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Federal Communications Commission
Bureau / Office

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

In the Matter of	)	
	)	
Kingsgate Telephone, Inc.	)	AAD 96-51
Petition for Waiver of the Definition	)	
of "Study Area" in the Appendix –	)	
Glossary of Part 36	)	CC Docket No. 96-45

To: Chief, Wireline Competition Bureau

REQUEST OF ETS TELEPHONE, INC.

Pursuant to Section 1.41 of the Commission's Rules, 47 C.F.R. § 1.41, ETS Telephone Company, Inc. f/k/a Kingsgate Telephone, Inc. ("ETS"), respectfully requests that the Commission take all actions necessary, if any, to assure that the public interest is not adversely affected by any retroactive application of the Commission's 2004 *Skyline Order* to ETS' Study Area No. 442091. This existing study area was created as a result of the Common Carrier Bureau's Memorandum Opinion and Order released in this proceeding on July 16, 1996.[1]

Introduction

ETS is an incumbent local exchange carrier[2] established in 1995 serving previously unserved areas in southeastern Texas. ETS was the first telephone company to serve these new homes, and in some areas ETS remains the only telephone company offering wireline telephone

[1] *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" 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, DA 96-1129, (1996) ("*Study Area Waiver Exceptions Order*").

[2] *See High-Cost Universal Service Support*, WC Docket No. 05-337; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Letter from Richard A. Gerstemeier, President ETS Telephone, Inc., to Marlene H. Dortch, Secretary, FCC (Dec. 21, 2007) (attached hereto as Exhibit 1). The Bureau necessarily confirmed ETS' status as an ILEC when it found in the Study Area Exceptions Order that the company could create a study area. Likewise, NECA admitted ETS as a member and confirmed in writing to ETS in 1996 that ETS "is operating as an incumbent local exchange carrier."

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service to consumers. On March 28, 1996, ETS (then named Kingsgate Telephone, Inc.) filed a Petition for Waiver in this proceeding to allow for the creation of a new study area to enable ETS to receive high-cost support from the federal Universal Service Fund. Acting on delegated authority pursuant to Sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, the Bureau determined that study area waivers are not required "under any of the following three conditions: (a) a separately incorporated company is establishing a study area for a previously unserved territory; (b) a company is combining previously unserved territory with one of its existing study areas in the same state; and (c) a holding company is consolidating existing study areas in the same state."[3] Because it was undisputed that ETS was a separately incorporated company establishing a study area for a previously unserved territory, ETS' petition for waiver was dismissed as moot and Study Area No. 442091 was established for ETS in Texas.

ETS has operated under this study area and received universal service support for nearly twelve years without incident. However, ETS has recently learned that the Commission may have received an informal inquiry as to whether the Commission's 2004 *Skyline Order*[4] now requires ETS to obtain a study area waiver in order to continue to receive universal service support.

ETS believes that the *Skyline Order* is inapplicable, and in any event does not have any retroactive effect on existing study areas. *Skyline* only requires a waiver "where a company is seeking to create a new study area from within one or more existing study areas."[5] ETS' study area is not "new" – it has existed for nearly twelve years. ETS has always been the first carrier

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[3] *Study Area Waiver Exceptions Order*, ¶ 9.

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

[5] *Skyline Order*, ¶ 13.

to provide service to all of the locations it serves, and, unlike in the *Skyline* case, no carrier provided service to any locations within ETS' study area before ETS' Petition for Waiver. Nothing in the *Skyline Order* requires a study area waiver in such circumstances.

Moreover, the *Skyline Order* itself makes clear that its "conclusions herein are limited to the issues raised in this matter,"[6] and not applicable to other previously determined cases. Similarly, when the Commission had previously adopted other changes to its standards for analyzing requested study area waivers, it held that such changes would apply "on a prospective basis only" to "[s]tudy area waiver requests filed after the release date of th[e] order" adopting the change.[7] Moreover, the Supreme Court has held that:

> Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.[8]

Therefore, even if the holding of the *Skyline Order* somehow were deemed applicable to new cases similar to ETS' going forward, it did not alter the status of study areas such as ETS' that already existed at the time of that order. Accordingly, because no party sought timely reconsideration or Commission review of the Bureau's 1996 Order in this proceeding, ETS' study area remains valid notwithstanding any interpretation of the Commission's subsequent *Skyline Order*.

