

³⁵ *Id.*, at n. 89 (“Here, Sandwich Isles is not providing competing service, but rather was providing service in areas not actually served by the existing incumbent LEC.”)

³⁶ *Petition for Waiver Filed by Rural Telephone Service Company*, Memorandum Opinion and Order, 12 FCC Rcd. 785 (CCB rel. Jan. 13, 1997) (“*Rural Telephone*”).

Bogue/Hill City exchange. Thus, we conclude the public interest will be served by Rural's provision of service in this area."³⁷ While not the same as finding that the area was "unserved," the Bureau relied on a factor not present here, which is a history of inadequate service to a rural area that would be improved by granting a study area waiver to a new ILEC. Beyond asserting that the service it provides to consumers is "affordable and reliable,"³⁸ ETS's petition is devoid of any suggestion of how continuation of its service benefits consumers in a way that differs from the service that would be provided by the ILEC. ETS cannot show that Central Telephone's service is not affordable and reliable, nor has ETS's petition demonstrated how eliminating receipt of high-cost support by ETS would render its own service unaffordable or unreliable. ETS's petition relies almost entirely on its financial expectations to satisfy the public interest prong of the Commission's rule waiver test.

In addition, the Bureau's *Rural Telephone* decision also acknowledges that the Commission had not yet formulated any rules to implement the Act's universal service requirements, including the ETC designation requirements in Section 214. The decision relies on language in Section 214(e) of the Act that is actually associated with the designation of multiple carriers as ETCs in the same area,³⁹ and that language does not support the concept of overlapping ILEC study areas. When the *Rural Telephone* decision was issued the process and requirements for a competitive carrier to be classified as a competitive ETC had not been developed and most states had not yet designated any LECs as ETCs. Although the Bureau

³⁷ *Rural Telephone*, at ¶ 13. In addition, although not discussed in the decision, United is a Rural Telephone Company under Section 153(44) of the Act and receives high-cost universal service support, so granting Rural Telephone Company's petition would not have created a new high-cost study area where there previously was none.

³⁸ ETS Petition, at page 7.

³⁹ *Rural Telephone*, at ¶ 14.

granted Rural Telephone Service Company a study area waiver, the decision appears to have been influenced, at least in part, by a desire to provide Rural Telephone Service Company with universal service support before there was a well established process for a competitive LEC to become an ETC and receive universal service support, and before the Commission's adoption of the "identical support" rule.⁴⁰

Finally, the *Rural Telephone* decision predates the *Skyline Order*. The *Skyline Order* articulates a clear concern for the creation of a new study area within an existing study area, and clarified that "treating an area as unserved when it was previously within an existing study area would be inconsistent with the purpose of the study area freeze."⁴¹ The *Skyline Order* also re-confirms the fundamental purpose of the 1984 study area freeze: "to prohibit companies from setting up high-cost exchanges within existing service territories as separate study areas to maximize high-cost support."⁴² What ETS proposes is precisely what the study area boundary freeze was designed to prohibit, which is the establishment of a new high-cost study area in an area that has not been designated as high-cost for universal service purposes.

⁴⁰ Since the passage of the Act it is a common occurrence for rural ILECs, like Rural Telephone Service Company, to edge out of their study area and overbuild the network of an ILEC in an adjacent study area. However, typically those rural ILECs do not pursue a study area waiver in order to expand their existing study area and receive universal service support based on their own costs, rather, they pursue competitive ETC status in order to receive the same universal service support available to the ILEC in the adjacent study area. In CenturyLink's experience, ILEC overbuilders do not seek, and do not obtain, study area waivers, particularly over the objection of the resident ILEC that is actually serving the area (this obviously differs from the routine boundary changes and transfers of territory that occur by agreement). In the context of ILECs that overbuild, and in the context of study area waivers, the *Rural Telephone* decision appears to be an aberration.

⁴¹ *Skyline Order*, at ¶ 11. The *Skyline Order* granted a study area waiver even though it resulted in a new high-cost area for purposes of universal service support. However, the amount of new support was *de minimis*, the new study area was a high-cost rural area previously unserved by the ILEC, and the ILECs involved also agreed to change their study area boundaries to transfer territory to Skyline Telephone. *Id.*, at ¶¶ 2, 5, 15, 16, 18.

⁴² *Id.*, at ¶ 12.

VI. CONCLUSION.

The current facts, regulatory scheme and law applicable to ETS's petition do not support finding that its waiver request is in the public interest. As discussed above, there is no Commission precedent that supports ETS's petition. Factually, ETS's service area in Central Telephone's study area is not a high-cost area. It is not in the public interest to grant a waiver to create a new study area in the study area of an ILEC that actually provides service as a COLR to the area in question, and that provides service without the benefit of universal service support. ETS's petition falls squarely within the type of harm that the study area freeze was meant to prohibit, which is the creation of a high-cost study area within an area that has not been designated as high-cost for universal service purposes. ETS's petition has not presented any special circumstances or good cause justification that would justify a deviation from the definition of "study area" nor from the requirement to be an ILEC in order to be a member of NECA to receive universal service support. Deviating from the Commission's rules in this

instance would not be in the public interest. With respect to CenturyLink's Central Telephone of Texas, Inc.'s study area, ETS's petition should be denied in all respects.

Respectfully submitted,

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