

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

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	

**OPPOSITION OF THE  
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION  
TO PETITONS FOR STAY**

The National Cable & Telecommunications Association (NCTA) hereby opposes the petitions for stay filed by a group of rural associations,<sup>1</sup> East Ascension Telephone Company, LLC (EATEL),<sup>2</sup> and Silver Star Telephone Company, Inc.<sup>3</sup> The petitioners ask the Commission to stay implementation of the benchmark methodology and initial benchmarks applicable to universal service High Cost Loop Support (HCLS) for rate-of-return (ROR) regulated incumbent local exchange carriers (LECs).<sup>4</sup> For the reasons explained below, the petitioners have failed to demonstrate that a stay is warranted under the four-prong test applied by the Commission.<sup>5</sup>

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<sup>1</sup> Petition for Stay of National Exchange Carrier Association, Inc., National Telecommunications Cooperative Association, Organization for the Promotion and Advancement of Small Telephone Companies, and Western Telecommunications Alliance, WC Docket Nos. 10-90 and 05-337 (May 25, 2012) (Rural Associations Petition).

<sup>2</sup> Petition for Stay of East Ascension Telephone Company, LLC, WC Docket Nos. 10-90 and 05-337 (May 25, 2012).

<sup>3</sup> Petition for Stay of Silver Star Telephone Company, Inc., WC Docket Nos. 10-90 and 05-337 (May 25, 2012) (Silver Star Petition).

<sup>4</sup> *Connect America Fund, High-Cost Universal Service Support*, WC Docket Nos. 10-90 and 05-337, Order, DA 12-646, ¶ 10 (Wireline Comp. Bur., Apr. 25, 2012) (*Benchmarking Order*) (“In this order, we implement the Commission’s rule to use benchmarks to impose reasonable limits on reimbursable capital and operating costs for [ROR] carriers for purposes of determining HCLS and adopt the methodology that the Bureau will use to determine carrier-specific benchmarks for [ROR] cost companies.”).

<sup>5</sup> *See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977) and *Virginia Petroleum Jobbers Assoc. v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958).

## I. A STAY COULD HARM OTHER INTERESTED PARTIES

Although the petitioners acknowledge that one of the prongs of the four-part test requires a showing that interested parties will not be harmed if the requested stay is granted,<sup>6</sup> none of the petitions makes any serious attempt at such a showing. The Rural Associations Petition and the Silver Star Petition devote one short paragraph to the issue while EATEL provides only one sentence.<sup>7</sup> No petition addresses the harm to competing providers if the stay requests were to be granted and ROR incumbent LECs were allowed to continue receiving excessive and inefficient amounts of HCLS in areas where the support is not warranted.

For example, both the Rural Associations Petition and the EATEL Petition cite EATEL as an example of a company in need of a stay of the benchmarking methodology.<sup>8</sup> According to its petition, EATEL asserts that “an abnormally large percentage” of the reductions in universal service high-cost support due to the benchmarking methodology will be borne by EATEL.<sup>9</sup> Contrary to the petitioners’ claim, however, the fact that the benchmarking methodology would lead to such a significant reduction in support for this company is evidence that the methodology is serving its intended purpose. At the holding company level, EATEL has received between \$25 and \$30 million for each of the last five years<sup>10</sup> to serve a relatively densely populated area<sup>11</sup> where broadband already is available to more than 97 percent of the population from a cable

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<sup>6</sup> EATEL Petition at 6 n.19; Rural Associations Petition at 2; Silver Star Petition at 1-2.

<sup>7</sup> Rural Associations Petition at 13; Silver Star Petition at 7; EATEL Petition at 7.

<sup>8</sup> Rural Associations Petition at 6; EATEL Petition at 2-3.

<sup>9</sup> EATEL Petition at 2-3.

<sup>10</sup> *Universal Service Monitoring Report*, CC Docket No. 98-202, Supplemental Materials: High-Cost Disbursements by Study Area (2011) (EATEL received \$25,286,808 in 2007; \$27,691,953 in 2008; \$29,959,809 in 2009; \$29,644,473 in 2010; and \$28,910,937 in 2011).

<sup>11</sup> According to the National Broadband Map, EATEL’s study area includes 43,022 households spread over 486 square miles, or more than 88 homes per square mile. National Broadband Map, <http://www.broadbandmap.gov/summarize/state/louisiana/usf-study-area/east-ascension-telephone-company%2c-llc> (last visited May 31, 2012).

operator, and wireless broadband is ubiquitously available from multiple providers.<sup>12</sup> While millions of Americans remain unserved by broadband, EATEL has received over \$130 million in federal universal service support to build a gold-plated network in an area that already was well-served by the private sector. Simply put, this situation is a perfect example of why it is so important for the Commission to move forward with reform. Granting a stay that allows EATEL to continue receiving all of its current high-cost support would be a waste of limited government resources and would be tremendously harmful to every other company operating in that study area.