Nonetheless, in the event that the Bureau now believes that ETS must have a study area waiver to continue to receive universal service support for Study Area No. 442091 based upon its

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[6] *Skyline Order*, ¶ 11.

[7] *U S WEST Communications, Inc., and Eagle Telecommunications, Inc., Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary of the Commission's Rules*, Memorandum Opinion and Order, AAD 94-27, 10 FCC Rcd 1771, ¶ 17 (1995) ("*PTI/Eagle Order*") (establishing that the Commission would evaluate whether a study area boundary change would have an adverse impact on the universal service fund by considering whether a study area waiver would result in an annual aggregate shift in an amount equal to or greater than one percent of total annual high-cost support, *but only* in cases going forward).

[8] *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988).

own costs, for the reasons set forth below it should either (1) issue a reconsideration order in this proceeding to grant the waiver requested by Kingsgate on a *nunc pro tunc* basis,[9] or (2) grant ETS leave to amend its prior request for waiver and preserve the status quo until on an interim basis until the Bureau issues a decision on the new waiver request.

I. EVEN IF *SKYLINE* NOW RETROACTIVELY REQUIRES ETS TO OBTAIN A WAIVER, THE PUBLIC INTEREST WOULD BE SERVED BY AN IMMEDIATE GRANT OF SUCH WAIVER.

The Commission may waive its rules for good cause shown,[10] and is required to "take a 'hard look' at meritorious applications for waiver, and [] consider all relevant factors."[11] In evaluating whether to grant any study area waivers required by the *Skyline Order*, the Commission has applied a three-prong standard set forth in the *PTI/Eagle Order*: (1) grant of the waiver must not adversely affect the universal service fund; (2) no state commission having regulatory authority over the relevant area opposes the transfer; and (3) the waiver must be in the public interest.[12] The record in this proceeding demonstrates that grant of a study area waiver would meet all of these criteria and would serve the public interest.[13]

ETS' satisfaction of the first prong of the *PTI/Eagle* test is an established fact. Because ETS has received universal service support for its study area for more than eleven years, and the

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[9] The Bureau could *sua sponte* issue a reconsideration decision to amend the *Study Area Waiver Exceptions Order* to grant ETS a study area waiver. The Bureau has authority to waive the 30-day limitation for such actions for good cause or where such action would serve the public interest. *See Request for Review of the Decision of the Universal Service Administrator by Pioneerland Library System Willmar, Minnesota*, File No. SLD-32103, Order on Reconsideration, DA 01-353, ¶¶ 6-8 (rel. Feb. 13, 2001) (Common Carrier Bureau issued *sua sponte* order on reconsideration granting requested relief more than 30 days after its denial order, waiving the 30-day rule pursuant to Section 1.3 of the Commission's rules.)

[10] 47 C.F.R. § 1.3.

[11] *KCST-TV, Inc. v. FCC*, 699 F.2d 1185, 1191-1192 (D.C. Cir. 1983) ("*KCST-TV*").

[12] The *Skyline Order* provided that any waiver request made necessary by its terms would be evaluated under the criteria set forth in the *PTI/Eagle Order*. *Skyline Order*, ¶ 13, citing *PTI/Eagle Order*, ¶ 5.

[13] If the Commission now chooses to grant a *nunc pro tunc* waiver on its own motion, ETS assumes that it would do so principally upon the record filed in this docket in 1996.

records available to the Commission show that ETS has received far less than 1% (less than one twentieth of 1%, or 0.05%) of the fund's total high-cost support.[14] Moreover, it could fairly be said that the incremental impact on the fund today of granting a waiver would be zero, because ETS has already been receiving all of the funding to which the study area waiver would apply.

The second prong of the *PTI/Eagle* test has also been satisfied. The Texas Public Utilities Commission informed the Commission in a letter dated April 26, 1996 that it has no objection to any necessary waiver of the FCC's rules as needed to establish a study area for ETS (then known as Kingsgate).[15]

