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ACCEPTED/FILED

MAR 23 2015

Before the
Federal Communications Commission
Washington, D.C. 20554

Federal Communications Commission
Office of the Secretary

In the Matter of)	
)	
Connect America Fund)	WC Docket No. 10-90
)	
Access Charge Reform)	CC Docket No. 96-262
)	
Reform of Access Charges Imposed by Competitive Local Exchange Carriers)	

**PETITION FOR LIMITED, EXPEDITED WAIVER BY WESTELCOM NETWORK,
INC. OF SECTION 61.26(A)(6) OF THE COMMISSION'S RULES**

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Date: February 23, 2015

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SUMMARY

Westelcom Network, Inc. (“Westelcom”) respectfully requests a limited, expedited waiver of the definition of “Rural CLEC” found in Section 61.26(a)(6) of the rules of the Federal Communications Commission (“Commission”). A competitive local exchange carrier (“CLEC”) that meets the definition of a “Rural CLEC” is allowed to use the “rural exemption” rate for that CLEC’s interstate switched access services as provided for under Section 61.26(e) of the Commission’s rules. Westelcom is a CLEC which serves rural areas of specific portions of upstate New York. Westelcom has operated as a “Rural CLEC” under Section 61.26(a)(6) and thus qualified for the “rural exemption” as set forth in 61.26(e) of the Commission’s rules. In 2012 the United States Census Bureau (“CB”) reclassified one of the communities in Westelcom’s service area from an “urban cluster” to an “urbanized area.” Absent a grant of the instant waiver, this reclassification would mean that Westelcom would no longer qualify as a “Rural CLEC” and thus Westelcom would not be permitted to use the higher interstate switched access rates as provided for under the Section 61.26(e) rural exemption.

Consistent with current Commission policy, the requested waiver is necessary to allow Westelcom to once again be subject to a reasonable transition period to phase down its access rates to zero while allowing Westelcom to utilize the revenues derived from its provision of exchange access services using Section 61.26(e)-established rates for the continued deployment of its fiber-based network. This fiber-based network, in turn, will allow Westelcom to continue and expand the provision of robust services, including broadband, to areas in upstate New York including the Critical Community Facility customer base which Westelcom currently serves. Special circumstances exist to support the prompt grant of this limited waiver. Westelcom respectfully submits that a prompt grant of the waiver is in the public interest. As demonstrated herein, such action is essential to address the specific facts presented here that demonstrate that a

waiver of Section 61.26(a)(6) in these specific instances is necessary not only to avoid undermining the public interest determinations made by the Commission in its November 18, 2011, *USF/ICC Transformation Order*, but also to further the Commission's public policy objectives found in its December 21, 2012, *Healthcare Connect Order*. As part of the relief requested herein, Westelcom respectfully requests that the Commission explicitly authorize it to refile its interstate switched access service rates as a "Rural CLEC" pursuant to Section 61.26(a)(6) and thus establish such rates as provided for under Section 61.26(e) of the Commission's rules.

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Westelcom Network, Inc. ("Westelcom"), pursuant to 47 C.F.R. § 1.3, respectfully requests a limited, expedited waiver of 47 C.F.R. § 61.26(a)(6) (the "Rural CLEC Definition") which, when applied, allows such competitive local exchange carrier ("CLEC") to charge exchange access users of its network the "rural exemption" rates under 47 C.F.R. §61.26(e). Westelcom seeks a limited waiver that will allow it to qualify for the "rural exemption" until July 1, 2020 and charge the rates provided for under Section 61.26(e) of the Commission's rules. For the reasons stated herein, Westelcom respectfully maintains that the instant waiver request is warranted because the application of the Rural CLEC Definition to Westelcom's specific circumstances runs contrary to and, in fact, undermines the public interest determinations made by the Commission in its *USF/ICC Transformation Order*¹ and *Healthcare Connect Order*.² Thus, as part of the relief requested herein, Westelcom respectfully requests that the Commission

¹ See *In the Matter of Connect America Fund, et al.*, Report and Order and Further Notice of Proposed Rulemaking, WC Docket No. 10-90 *et al.*, 26 FCC Rcd 17663 (2011), *aff'd* In Re: FCC 11-161, 753 F.3d 1015 (10th Cir. 2014), *pet. for cert. pending* ("*USF/ICC Transformation Order*").

² *In the Matter of Rural Health Care Support Mechanism*, Report and Order, WC Docket No. 02-60, 27 FCC Rcd 16678 (2012) ("*Healthcare Connect Order*").

explicitly authorize it to refile its interstate switched access service rates as a “Rural CLEC” pursuant to Section 61.26(a)(6) and thus establish such rates as provided for under Section 61.26(e) of the Commission’s rules.³

In 2012, the Census Bureau (“CB”) reclassified one of the communities in Westelcom’s service area – Watertown, New York – from an “urban cluster” to an “urbanized area.”⁴ As a result and absent the requested waiver, Westelcom does not meet the rote application of the Rural CLEC Definition. Westelcom requests a limited waiver on an expedited basis so as to allow it refile its interstate switched access service rates in order, once again, to have the status of a Rural CLEC under the Rural CLEC Definition until July 1, 2020. This waiver will allow Westelcom to use the established transition period outlined in the *USF/ICC Transformation Order*⁵ required to phase down its access charges from the applicable National Exchange Carrier Association, Inc. (“NECA”) rates to zero. At the same time, a grant of this waiver will allow Westelcom to generate appropriate intercarrier compensation (“ICC”) revenues envisioned by the *USF/ICC Transformation Order* which have been and will be used by Westelcom for the deployment of its fiber-based network serving specific rural areas of upper New York State. As explained herein, Westelcom’s customer base includes a significant number of Critical Community Facility (“CCF”) operations.⁶ The continued provision and expansion of service

³ On February 20, 2015, Westelcom updated its tariff for switched access to mirror the competing incumbent local exchange carrier’s rate, Verizon New York, Inc.

