

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
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)	CC Docket No. 96-45

REPLY COMMENTS

ETS Telephone Company, Inc. (“ETS”) submits the following reply comments in support of its petition filed in this proceeding on September 17, 2014.

I. ETS Has Not Misled the Commission or the Public.

ETS’s petition has drawn opposition from its larger Texas neighbors, who not surprisingly would prefer that ETS no longer receive USF support. While they raise some valid points in this admittedly unusual case, ETS wants at the outset to emphatically reject one commenter’s allegation that ETS “misled” the Commission and that “ETS should not be allowed to profit off its lack of forthrightness with the Commission over the last eighteen years.”¹ From the very beginning in 1995 and 1996, ETS fully disclosed its plans to the Texas PUC and to the Commission. ETS’s March 1996 waiver petition clearly identified it as a new “facilities based competitor” that planned to serve unserved territory in within an existing study area.² ETS’s 2008 filings in this docket described, in thorough detail, that ETS is a CLEC under Texas law

¹ CCFB Comments at 14-15.

² Kingsgate Petition at 1, 4-5.

(which is irrelevant to this proceeding, in which only federal law applies)³ and that ETS's first completed for-hire telephone call was completed after February 8, 1996. ETS's participation in the high-cost fund as an incumbent LEC has been in the open, viewable in detail by all of the parties that now oppose ETS's request, as well as by the Commission.

Consolidated suggests that ETS has acted "without Commission sanction or approval" to deftly conceive a plan to stretch the holding of a "1996 Common Carrier Bureau Order" to support the creation of its study area.⁴ But this was not just any "Bureau order;" it was the order that explicitly addressed ETS's original petition for a study area waiver, along with the similar requests of two other carriers. Thus, rightly or wrongly, it was the Commission, and not ETS, that sanctioned the creation of ETS's original study area, and that has thereafter permitted ETS to receive USF support as an ILEC. And when ETS became aware of uncertainty regarding its appropriate classification, it was ETS, and not the Commission or any of the commenters, that filed a petition seeking clarification. But for six more years thereafter, the Commission continued to treat ETS as a rate-of-return incumbent carrier.

This is why, as AT&T notes, that at times ETS has called itself an ILEC, notwithstanding the ambiguity the proper application of Section 251's definitions to ETS. ETS reasonably described itself as an ILEC because that is how the FCC, NECA and USAC had treated it for years. ETS wasn't calling itself an ILEC to deceive anyone, but was simply describing effective

³ USTA is incorrect in stating that "If the Texas PUC was in support of the waiver request, it would classify ETS as an ILEC, which it has not." USTA Comments at 4. The PUC must operate in accordance with Texas law, which has differing definitions of CLEC and ILEC than does federal law.

⁴ CCFB Comments at 19 and ii.

reality.⁵ Even if the Act itself was ambiguous,⁶ the Commission's treatment of ETS had not been.

II. The Public Interest Favors Continued Support for ETS.

The commenters have not comprehensively provided evidence that they actually serve substantial portions of ETS's study area, much less that they did so prior to ETS's entry (to disprove that the area was previously "unserved").⁷ Statements that they would be "willing" to serve areas ring hollow after so many years of not doing so. The developments had no existing facilities and were not, as Consolidated alleges, "readily served by [other carriers'] existing facilities."⁸ Instead, substantial build-out by ETS was required.

AT&T provided a chart listing companies that supposedly provide broadband to each of ETS's service areas, but its list is flawed for several reasons. It does not indicate whether such providers offer voice services at all, much less to all of the homes in ETS's service area.⁹ At least some of the providers listed, such as Skynet and Internet America, are wireless ISPs that do not offer voice services in the area. It is notable that AT&T only lists itself as a wireline provider in 2 of the 33 communities. Much of AT&T's list is composed of competitive wireless providers, which are present throughout much of the country. Wireless substitution is of course

⁵ For the record, ETS also emphatically disputes AT&T's unsupported characterization of ETS's RUS loan as "questionable." The project that RUS funded was similar to numerous other projects around the country that RUS funded and complied with all applicable laws and regulations. ETS paid off its RUS loan in full.

⁶ AT&T's derision of ETS's 2008 comment that the definition of ILEC in Section 251 as "nothing to do with universal service" was taken out of context. ETS's 2008 reply comments, read in their entirety, make clear that ETS understood that the definition of ILEC in Section 251 had been applied by the Commission to its universal service rules. Some commenters take the view that it is easy to conclude that ETS is not an ILEC in areas that it was authorized to serve but did not actually serve prior to February 8, 1996. But if so, it could be questioned whether another ILEC is really an ILEC in areas where it has constructed initial facilities since 1996.