The petitioners also ignore the harm that a stay would cause to consumers in the hundreds of study areas that would receive additional support as a result of the benchmarking methodology. In the *Benchmarking Order* the Wireline Competition Bureau stated that although approximately 100 study areas would see reductions in support as a result of the benchmarking methodology, there would be approximately 500 study areas that would receive additional support.<sup>13</sup> As the Commission stated when it proposed the current reforms to ROR high-cost support, “Though those carriers are often acting in the best interests of their customers and communities – and in a manner consistent with or even encouraged by our current rules – *excessive spending in any one community may have the unintended consequence of limiting opportunities for consumers in other communities and therefore not be in the best interests of the country as a whole.*”<sup>14</sup> Granting the petitioners’ stay requests would harm consumers in areas

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<sup>12</sup> *Id.*

<sup>13</sup> *Benchmarking Order*, DA 12-646 at ¶ 5.

<sup>14</sup> *Connect America Fund*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 26 FCC Rcd 4554, 4615, ¶ 173 (2011) (emphasis added).

that would see an increase in high-cost support as a result of the Commission's reforms and the benchmarking methodology.

## **II. PETITIONERS HAVE FAILED TO DEMONSTRATE THAT A STAY IS NECESSARY TO PREVENT IRREPERABLE HARM**

The petitioners have failed to demonstrate that they will suffer irreparable harm absent the stay. Simply stating that some ROR incumbent LECs will lose support is not sufficient.<sup>15</sup> As discussed above, the Commission fully contemplated this outcome and acknowledged that its reforms would reduce support to some ROR incumbent LECs.<sup>16</sup> The Commission stated, "To the extent costs above the benchmark are disallowed under this new rule, companies are free to file a petition for waiver to seek additional support."<sup>17</sup>

If the effect of the reductions in support were as dramatic as suggested in the stay petitions, i.e., if companies would be irreparably harmed by the reductions, presumably the Commission would have received waiver requests from a substantial majority of the affected companies. But that has not been the case. Of the roughly 100 companies that would be negatively affected by the new benchmarking methodology, only a handful have requested waivers from the Commission. Consequently, rather than granting the petitioners' stay request, which would prevent redistribution of support to consumers in 500 study areas, the Commission should rely on the waiver process to provide more targeted relief to the relatively few study areas in which such additional support may be warranted.

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<sup>15</sup> See *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) ("[E]conomic loss does not, in and of itself, constitute irreparable harm."); see also *Virginia Petroleum Jobbers*, 259 F.2d at 925 ("Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough.").

<sup>16</sup> *Id.*; *Connect America Fund, et al.*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17745, ¶ 220 (2011) (*CAF Order*).

<sup>17</sup> *CAF Order*, 26 FCC Rcd at 17745, ¶ 222.

### **III. A BLANKET STAY WOULD NOT SERVE THE PUBLIC INTEREST**

Grant of the stay requests would not serve the public interest. Although the new methodology would have either a positive effect or no effect on the vast majority of companies, the petitions seek to stay the methodology in its entirety. Staying a general rule simply because it may have negative consequences for a small minority of companies would be a terrible result in the context of the comprehensive reform that the Commission adopted last year. The benchmark methodology is meant to reduce support to ROR incumbent LECs that have been using it inefficiently and redistribute it to more efficient providers. As the Commission correctly noted in the *CAF Order*, the “purpose of universal service is to benefit the customer, not the carrier.”<sup>18</sup>

Granting the stay will help those carriers that have been found to be receiving too much support based on the benchmarks, but this does not serve the public interest and it is not consistent with the goals of universal service. The public interest would instead be served by the Commission denying the blanket stay request for all ROR incumbent LECs and examining requests for waiver on a case by case basis to determine where additional support is needed to ensure that consumers receive the benefits of universal service.

### **IV. PETITIONERS HAVE NOT DEMONSTRATED THAT THEY ARE LIKELY TO SUCCEED ON THE MERITS**

Finally, the petitioners have not demonstrated that they are likely to prevail on the merits of their applications for review. Many of the arguments raised by the petitioners have already been addressed and dismissed by the Commission when it adopted the limits on HCLS.<sup>19</sup> To the extent there should be changes or corrections to specific carriers’ data used to generate the

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<sup>18</sup> *Id.* at 17745, ¶ 221 (citing *Rural Cellular Association v. FCC*, 588 F.3d 1095, 1103 (D.C. Cir. 2009) (quoting *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 621 (5th Cir. 2000))).

<sup>19</sup> *CAF Order*, 26 FCC Red at 17743-47, ¶¶ 214-226.

benchmark caps, these changes can be made on a case-by-case basis; this is not a basis for staying the entire methodology for all carriers.

**CONCLUSION**

The petitioners have failed to demonstrate that a stay would not harm other interested parties, would preclude irreparable harm, would serve the public interest, and that they are likely to prevail on the merits of their underlying applications for review. The Commission should therefore deny the petitions.

Respectfully submitted,

**/s/ Rick Chessen**

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