⁴ CB classifications are updated without input from agencies, such as the Commission, that rely upon the CB’s classifications for implementation of those agencies’ individual programs. *See infra* nn. 53 and 54, and accompanying text.

⁵ *See id.* at ¶¶ 798-807; *see also* 47 C.F.R. §§ 51.911(c) and 51.913.

⁶ In its Community Connect Grant Program, the United States Department of Agriculture has defined “Critical Community Facility” as “the Community Center; any public school, public education center, public library, public medical clinic, public hospital, community college, public

to this customer base is fully consistent with the overarching objectives of broadband deployment announced in the *USF/ICC Transformation Order* and the *Healthcare Connect Order*.⁷ Accordingly, as is set forth herein, good cause exists to grant Westelcom's petition for waiver.⁸

I. BACKGROUND

A. Westelcom Operations

Westelcom⁹ is a CLEC operating in New York.¹⁰ Westelcom was established in 1981 and has been providing broadband internet services and telecommunications services – local dial tone and/or long distance services – to customers¹¹ located in a rural six county area in the Adirondack region of New York from Lake Ontario to Lake Champlain.¹² The Adirondack region is, as a general matter, sparsely populated and is known for its “dazzling lakes, wild

university; or law enforcement, fire or ambulance station in the Proposed Funded Service Area.” 7 C.F.R. § 1739.3. Consistent with this definition, the businesses that Westelcom serves are also private institutions comparable to the public entities described in 7 C.F.R. § 1793.3, and are thus included in the definition of Critical Community Facility for the purposes of this petition.

⁷ See *Healthcare Connect Order* at ¶¶ 34 and 39.

⁸ Certain factual assertions that relate to proprietary and competitively sensitive information made in this petition are disclosed in Confidential Attachment A which is being filed separately with the Commission today pursuant to 47 C.F.R. § 0.459. A redacted version of Confidential Attachment A is attached hereto.

⁹ Attached hereto is the “Declaration of Paul Barton” attesting to the underlying facts contained in this filing. Mr. Barton is President of Westelcom. See Attachment B.

¹⁰ Westelcom is a wholly-owned subsidiary of Chazy & Westport Telephone Corporation (“Chazy”), an incumbent rural local exchange carrier in the State of New York. Westelcom does not compete with Chazy.

¹¹ See Confidential Attachment A at page 1.

¹² This area is commonly referred to as the “North Country.” See Map of New York Regional Economic Development Councils, available at <http://regionalcouncils.ny.gov/map>. Westelcom uses the term “Adirondack North Country” to refer to this same region.

mountains, and charming towns and villages.”¹³ Over the past eleven years, Westelcom has made significant investments to deploy a robust fiber-based network in specific areas in the Adirondack North Country.¹⁴ For example, its fiber network provides coverage to significant areas of Watertown, New York,¹⁵ as well as fiber optic infrastructure and other services in the rural communities of Malone, Clayton, Elizabethtown, Ticonderoga, and Plattsburgh.¹⁶ During this same time period, Westelcom has focused its investments on deploying fiber optic circuits to replace leased copper lines from the incumbent carrier, Verizon New York, Inc., in an effort by Westelcom to improve quality, increase network capabilities, gain efficiency, reduce costs, and ultimately to encourage economic development in the area.¹⁷ As a result of its investments Westelcom has replaced a significant amount of its leased copper lines with wholly-owned fiber.¹⁸ This investment provides high-speed fiber optic transport capabilities to meet the advanced broadband needs of its CCF and other business customers that otherwise may not have been provided with state-of-the-art services crucial to the customers’ needs.¹⁹

¹³ See About the Adirondacks, available at <http://visitadirondacks.com/about>.

¹⁴ See Confidential Attachment A at page 1; Attachment C, page 6, Kelly Vadney, *Westelcom Installs New Call Switch*, Watertown Daily Times, Nov. 15, 2006, at B1.

¹⁵ See Confidential Attachment A at page 1.

¹⁶ Each of the communities of Malone, Clayton, Elizabethtown, Ticonderoga, and Plattsburgh communities have a population of less than 50,000 and have not been recategorized as part of an urbanized area by the CB.

¹⁷ See Confidential Attachment A at page 1; Attachment C, page 7, Arianna MacNeill, *Westelcom rolling out new fiber optic cable network*, The Malone Telegram, Mar. 5, 2013, at A1; Attachment C, page 8, Press Release, Westelcom Network, Inc., *Broadband to Benefit Development* (2008), available at http://www.westelcom.com/NewsRoom/2008/devel_corp.htm; Attachment C, page 9, *Fiber-Optic Line Being Installed for City Hall, Fire Station*, Watertown Daily Times, Aug. 24, 2006 at B3.

¹⁸ See Confidential Attachment A at page 1 and Confidential Exhibit 1.