⁷ AT&T notes that ETS stated to the PUC in 1995 that its proposed initial service territory included 250 existing AT&T telephone lines. ETS has not been able to determine the company's basis for that statement, but it does not appear that ETS ever actually built facilities into an area where AT&T already had pre-existing facilities.

⁸ CCFB Comments at ii.

⁹ Confusingly, AT&T also lists ETS as a provider in some of the areas, but not others.

a legitimate topic in consideration of USF reform, but is not a reasonable basis for distinguishing ETS's case from other rate-of-return carriers.

Consolidated offered a map that shows portions of ETS's service area adjacent to or in some cases surrounded by a color shading indicating a Consolidated service area, but has not provided information regarding its actual service within the ETS service areas. It devotes a substantial portion of its comments and exhibits to alleging, incorrectly, that ETS has excluded Consolidated from entering developments through de facto exclusive access agreements. While ETS has agreed to various marketing arrangements with developers, it has not negotiated for any exclusive access, and it uses the same easements that are available to all carriers. ETS is aware that in 2012, Consolidated had difficulties obtaining timely access to certain commercial tenants in the Katy Ranch Crossing development. ETS was not a party to this dispute between Consolidated and the property owner. As the Commission is well aware, these situations are not uncommon, and Texas and federal law already provide avenues for relief, which Consolidated availed itself of. Indeed, ETS is currently facing a similar problem in accessing tenants of the nearby Katy Mills Mall, where the property owner has been insisting on terms of access that favor Consolidated over ETS. ETS's recourse is to enforce building access laws, or lobby for new laws or regulations if it believes such rules are inadequate -- not to urge the Commission to take away Consolidated's study area.

This showing of the other ILECs' lack of service to these unserved communities, combined with the Texas PUC's non-opposition to ETS's request¹⁰ and the very small impact on

¹⁰ Windstream incorrectly states that "the Commission must not consider ETS's waiver request unless and until the Texas PUC expresses its support for the request." Windstream Comments at 4. The Commission's orders state only that the PUC's non-opposition would be considered in the analysis. As previously stated, the PUC filed a letter in this docket stating its non-opposition, and that letter has been attached hereto as Exhibit 1. ETS made the PUC aware of the re-opening of this proceeding and provided a copy of the PUC's prior filing to its staff so that it would have the opportunity to revisit that position or file other comments if it wished to do so.

the fund,¹¹ may have been sufficient in 1996 or 2008 (when ETS previously brought its case to the Commission) for the Commission to grant a waiver with respect to at least part, if not all, of ETS's service area as in the public interest, in order to assure that residents of these rural areas could receive affordable, quality telephone services. That said, ETS recognizes that the public interest analysis for a request to create a new study area in 2014 arguably should include an analysis of the consistency of the request with the objectives of the *Transformation Order*. The commenters point out that at least much of ETS's service area is not expected to qualify for funding once the Commission's reform efforts are fully implemented, since cable broadband services are available in at least most of the area from an unsubsidized provider. For this reason, if ETS were seeking a waiver to establish a new study area for the first time, approval of the waiver under the public interest analysis should be more challenging than it would have been in 1996 when ETS first requested the waiver. Much of the commenters' oppositions are based on that fact.

But ETS is not seeking the establishment of a new study area. ETS's study area already exists, and has for eighteen years. Whether or not the Commission now shares the commenters' view that it made a mistake, as a practical and equitable matter, the fact is that ETS has effectively been treated as a rate-of-return ILEC since 1996. ETS's investment and business decisions have relied on the Commission's 1996 decision to sanction the creation of ETS's study area and to treat ETS as a rate-of-return ILEC. While these facts do not compel the Commission to maintain the *status quo* indefinitely, under Commission precedent they do

¹¹ Consolidated correctly notes that the *Transformation Order* changed the public interest analysis for new study area waiver requests by eliminating the 1% test. ETS stands by its position that the net effect on the fund is \$0 since ETS already receives support for its existing study area. However, for the record, in 2014, ETS is scheduled to receive \$2,289,060 in interstate common line support for 12,570 lines. Grant of the waiver would not result in consolidation of study areas because it would simply preserve the status quo; however, that does not preclude grant of the waiver because the Commission has stated that "these guidelines are only guidelines and not rigid measures for evaluating a petition for study area waiver." *Transformation Order*, ¶ 265.

deserve consideration as part of the public interest analysis that should govern the ultimate disposition of the case.