The public interest would also be served by assuring that there is no disruption in ETS' ability to continue to provide service to its customers, many of which have no other option for wireline telephone or broadband service. In considering whether to grant a waiver, the Commission is required to take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.[16] ETS could not have built a new network to provide telecommunications and advanced services to these previously unserved communities – in furtherance of the goals of the Act – without the support of the universal service fund. ETS reasonably relied on the Bureau's 1996 decision that led to the creation of ETS' study area and ETS' eligibility for universal service support, and thereupon invested millions of dollars to build a new network to areas that had never been served by any wireline telephone company. Developers subsequently relied on the Bureau's decision when they chose to build new homes in areas that ETS had pledged to serve. ETS' private investors and creditors and the Department of Agriculture's Rural Utilities Service relied on the Bureau's decision in

[14] ETS receives approximately $2 million per year of the $4.1 billion allocated for high-cost support.
[15] The letter was received by the FCC and filed in the record of this proceeding on April 29, 1996.
[16] *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969) ("*WAIT Radio*"); *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) ("*Northeast Cellular*").

their decisions to provide capital to ETS for its buildout, based on a business plan that assumed ETS' eligibility to receive high-cost support for its study area based upon its own costs. And consumers relied on the Bureau's decision when they chose to buy homes in communities served by ETS, believing that the homes had access to the affordable and reliable telephone service provided by ETS. These investment-backed expectations deserve substantial consideration.[17] Any disruption to ETS' ability to obtain support for its study area would jeopardize ETS' ability to continue to finance further construction to serve the new homes that continue to be built in its growing communities, and would therefore impose significant hardship on ETS and on the communities it serves.

In addition, the public interest is served by grant of a waiver where application of a rule in a particular circumstance would not further the purpose of the rule.[18] The purpose of the study area freeze was to prevent carriers from disaggregating and recombining study areas, or portions thereof, to increase high-cost support through the manipulation of study area boundaries.[19] This concern was plainly inapplicable to the case of ETS in 1996, when it independently sought the creation of its first study area. And if ETS' request is instead considered in the context of the present rather than a retrospective analysis of its 1996 request, the Bureau has similarly found that "authorizing a new study area that merely encompasses [an ILEC's] existing service area will not compromise the Commission's reasons for freezing the study area boundaries."[20] The

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[17] *See Connolly v. Pension Ben. Guaranty Corp.*, 475 U.S. 211, 224-25 (1986).

[18] *See WAIT Radio*, 418 F.2d at 1157-59 (D.C. Cir. 1969) ("[A] general rule, deemed valid because the overall objectives are in the public interest, may not be in the 'public interest' if extended to an applicant who proposes a new service that will not undermine the policy, served by the rule, that has been adjudged in the public interest.").

[19] *See MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board*, CC Docket Nos. 78-72, 80-286, Recommended Decision and Order (1984).

[20] *Guam Telephone Authority Petition for Declaratory Ruling*, AAD 97-27, Report and Order, ¶ 13 (Acct. Aud. Div. 1997).

courts have consistently held that where the premise of a rule does not apply, the "logic of applying [the rule] collapses," and the Commission may not deny a requested waiver.[21]

Finally, it would be untenable to cast ETS into a no man's land as an ILEC with no study area. Even if ETS could then somehow claim that it is eligible for "identical support,"[22] it is unclear whose support ETS should be identical to, since there is no other carrier serving some areas in which ETS is providing service. Moreover, the Commission should have no interest in subjecting ETS to a highly-disruptive switch away from reliance on its own cost studies to use of the identical support rule for support when the Commission has tentatively concluded that the identical support rule should be abolished.[23] The Commission observed in its recent Notice of Proposed Rulemaking that the identical support rule undermines a carrier's incentive and ability to "invest in, or expand, its own facilities in areas with low population densities, thereby contravening the Act's universal service goal of improving the access to telecommunications services in rural, insular and high-cost areas."[24] By contrast, the creation of ETS' own study area in 1996 has enabled it to do for the past eleven years exactly what the Commission now wants all carriers to do: deliver telephone and advanced services to unserved high-cost areas and receive support based upon its own costs. The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.[25] It would disserve the public interest to turn upside-down ETS' eleven-year record of delivering the objectives of the Act for no other reason than to conform ETS to some inapplicable, and in any case inapposite, mold that virtually everyone agrees is outdated and in need of reform.

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[21] *KCST-TV*, 699 F.2d at 1191-1192, 1195.

[22] *See* 47 C.F.R. § 54.307.

[23] *High-Cost Universal Service Support, Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, Notice of Proposed Rulemaking, FCC 08-4 (rel. Jan. 29, 2008).

[24] *Id.* ¶ 10.