¹⁹ See Attachment C, page 10, *Westelcom keeps on improving communications infrastructure*, Watertown Daily Times, Mar. 7, 2010 at P34, available at

Westelcom's investments have proven to be particularly important for CCFs and the healthcare industry in the Adirondack North Country. Westelcom has become one of the primary providers of communications services to smaller health care facilities in the Adirondack North Country by interconnecting a significant number of hospitals, clinics and practices.²⁰ This effort includes providing the Internet backbone for the Fort Drum Regional Health Planning Organization.²¹ In Watertown, New York for example, Westelcom provides service to a considerable number of CCFs and those entities make up a significant percentage of Westelcom's business customers.²² Consistent with Westelcom's experience, it has been noted that, "as healthcare professionals rely more on electronic medical records, tests, images, videos" and telemedicine, high capacity broadband networks have increasingly become a necessary way

<http://www.watertowndailytimes.com/article/20100307/UNKNOWN/303079739>; *Why Jefferson Community College Chose Westelcom for their Telecommunications Needs*, Testimonial (2009), available at <https://www.youtube.com/watch?v=uLjkbYqLPMM>; Attachment C, page 11, *Immaculate Heart Central Gets High-Speed Network*, Watertown Daily Times, Jan. 6, 2008 at B1; Attachment C, page 12, Press Release, Westelcom Network, Inc., *Westelcom Delivers High-Speed Fiber Network to Samaritan Medical Center* (2007), available at <https://www.westelcom.com/NewsRoom/2007/samaritanfiber.htm>; Attachment C, page 13, *Closing the Loop on Fiber Optics in Watertown*, originally reported by MSNBC.com (2006) available at http://www.westelcom.com/NewsRoom/2006/msnbc_fiber.htm.

²⁰ See Confidential Attachment A at page 1.

²¹ See Attachment C, pages 14-16, Amanda Morrison, *Wired for Success*, NNY Business (January 2014) at 27, available at http://www.westelcom.com/wired_for_success.pdf. Fort Drum does not have a military hospital on base, so the Fort Drum Regional Health Planning Organization ("FDRHPO") works "to analyze the existing healthcare system available to Fort Drum Soldiers, their Families, and the surrounding civilian community, identify gaps and then leverage additional medical resources." See *What is FDRHPO?*, available at <http://www.fdrhpo.org/our-model-of-care/what-is-fdrhpo/>. The mission of FDRHPO involves coordination of military treatment facilities with civilian healthcare facilities to provide complete care to Fort Drum. *Id.*

²² See Confidential Attachment A and Confidential Exhibit 2 at page 1.

to transfer and move this data.²³ Accordingly, Westelcom respectfully submits that its fiber optic networks have proven to be an integral component of the economic development in the Adirondack North Country area of New York and particularly in the healthcare industry.²⁴

Westelcom's network investment and operational capability result from a combination of its willingness and commitment to deploy in rural areas of the Adirondack North County a state-of-the-art fiber-based network and to provide services to customers requiring advanced broadband services. This willingness and commitment is also reflected in Westelcom's rational reinvestment of revenue from all of the services it offers – local exchange, long distance, advanced services and exchange access services – to support and expand this network and the

²³ See Attachment C, page 17, Vivian Wagner, *Fiber Optics and Rural Medicine: Healthcare at the Speed of Light*, TechNewsWorld, July 10, 2010, available at <http://www.technewsworld.com/story/70390.html> (discussing the Commission's Rural Health Care Pilot Program); see also *Healthcare Connect Order* at ¶ 1 (“Whether it is used for transmitting electronic health records (EHRs), sending X-rays, MRIs, and CAT scans to specialists at a distant hospital, or for video conferencing for telemedicine or training, access to broadband for medical providers saves lives while lowering health care costs and improving patient experiences.”).

²⁴ Westelcom provides services to two FDRHPO telemedicine networks as a subcontractor to the Development Authority of the North Country (“DANC”). The North Country Telemedicine Project (“NCTP”) currently includes thirty-six (36) healthcare facilities. See Attachment C, pages 23-34, NCTP: HCF Network Plan, Jan. 24, 2014, available at http://www.universalservice.org/_res/documents/rhc/pdf/tools/HCF-Posted-Services/17236_RFP01_Network_Plan.pdf; Attachment C, pages 35-76, NCTP Annual Report #1 (Sept. 30, 2013), available at <http://apps.fcc.gov/ecfs/document/view?id=7520946524>. Westelcom provides internet access for the entire NCTP project as well as network operations and service support. The Adirondack-Champlain Telemedicine Information Network (“ACTION”) currently includes fifty-three (53) health care facilities. See Attachment C, pages 77-105, ACTION Annual Data Report #1 (Sept. 30, 2013) available at <http://apps.fcc.gov/ecfs/document/view?id=7520946567>. Both projects are participants in and receive support from the Commission's Rural Health Care Pilot Program. See *Selected Participants – Health Care Pilot Program*, available at <http://www.usac.org/rhcp/about/participants.aspx>.

services provided over it.²⁵ Westelcom has maintained its commitment to the communities it serves through a measured deployment of a fiber-based network based on the revenues that the existing network generates, even as it competes with Time Warner Cable, Charter Communications, Verizon Communications, Inc., and AT&T, Inc. (each of which is a multi-faceted and much larger competitor in areas of the State of New York).