The Commission has repeatedly found that the public interest can be disserved by a flash cut to a new rule that would disrupt the settled business expectations of consumers or regulated entities. Even if, as Consolidated suggests, ETS should have “assumed the risk of an adverse Commission decision” as to its continued eligibility to receive USF support,¹² the same could be said for all USF participants whose receipt of funding will be affected by the *Transformation Order*. In that order, the Commission could have ordered rapid phase out of support from carriers that would be losing it, and told everyone that they should have “assumed the risk” that the rules would change right away, especially after years of notice that reform was under consideration. Instead, the Commission emphasized that it was “careful to implement these changes in a gradual manner so that our efforts do not jeopardize service to consumers or investments made consistent with existing rules.”¹³ Accordingly, the *Transformation Order* afforded a three-year transition period to rate-of-return carriers whose funding will be eliminated under the new 100% overlap standard.¹⁴

ETS is similarly situated to other carriers that have been receiving high-cost support as rate-of-return incumbent carriers. If ETS’s participation in the high-cost program as an ILEC will be terminated, a gradual transition would assist ETS in preserving quality services and reasonable prices for its customers without unduly disrupting its ability to maintain its network and continue ongoing investment, by better enabling it to adjust its business model to reduce expenses and/or increase cash inflows to replace high-cost support. It would be arbitrary and capricious to impose a lesser transition on ETS (and its affected customers) than the Commission

¹² CCFB Comments at 19.

¹³ *Transformation Order*, ¶ 285.

¹⁴ *Transformation Order*, ¶¶ 280-284.

is providing to these other carriers. Therefore, if the Commission decides that ETS should no longer receive high-cost support, it should afford the same transition period.

III. ETS Would Not Oppose a Practical Alternative that Includes the *Transformation Order's* Phase-Out Transition.

ETS continues to believe that the Commission did not make a “mistake” in permitting the establishment or expansions of ETS’s study area, and that the commenters have not provided sufficient evidence to warrant a reversal. Even though ETS may in any event eventually lose much of its funding as a result of the *Transformation Order*, it appears that it would continue to receive at least some funding even after implementation of the current reforms, absent a change in its current status. At the same time, ETS also appreciates the challenges that its unusual situation of overlapping study areas poses for the Commission’s national implementation of its important reforms. To expedite the resolution of all of these issues, ETS would be willing to forgo its pending request for waivers if the Commission will treat ETS the same as other parties that will have their high-cost support eliminated under the 100% overlap test. Specifically: (1) the Commission could treat all of ETS’s study area territory as belonging to other incumbent LECs for purposes of its forthcoming proceeding to determine 100% overlaps with unsubsidized providers; and (2) ETS would temporarily continue to participate in the existing programs but would be treated as a carrier with a 100% overlap (whether the case or not). Under such an approach, it would not even be necessary for the Commission to rule on the merits of ETS’s waiver requests, which ultimately could be dismissed as moot.

ETS anticipates a first response that some parties might have to this proposal: that if ETS never should have received funding in the first place (a characterization that ETS disputes), then it should not be permitted to try to negotiate to receive any further funding from the program. However, if the Commission would in any event seek to act consistently with its precedent

favoring gradual transition periods over flash cuts, then ETS's proposal would not increase (and could decrease) the amount of funding that ETS will ultimately receive. Instead, the net effect of adoption of this approach would be only that the Commission could more expeditiously move forward with its broader reforms, which in turn would render this unusual case into a mooted footnote of history, while avoiding at least much of the disruptive effects on ETS's customers.

CONCLUSION

For the foregoing reasons, ETS respectfully requests that the Commission grant any waivers that it deems necessary to permit ETS to continue to operate and receive high-cost support throughout its Study Area, or, in the alternative, defer consideration of the requested waivers and adopt the proposed transition plan set forth herein.

Respectfully submitted,



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Counsel for ETS Telephone Company, Inc.

November 6, 2014

Exhibit 1

Texas PUC Non-Opposition to Waiver to
Permit Establishment of Study Area



Public Utility Commission of Texas

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Austin, Texas 78757-1098
512/458-0100 • (Fax) 458-8340

Pat Wood,
Chairman

Robert W.
Commissioner

Judy Wals
Commissioner

Carole J. Vogel, Director
Office of Regulatory Affairs

April 26, 1996

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APR 29 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Washington, D.C. 20554

RE: Waiver of Study Area Boundary for
Kingsgate Telephone, Inc.

Dear Mr. Caton:

This is to confirm that the Public Utility Commission of Texas has granted to Kingsgate Telephone, Inc. a certificate of operating authority to provide telecommunications services in Texas. Therefore, the Public Utility Commission of Texas has no objection to a waiver of the FCC rules, as deemed necessary by the FCC, to establish a study area for Kingsgate Telephone, Inc.

Sincerely,

A handwritten signature in dark ink, appearing to read "C. J. Vogel".

Carole Vogel, Director

Printed on recycled paper

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