[25] *Northeast Cellular*, 897 F.2d at 1166.

For all of these reasons, to the extent that the Commission believes a study area waiver is now necessary, it can and should grant such a waiver on the basis of the existing record in this proceeding.[26]

II. Any Commission Action Should Avoid Temporary Unnecessary Disruption

In any action on this issue, the Commission should assure that ETS and its customers are not unfairly penalized for the company's reasonable reliance on the Bureau's decision in 1996 that led to the creation of ETS' study area and ETS' eligibility for universal service support. To that end, any waiver granted to ETS should be adopted *nunc pro tunc*, and any determination that ETS must seek a waiver should be coupled with an order preserving the *status quo* on an interim basis until the Bureau issues a decision on the new waiver request. The Bureau and Commission afforded both of these considerations to Sandwich Isles Communications, Inc. in 2004-2005, when that company found itself needing a study area waiver years after the study area had been created.

In July 1997, Sandwich Isles filed a petition requesting waivers as needed to receive high-cost loop support to provide service to certain areas in the state of Hawaii. Sandwich Isles' petition stated that it was not required to seek a study area waiver, based upon the Bureau's holding in the 1996 *Study Area Exceptions Order* that waivers were not needed for it to create a new study area for a previously unserved area. After the comment period had closed, GTE Hawaiian Telephone Company filed an Opposition to Sandwich Isles' petition arguing that the

[26] If a waiver is granted in this docket based on the existing record, ETS has assumed that the Commission would limit the geographic scope of the waiver to the area requested by Kingsgate in 1996. *See supra* n. 33 (noting Bureau's decision to similarly confine the scope of the second *Sandwich Isles* waiver proceeding). Subsequent to 1996, ETS has on occasion added additional unserved territories to its existing Study Area No. 442091, pursuant to the Bureau's holding in the *Study Area Waiver Exceptions Order* that carriers are not required to seek study area waivers when combining previously unserved territory with one of its existing study areas in the same state. (The Commission confirmed this rule in the *Skyline Order*, ¶ 14.) ETS recognizes that these expansions could be subject to future proceedings.

areas Sandwich Isles proposed to serve were not, in fact, unserved. The Accounting and Audits Division of the Common Carrier Bureau did not consider GTE's objections and granted various waivers to Sandwich Isles in February 1998.[27] The Bureau order confirmed that a study area waiver was not needed for unserved areas, and stated that the petition in 1998, "for regulatory purposes we will recognize Sandwich Isles' service territory in Hawaii as a study area."[28]

On March 5, 1998, GTE filed a timely Application for Review of the Bureau's order, repeating its claim that the area in question was not unserved. The application remained pending for six years, until October 2004 when the Commission reversed the Bureau's decision that had created Sandwich Isles' study area. The sole basis for the Commission's action was its conclusion that the Bureau had erred by failing to consider GTE's evidence in the record that the areas Sandwich Isles proposed to serve were not "unserved" for purposes of the study area waiver requirement.[29] Because in the intervening period the Commission had adopted the *Skyline Order*, the Commission held that the Skyline standard would now apply to any new study area waiver request sought by Sandwich Isles.[30]

At the same time, the Commission recognized that the temporary elimination of Sandwich Isles' *de facto* study area would cause inordinate hardship and disruption to Sandwich

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[27] *Sandwich Isles Communications, Inc., Petition for Waiver of Section 36.611 of the Commission's Rules and Request for Clarification*, Order, AAD 97-82, Order, DA-98-166, (Acct. Aud. Div. 1998) ("*Sandwich Isles I*").

[28] *Id.*, ¶ 15.

[29] *GTE Hawaiian Telephone Company, Inc. Application for Review of a Decision by the Common Carrier Bureau – Sandwich Isles Communications, Inc. Petition for Waiver of Section 36.611 of the Commission's Rules and Request for Clarification*, AAD 97-82, Memorandum Opinion and Order, FCC 04-256, ¶ 7 (rel. Oct. 29, 2004) ("*Verizon Hawaii Order*").

[30] *Verizon Hawaii Order*, ¶¶ 8-10. It must be emphasized that the basis for the Commission's Verizon Hawaii Order was <u>not</u> to impose retroactive application of the *Skyline Order*. Instead, the Commission reversed the Bureau's 1997 Sandwich Isles Order for an independent reason – the Bureau's failure to consider GTE's evidence – and then found that, once the Bureau's order had been vacated, that the new law adopted in *Skyline* would apply to proceedings going forward.