Westelcom implemented the FCC's ICC phase down outlined for CLECs in the *USF/ICC Transformation Order* and planned accordingly based on the transition schedule announced in that decision. This planning, however, contemplated the phase down of Westelcom's interstate switched exchange access service rates based on Westelcom's continued status as a Rural CLEC and thus the use of the rural exemption-established rate under Section 61.26(e) of the Commission's rules. Westelcom respectfully submits that any delay in granting this limited waiver request and explicitly allowing and authorizing the re-filing by Westelcom of Rural CLEC-based rates will have a significant negative impact on Westelcom and its customers and deny Westelcom the glide path that unquestionably was intended for all carriers by the *USF/ICC Transformation Order*.

²⁵ See Confidential Attachment A at page 2 and Confidential Exhibit 3.

B. The 2010 Census and 2012 CB Reclassification of Watertown, New York

Following the 2010 census, the CB reclassified thirty-six communities as “urbanized areas.”²⁶ One of the newly identified urbanized areas was Watertown, New York,²⁷ a community within Westelcom’s service area. Watertown’s actual population in 2010 was 27,023²⁸ which was an increase of only 318 from 2000.²⁹

Nonetheless, through a revised and complex set of criteria, utilizing factors other than actual population growth, the CB reclassified Watertown from an urban cluster to an urbanized area with a total population of 57,840.³⁰ The CB relied primarily on (1) new “impervious surface” criteria in conjunction with “enclave” and “indentation” criteria; and (2) inclusion of additional noncontiguous territory through “hops and jumps” criteria to extend Watertown’s

²⁶ See Attachment C, page 106, *Growth in Urban Population Outpaces Rest of Nation*, Census Bureau Reports, Mar. 26, 2012, available at: https://www.census.gov/newsroom/releases/archives/2010_census/cb12-50.html. Only seven of the communities classified as urbanized areas have populations that exceed 50,000. The remaining communities are designated as urbanized areas based solely on the Census Bureau’s complex criteria, such as Watertown, New York.

²⁷ See Census Bureau, 2010 Urban and Rural Classification, available at <https://www.census.gov/geo/reference/ua/urban-rural-2010.html>; Attachment C, page 107, *New Urbanized Areas: 2010*, available at https://www.census.gov/geo/maps-data/maps/pdfs/thematic/2010ua/UA2010_NewUAs_Map.pdf.

²⁸ See Attachment C, page 108, *Census Bureau Quick Facts, Watertown, New York*, available at <http://quickfacts.census.gov/qfd/states/36/3678608.html>.

²⁹ See Attachment C, page 110, *United States Census Bureau, American Fact Finder, Community Facts, Profile of General Demographic Characteristics: 2000, Watertown, New York*, available at <http://factfinder.census.gov/>.

³⁰ See Attachment C, pages 113-117, *Census Bureau, Differences between the Final 2010 Census Urban Area Criteria and the Census 2000 Urban Area Criteria (“Urban Area Criteria Changes”)*, available at https://www.census.gov/geo/reference/pdfs/ua/2000_2010uadif.pdf; *2010 Census Urban and Rural Classification and Urban Area Criteria, List of 2010 Urbanized Areas*, available at http://www2.census.gov/geo/ua/ua_list_ua.xls.

urban boundaries further into surrounding communities.³¹ The addition of the “impervious surface” criteria was a significant change to the CB urban area criteria for the 2010 census. Prior to 2010, the CB identified the initial urban core area by using census block group and block population density, count, and size thresholds, which are measures that relate to population. Starting with the 2010 census the CB began also utilizing the “National Land Cover Database to identify territory with a high degree of impervious land cover”³² to add to the initial urban core. By definition these “impervious surface” areas include additional land, but not additional population. The application of the new criteria to Watertown resulted in the creation of a larger urban core upon which the CB was able through other criteria to include several communities; many more than ten (10) miles away from Watertown, in the newly-established urbanized area. The paper “growth” that the CB related to Watertown, however, does not translate to actual growth of potential customers and does not alter the cost to Westelcom to provide service to Watertown. Significantly, Westelcom does not (and cannot) serve the epicenter of this expanded area: the 12,000+ population of Fort Drum.³³ Unlike the multi-faceted markets in which its

³¹ These communities include, census designated places Fort Drum and Great Bend, the towns of Watertown, Rutland, and LeRay, and the villages of Deferiet, Herrings, Glen Park, Brownville, Dexter, Black River, West Carthage, and Carthage. *See* Attachment C, pages 118-119, E-mail from Christopher J. Henrie, Geographic Standards and Criteria, Geography Division, U.S. Census Bureau, to Eileen Bodamer, Bodamer Consulting, LLC (Nov. 5, 2014, 11:34 EST). *See also* 76 Fed. Reg. 53030 (Aug. 24, 2011) at V.B.1.c (impervious surface criteria), V.B.4 (enclave criteria), V.B.6 (indentation criteria), V.B.3 (hops and jumps criteria), and V.C (definitions).

³² *See Urban Area Criteria Changes*, Attachment C, page 113. “Impervious surfaces” are defined as “[m]an-made surfaces, such as building roofs, roads, and parking lots.” 76 Fed. Reg. 53030 at V.C.

³³ *See* Attachment C, page 120, Census Bureau Quick Facts, Fort Drum, New York, available at <http://quickfacts.census.gov/qfd/states/36/3626759.html>. All switching for on-post or military barracks dial tone service is government owned. The army contracts with one national contractor to deliver trunks to all of the switches. *See* Attachment C, pages 134-136 and 154-156, Army Regulation 25-13, Information Management, Telecommunications and Unified Capabilities, (Mar. 25, 2013) at Section 3-5 and Appendix B-6, B-18, available at

largest competitors in Watertown also operate, Westelcom does not serve any truly urban areas with which to average its cost.

Yet, as a result of the CB's complex definition of hops and jumps and impervious surfaces, Westelcom is, absent the requested waiver grant, foreclosed from the reasonable transition of a carrier's ICC rates afforded to *all other* carriers by the *USF/ICC Transformation Order*. The reclassification also undermines Westelcom's ability to carry out a goal it shares with the Commission – to enhance advanced telecommunications availability for the rural health care industry.³⁴

C. The Effect of the Reclassification of Watertown, New York as an “Urbanized Area”

The reclassification of Watertown was brought to the attention of Westelcom through billing disputes submitted by certain interexchange carriers.³⁵ In reviewing these disputes and based on its internal analysis of carrier access billing invoices, Westelcom determined that a change of its Rural CLEC status under Section 61.26(a)(6) would immediately reduce its interstate exchange access revenues by ninety-six percent (96%). This reduction in revenue is significant and, as with any carrier, has impacted Westelcom's fiber investment decisions.³⁶ This impact curtails Westelcom's ability to expand advanced telecommunications services within the

http://www.apd.army.mil/pdffiles/r25_13.pdf. Westelcom serves only limited portions of the Adirondack North Country. Thus, it is not eligible to compete for on-post or military switching or transport services. Westelcom also does not have the facilities existing to serve civilian businesses located on the base and to provide such service through the lease of other companies' facilities would not be economical. Likewise, the communities that were added to form Watertown's urbanized area are not currently served by Westelcom, nor could they be served economically. *See supra* note 31.

³⁴ *See, e.g., Healthcare Connect Order* at ¶¶ 34 and 39.

³⁵ Westelcom became aware that the reclassification occurred on October 24, 2014, when an interexchange carrier disputed a billing.

³⁶ *See Confidential Attachment A and Confidential Exhibit 4.*

Adirondack North Country communities it serves, including the healthcare industry.

While Westelcom could undertake the regulatory process in an effort to remove Watertown from its service area in order to preserve its status as a Rural CLEC, such action would, in Westelcom's view, have an adverse impact on the public interest and specifically its commitment to the Watertown community. Any effort to remove its operations in Watertown would require Westelcom to turn its back on the very commitments it has made in Watertown as reflected in its contributions to the Watertown community that, in 2012, resulted in Westelcom being honored as Business of the Year by the Greater Watertown-North Country Chamber of Commerce.³⁷ These commitments and contributions to Watertown do not end there. Rather, Westelcom's commitments and contributions are reflected in its investment of substantial network resources in business centers in various industrial parks and to medical establishments and other local businesses, and in human resources. As to the human resource commitments, Westelcom ensures that its employees are actively engaged in the Watertown community.³⁸ Even if it were reasonable to end these corporate commitments, from a technical perspective, removal of Watertown from Westelcom's service area would also disrupt Westelcom's provision

³⁷ See Attachment C, page 21, Ted Booker, *Five companies take home 2012 Business of the Year awards*, Watertown Daily Times, Mar. 7, 2013, available at <http://www.watertowndailytimes.com/article/20130307/NEWS03/703079845>. This award "is presented to a business able to demonstrate outstanding leadership and vision, successful performance and substantial growth, and able to serve as an inspiration to other businesses. The award is designed to recognize and reward a Jefferson County business that has invested in the region by creating economic success in the Greater Watertown area." See Greater Watertown-North Country Chamber of Commerce, Events & Programs, <http://www.watertownny.com/pages/EventsPrograms/>.

³⁸ All Westelcom executives, management and directors participate in at least one community board, fundraiser, committee or group. Additionally, Westelcom regularly provides financial support to Watertown-based charitable organizations and it sponsors an annual high school scholarship to promote education in technology. Westelcom employees hold positions as coaches, board directors, school committee officials, emergency medical technicians, military support representatives and charitable agency officers in the Watertown community.

of services to surrounding rural communities. For Westelcom, any effort to leave Watertown is nothing more than a Hobson's choice.

Westelcom respectfully submits that the impacts described herein are not in the public interest and otherwise contradict the public policy rationale supporting the *USF/ICC Transformation Order*: reasonable transitions of ICC rates serve the public interest. These benefits would be denied to Westelcom and the customers it serves if Section 61.26(a)(6) of the Commission's rules is blindly applied. Thus, Westelcom seeks limited, expedited relief in order to allow Westelcom to reestablish a rational and appropriate ICC glide path to a zero ICC rate by July 1, 2020.

II. STANDARD FOR GRANTING WAIVER

The general standard for the granting of a waiver by the Commission from a regulation is set forth in 47 C.F.R. §1.3. This regulation states:

The provisions of this chapter may be suspended, revoked, amended, or waived for good cause shown, in whole or in part, at any time by the Commission, subject to the provisions of the Administrative Procedure Act and the provisions of this chapter. Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.