Isles and its customers with no compelling public interest benefit in return. The Commission therefore preserved the *status quo* on an interim basis to permit Sandwich Isles to seek a waiver:

> we will provide Sandwich Isles the opportunity to seek a study area waiver. To ensure continued service to Sandwich Isles' customers, we will continue to treat Sandwich Isles as an incumbent LEC for purposes of receiving universal service support until the Commission rules on a request for a study area waiver, provided that Sandwich Isles file such request within 60 days of the effective date of this Order.[31]

Accordingly, within 60 days, Sandwich Isles filed a petition for a study area waiver with the Bureau. The Bureau elected to apply its review to the study area that Sandwich Isles had originally requested in 1997, and to the evidence of whether any other carrier served that area in 1997.[32] The Bureau found that although GTE may have been franchised to serve that area in 1997, and although it later initiated service to parts of the area after Sandwich Isles study area was created, the area was still considered to be "unserved" as of Sandwich Isles' entry in 1997 for purposes of its study area waiver request:

> Hawaiian Telcom contends that it is far from clear that granting Sandwich Isles' Petition will serve the public interest because Sandwich Isles is not the only party capable of providing service to the Hawaiian home lands. ... Hawaiian Telcom disputes Sandwich Isles' claim that the Hawaiian home lands would have remained unserved if it were not for Sandwich Isles, and claims that GTE was ready, willing, and able to provide service to the Hawaiian home lands when the Bureau granted Sandwich Isles' 1997 Petition. Sandwich Isles claims that GTE had no authority to operate in any area of the Hawaiian home lands not authorized by the Department of Hawaiian Home Lands, and, therefore its study area could not have included the entire Hawaiian home lands. *We find that the fact that GTE (later Verizon) may have had authority to serve the Hawaiian home land does not*

[31] *Verizon Hawaii Order*, ¶ 10.

[32] *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*, CC Docket No. 96-45, Order, DA 05-1355, ¶ 15 (rel. May 16, 2005) ("second *Sandwich Isles Waiver Order*" or "*Sandwich Isles II*") ("the study area we grant herein should be limited to only those areas where there were no facilities or service on the Hawaiian home lands in 1997, *i.e.*, the areas that Sandwich Isles claimed were unserved in its 1997 Petition" in part because "the scope of this proceeding, and both the Bureau's 1998 order and the Commission's 2004 order, were limited to those areas."). It is for this reason that ETS has limited its instant request herein that the Commission grant a waiver on its own motion for the study area requested by Kingsgate in 1996, if a waiver is necessary.

> *demonstrate that it is not in the public interest to grant a study area waiver to Sandwich Isles. In fact, the record is clear that 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.[33]

In other words, even though the *Skyline Order* now required a waiver for a new Sandwich Isles study area to be created in areas within GTE's study area, the Bureau found that such waiver *should be granted* where most of the area was in fact not served with active subscriber line service, if the carrier also satisfies the other criteria for waiver.[34]

The Bureau accordingly granted Sandwich Isles' request for waiver. Significantly, for purposes of this case, it made the grant effective on a *nunc pro tunc* basis to the date of the Bureau's first *Sandwich Isles Order*, which had the effect of avoiding any dispute or uncertainty as to the status of past universal service payments and which enabled Sandwich Isles to continue to use its existing cost study data on an uninterrupted basis.

If the Commission now believes that ETS requires a study area waiver, the facts of this case would be in certain key respects similar to the facts that led the Commission and the Bureau to assure the avoidance of a disruption. As noted above, consumers, property owners, developers, ETS, and ETS' investors and lenders all placed substantial reliance on the Bureau's 1996 decision in this proceeding and the resulting eligibility of ETS to receive universal service support. Any disruption to ETS' ability to obtain support for its study area would inflict major economic injury on ETS and would dramatically interfere with the investment-backed

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[33] *Id.*, ¶¶ 20-21.