The Commission has further explained this "good cause" standard as follows:

The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest. *Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*). In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166. Waiver of the Commission's rules is appropriate only if both (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest. *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008); *Northeast Cellular*, 897 F.2d at 1166.³⁹

³⁹ *In the Matter of Connect America Fund et al.*, Order, WC Docket No. 10-90 et al., 27 FCC

III. SPECIAL CIRCUMSTANCES WARRANT DEVIATION

When the Commission enacted its access charge reform regulations in 2001⁴⁰ Westelcom was defined as a Rural CLEC under the Rural CLEC Definition and was entitled to utilize the “rural exemption” which permitted it to charge other carriers for interstate exchange access using the applicable NECA access tariff rate.⁴¹ Ten years later, Westelcom, recognized the demands of the public policy foundations of the *USF/ICC Transformation Order* vis-à-vis the transition of Westelcom’s interstate switched exchange access rates to “zero,” and it planned accordingly. At the same time, Westelcom persisted in believing that the fiber-based network it continued to deploy met the Commission’s overarching broadband objective within the *USF/ICC Transformation Order*.

Regardless of the public interest determinations that may have supported the *CLEC Access Charge Reform Order*, Westelcom respectfully submits that the strict application of those determinations cannot stand when the more recent Commission public interest pronouncements within the *USF/ICC Transformation Order* are considered. In the *USF/ICC Transformation Order*, the Commission stated in pertinent part:

We believe that these transition periods strike the right balance between our commitment to avoid flash cuts and enabling carriers sufficient time to adjust to marketplace changes and technological advancements, while furthering our overall goal of promoting a migration to modern IP networks. We find that consumers will benefit from this regulatory transition, which enables their providers to adapt to the changing regulatory and technical landscape and will

Rcd 15768 (2012) at n. 9.

⁴⁰ *In the Matter of Access Charge Reform*, Seventh Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-262, 16 FCC Rcd 9923 (2001) (“*CLEC Access Charge Reform Order*”).

⁴¹ 47 C.F.R. § 61.26(e). None of the communities in Westelcom’s service area in 2001 exceeded the 50,000 population threshold or were identified as “urbanized areas” by the Census Bureau.

enable a faster and more efficient introduction of next-generation services.⁴²

The requested waiver is supported by the public interest benefits derived in (1) establishing a reasonable transition in ICC rates, (2) encouraging the deployment of fiber-based networks,⁴³ and (3) meeting the need for advanced services to consumers,⁴⁴ including Westelcom's expansive provision of such services to the Adirondack North Country's CCFs and, in particular, the provision of advanced services to the healthcare industry.⁴⁵ Prompt grant is required to avoid any results explicitly contrary to the public interest framework now established in the *USF/ICC Transformation Order* and to avoid serious risks to Westelcom's significant investment in infrastructure and delivery of advanced telecommunications services to rural areas. This latter risk, in particular, would be directly contrary to the Commission's goals outlined in the *Healthcare Connect Order*.⁴⁶

In this regard, two of the goals of the Commission's Healthcare Connect Fund are to (1) increase access to broadband by rural health care providers ("HCPs");⁴⁷ and (2) foster "development and deployment of broadband health care networks, particularly networks that

⁴² *USF/ICC Transformation Order* at ¶ 802.

⁴³ See e.g., *In the Matter of Technology Transitions, et al.*, Order, Report and Order and Further Notice of Proposed Rulemaking, Report and Order, Order and Further Notice of Proposed Rulemaking, Proposal for Ongoing Data Initiative, GN Docket No. 13-5, *et al.*, 29 FCC Rcd 1433 (2014) ("*Technology Transitions Order*") at ¶¶ 16 and 18 (identifying the deployment of fiber-based networks as one of the "three key technology transitions that significantly affect customers.").

⁴⁴ As the Commission explained in the *Technology Transitions Order*, it is "committed to exploring ways to ensure that, as networks transition, the access of rural American customers . . . is not just preserved, but enhanced, in all areas of the country." *Id.* at ¶ 90.

⁴⁵ See, e.g., *Healthcare Connect Order* at ¶¶ 34 and 39.

⁴⁶ *Id.*

⁴⁷ *Id.* at ¶ 34.

include HCPs that serve rural areas.”⁴⁸ These goals implement “Congress’s directive in section 254(h) of the Communications Act that the Commission ‘enhance access to advanced telecommunications services and information services’ for eligible HCPs and to provide telecommunications services necessary for the provision of health care in rural areas at rates reasonably comparable to similar services in urban areas.”⁴⁹ Because Westelcom serves a significant number of CCF and healthcare industry customers, the failure to grant the requested waiver would frustrate the further deployment of advanced telecommunications services to rural health care providers, a result that is directly contrary to these stated Commission goals.⁵⁰

Taking into consideration these specific circumstances and facts, rote application of Section 61.26(a)(6) would render the public policy framework and underpinnings of the *USF/ICC Transformation Order* illusory. A ninety-six percent (96%) reduction in interstate switched exchange access revenue arising from the application of the Rural CLEC Definition is not a rational ICC transition. The rote application of the Rural CLEC Definition to Westelcom will have a significant impact on investment decisions regarding the deployment of additional fiber in its service area. Not granting the requested waiver promptly will also adversely affect Westelcom’s provision of additional advanced telecommunications services to the rural healthcare industry in the Adirondack North Country within New York, a result inconsistent with the Commission’s objectives articulated in the *Healthcare Connect Order*.

Westelcom recognizes that, in adopting 47 C.F.R. § 61.26(a)(6), the Commission’s test for applying the rural exemption was based primarily on the rationale of administrative

⁴⁸ *Id.* at ¶ 39.

⁴⁹ *Id.* at ¶¶ 34 and 39 (citing 47 U.S.C. §§ 254(h)(1), (h)(2)(A)).

⁵⁰ *Id.*

simplicity when it determined to rely on CB data and classifications.⁵¹ Westelcom respectfully submits, however, that the underlying reasons used to establish Section 61.26(a)(6) *cannot* and *should not* be permitted to contravene the Commission's more recent *USF/ICC Transformation Order* pronouncements mandating a reasonable transition period for all carriers⁵² as well as the companion public interest objective of encouraging the provision of advanced services to rural healthcare providers (which Westelcom's operations help achieve) articulated in the *Healthcare Connect Order*. It is not surprising, therefore, that the CB warned against the very type of results that are outlined here arising from the rote application of CB's complex urban classification criteria. The CB has advised government agencies that use of the results of its classification and data regarding "changes to the urban area criteria might affect the implementation of their programs."⁵³ And, the CB urged the agencies when "considering the appropriateness of the classification for use in a nonstatistical program . . . to consider permitting appropriate modifications of the results of implanting the urban-rural classification specifically for the purposes of its program."⁵⁴ Westelcom respectfully submits that its situation and the need for its requested expedited waiver demonstrate the type of situation to which CB's warning applies.

To address these special circumstances, therefore, Westelcom respectfully seeks a limited, expedited waiver of 47 C.F.R. § 61.26(a)(6) so as to allow Westelcom to refile its

⁵¹ *CLEC Access Charge Reform Order* at ¶ 75. This Petition does not request that the Commission re-write its rule, but rather that the Commission allow a limited waiver of that definition to Westelcom based on the special circumstances set forth herein.

⁵² *USF/ICC Transformation Order* at ¶ 802. Furthermore, inasmuch as the goal of administrative efficiency has largely, if not completely, been accomplished with the establishment of the phase down of ICC rates to zero through the *USF/ICC Transformation Order*, intervening public policy goals, as well as the unique circumstances here present, combine to outweigh an efficiency argument.

⁵³ 76 Fed. Reg. 53030 (Aug. 24, 2011).

⁵⁴ *Id.*

interstate switched access service rates in order to regain its status as a Rural CLEC under the Rural CLEC Definition, thus enabling its use of the Section 61.26(e)-provided NECA rates as a benchmark until July 1, 2020.⁵⁵ Westelcom respectfully submits that there is no better case for a waiver than in this instance. Strict application of the regulation runs afoul of the overriding framework the Commission has established in allowing a transition period for carriers to “adjust to marketplace changes and technological advancements, while furthering [the] overall goal of promoting a migration to modern IP networks.”⁵⁶ Granting Westelcom’s waiver request will not significantly increase the number of access lines that are subject to the rural exemption. Westelcom’s current switched access line count is considerably less than one percent (1%) of the total switched access lines in the United States as of December 31, 2013.⁵⁷

Likewise, Westelcom respectfully submits that the Commission need not be concerned that a grant of the relief that Westelcom seeks will open the “flood gates” for similar requests. As noted above, following the 2010 census, the CB reclassified twenty-nine communities as “urbanized areas” using the complex criteria equally applicable to Watertown.⁵⁸ Moreover, Westelcom has provided specific facts regarding its operations that would narrowly tailor the

⁵⁵ *USF/ICC Transformation Order* at Figure 9.

⁵⁶ *Id.* at ¶ 802.

⁵⁷ Compare Industry Analysis and Technology Division, FCC, *Local Telephone Competition: Status as of December 31, 2013* at Figure 4 (Oct. 2014) (“*Local Telephone Competition*”) (reporting a total of 85,281,000 switched access lines as of December 31, 2013 in the United States), with Confidential Attachment A at page 2.

⁵⁸ See *supra* note 26, and accompanying text.

relief Westelcom seeks to only Westelcom's operations.⁵⁹ Thus, Westelcom respectfully submits that an expedited waiver of 47 C.F.R. § 61.26(a)(6) as outlined herein is fully justified. The relief that Westelcom seeks will harmonize the Commission's now-governing public policy framework established in the *USF/ICC Transformation Order* and the policy objectives enunciated in the *Healthcare Connect Order*, goals that Westelcom's activities in the Adirondack North Country are aimed at achieving.

IV. GRANTING OF WAIVER WOULD SERVE PUBLIC INTEREST

Based on the demonstrations herein, Westelcom respectfully submits that a prompt grant of this requested waiver is unquestionably in the public interest. A grant of the waiver would avoid the draconian effect of strict application of a decade-old CLEC benchmark rate regulation that clashes with more recent *USF/ICC Transformation Order* policy principles of allowing all