[34] The *Study Area Exceptions Order*, the *Skyline Order*, and the second *Sandwich Isles Waiver Order* thus can all be read together in a consistent policy framework: a separately incorporated company seeking to establish a study area for a previously unserved territory does not need a waiver if the area is not part of an existing study area (*Study Area Exceptions*), it does need a waiver if the area is part of an existing study area (*Skyline*), and that waiver should be granted if the carrier whose study area already includes such territory is not actually providing active services in that portion of its study area (*Sandwich Isles II*), if the carrier satisfies the other criteria for waiver.

expectations of all of these parties, including the customers who do not have access to any other wireline telephone service. Just as in the case of Sandwich Isles, there is no compelling reason for the Commission, even temporarily, to pull the carpet out from under all of these parties that reasonably relied on the still-valid Bureau order.

Therefore, if a waiver is granted, it should be done on a *nunc pro tunc* basis, just as the Bureau did for Sandwich Isles. And if the Commission believes that a waiver is necessary but does not grant that waiver on its own motion, it should afford ETS and its customers the same consideration it extended to Sandwich Isles by granting ETS leave to amend[35] the previously-filed waiver request and maintaining the *status quo* for a reasonable period of time. This would give ETS an opportunity to prepare and file the necessary information without undue disruption and harm to the thousands of rural customers who rely on ETS' service.

III. Conclusion

For the foregoing reasons, in the event that the Commission determines that the Skyline Order has retroactively required ETS to obtain a study area waiver, ETS respectfully requests that the Commission take appropriate action as described herein.

Respectfully submitted,

Richard A. Gerstemeier
President and Chief Executive Officer
En-Touch Systems, Inc.
11011 Richmond Ave., Suite 400
Houston, Texas 77042
Phone: (281) 225-0501

March 12, 2008

[35] ETS respectfully requests leave to amend rather than a directive to file a new petition, in part, because it would be inequitable to require ETS to pay a new filing fee. ETS already paid the substantial filing fee for its petition in this proceeding. Because ETS is a small company with limited resources, it would be especially burdensome and unfair to require ETS to pay again for the same request.

Exhibit 1

Letter from Richard A. Gerstemeier, President ETS Telephone, Inc., to Marlene H. Dortch, Secretary, FCC, filed December 21, 2007 in *High-Cost Universal Service Support*, WC Docket No. 05-337; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45

ETS Telephone Company
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December 21, 2007

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: High-Cost Universal Service Support, WC Docket No. 05-337; Federal-State Joint Board on Universal Service, CC Docket No. 96-45

Dear Ms. Dortch:

On June 6, 2007, and on July 17, 2007, ETS Telephone Company, Inc. ("ETS") submitted comments and an *ex parte* letter in these proceedings urging that any proposed cap on federal high-cost universal service support should not be imposed on a CETC that relies on its own cost study rather than on the "identical support" rule. In these documents, ETS identified itself as a competitive local exchange carrier and therefore as a CETC, which Section 54.5 of the Commission's rules defines as any ETC that is not an incumbent LEC.

The purpose of this letter is to clarify for the record that ETS is an incumbent local exchange carrier under Section 251(h)(1) of the Telecommunications Act of 1996, and is therefore an ETC rather than a CETC under Section 54.5. The reason for the confusion on this matter is that under Texas law, according to the Texas Public Utilities Regulatory Act, "'Incumbent local exchange company' means a local exchange company that has a certificate of convenience and necessity on September 1, 1995."[1] ETS received its initial facilities-based Certificate of Operating Authority to provide local exchange service from the Texas PUC on December 8, 1995,[2] and initiated operations to provide local exchange service prior to February 8, 1996. ETS therefore has the unusual distinction of being an ILEC under federal law but not under Texas law, even though it was the first carrier to provide service in its markets.[3]

[1] Texas Public Utilities Regulatory Act (PURA), § 51.002(3). This date was chosen because it was the date on which the Texas legislature adopted the Public Utilities Regulatory Act of 1995, five months before Congress adopted its own different definition of ILEC in the Telecommunications Act of 1996.
[2] At the time, ETS operated under the name Kingsgate Telephone.
[3] Because ETS is not classified as an ILEC under state law, and because the Joint Board proposed to apply the cap on a state-by-state basis, ETS had been concerned that some parties might believe that the cap would apply to ETS.

Although ETS would not be directly affected by the proposed cap, it continues to agree that the public interest would not be served by the unnecessary imposition of a temporary cap on a wireline CETC that receives support based on its own costs, rather than through the identical support rule.

Sincerely,

Richard A. Gerstemeier

Richard A. Gerstemeier
President
ETS Telephone Company, Inc.