⁵⁹ In three previous instances the Commission has denied petitions for waiver or forbearance of the CLEC benchmark rule in 47 C.F.R. § 61.26. See, e.g., *In the Matter of Petition of Northern Telephone & Data Corp. for Waiver of Section 61.26(b)(1) of the Commission's Rules, Order*, WC Docket No. 09-216, 25 FCC Rcd. 274(2010) ("*Northern Telephone*"); *In the Matter of Petition of OrbitCom, Inc. for Forbearance from CLEC Access Charge Rules, Memorandum Opinion and Order*, WC Docket No. 08-162, 23 FCC Rcd. 13187 (2008) ("*OrbitCom*"); *In the Matter of Access Charge Reform, PrairieWave Telecommunications, Inc. Petition for Waiver of Sections 61.26(b) and (c) or in the Alternative Section 61.26(a)(6) of the Commission's Rules, et al., Order*, CC Docket No. 96-262, 23 FCC Rcd. 2556 (2008) ("*PrairieWave*"). Each of those cases is readily distinguishable from the present case as they all lacked sufficient facts to support a waiver. See *Northern Telephone* at ¶ 6 (denying the petition for waiver and finding that the petitioner "fail[ed] to meet its fundamental burden to make the necessary showing for the relief it request[ed]" where the petitioner provided "no supporting data, cost studies, or other evidence of any kind."); *OrbitCom* at ¶ 1 ("OrbitCom's petition fails to address in any manner the statutory criteria for a grant of forbearance or to provide any showing that those criteria are met by its request."); *PrairieWave* at ¶¶ 13, 15, and 21 (finding that neither petitioner presented any special circumstances warranting a deviation from the rule where evidence)). Contrary to these cases, Westelcom has provided the fact-driven analysis to justify this waiver request, in addition to the fact of the Commission's decisions arising in the *USF/ICC Transformation Order* as well as the implications on this petition of the policies established in the *Healthcare Connect Order*.

carriers an extended transition period to adjust their rates⁶⁰ and of encouraging the deployment of fiber-based networks that can provide advanced services articulated in the *Healthcare Connect Order*. The Commission's most recent statements and framework must not be held hostage to the rote application of 47 C.F.R. § 61.26(a)(6) in a manner that adversely affects Westelcom and the customers it serves.⁶¹ If this were to occur, the glide path provided in the *USF/ICC Transformation Order* would be illusory and would, in this instance, undermine the Commission's concomitant commitment of encouraging the deployment of fiber-based networks that allow for the provision of broadband to rural areas, including rural healthcare facilities.

In light of previous Commission orders, Westelcom initiated the planning necessary to migrate access rates to zero and utilize revenue other than exchange access for the deployment and provision of services it intended to offer. Understandably, based on prior Commission policy and pronouncements, and specifically the *USF/ICC Transformation Order*, Westelcom anticipated that it would have a rational, measured transition period to accomplish the phase down of its interstate switched access ICC rates. Absent a grant of this waiver, this transition will effectively not occur. The requirement to immediately reduce its interstate switched access rates by ninety-six percent (96%) effectively results in a complete absence of any meaningful transition period for Westelcom to implement the Commission's ICC framework that the *USF/ICC Transformation Order* otherwise provided.

Furthermore, Westelcom's past and present investments in fiber-based networks are directly in line with the Commission's goals and those of Congress relating to the promotion of

⁶⁰ See *USF/ICC Transformation Order* at ¶¶ 798-807.

⁶¹ Even when the Commission adopted its Access Charge Reform Order that applied only to CLECs, it provided for a reasonable transition period. See *CLEC Access Charge Reform Order* at ¶¶ 4, 6, 37, and 62. More recent policy mandates an extended transition for all carriers. See *USF/ICC Transformation Order* at ¶¶ 798-807.

access to and deployment of broadband for health care providers in rural areas.⁶² A prompt grant of Westelcom's waiver request would allow Westelcom to continue to provide advanced telecommunications to CCF customers whose advanced telecommunications needs would not be met with services that are otherwise immediately available.⁶³

Accordingly, for all of these reasons, Westelcom should be allowed to reestablish its ICC transition based on the applicable NECA access rates. Westelcom respectfully submits that the public interest is advanced by this result. Allowing Westelcom to utilize the reasonable transition period available to a CLEC meeting the Rural CLEC Definition will afford Westelcom the opportunity to continue to provide and expand its facilities, including upgrading and deploying fiber in a manner that serves CCFs in rural areas of New York. As the Commission noted, "consumers will benefit from this regulatory transition, which enables their providers to adapt to the changing regulatory and technical landscape and enable a faster and more efficient introduction of next-generation services."⁶⁴ A prompt grant of the requested limited waiver will allow Westelcom to continue investing in the advanced communications infrastructure in its service area and will provide the consumer benefits the Commission desires.

⁶² See, e.g., *Healthcare Connect Order* at ¶¶ 34 and 39; see also *supra* nn. 45-50, accompanying text and Section I.A, *supra*, at pages 3-7.

⁶³ In its service area, Westelcom offers the fastest broadband speeds among its competitors. See Attachment G, at pages 1-12, National Broadband Map for Watertown, Malone, Ticonderoga, Plattsburgh, Clayton, and Elizabethtown, New York, and available at <http://www.broadbandmap.gov>.

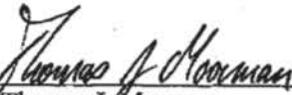
⁶⁴ *USF/ICC Transformation Order* at ¶ 802.

V. **CONCLUSION**

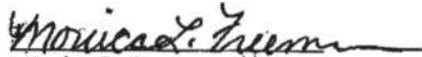
Good cause exists for a prompt grant of the limited waiver as requested by Westelcom. The Commission's more recent policy pronouncements and framework arising from the *USF/ICC Transformation Order* and the *Healthcare Connect Order* must in this instance trump the administrative convenience of the rote application of the "Rural CLEC" definition in 47 C.F.R. § 61.26(a)(6). Strict application of 47 C.F.R. § 61.26(a)(6) under the specific factual demonstrations contained herein is contrary to the public interest. A failure to promptly grant the waiver would result in direct harm to those rural areas served by Westelcom in the Adirondack North Country within the State of New York and would be contrary to the public policy and stated goals of the Commission.

Respectfully submitted,

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Date: February 23, 2015