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August 24, 2012

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street SW
Room TW-A325
Washington, DC 20554

Re: *Petition of Allband Communications Cooperative for Waiver of Part 54.302 and the Framework to Limit Reimbursable Capital and Operating Costs*

In the matter of: Connect America Fund, WC Docket No. 10-90
A National Broadband Plan for Our Future, GN Docket No. 09-51
Establishing Just and Reasonable Rates for Local Exchange Carriers,
WC Docket No. 07-135
High-Cost Universal Service Support, WC Docket No. 05-337
Developing an Unified Intercarrier Compensation Regime,
CC Docket No. 01-92
Federal-State Joint Board on Universal Service, CC Docket No. 96-45
Lifeline and Link-Up, WC Docket No. 03-109
Universal Service Reform--Mobility Fund, WT Docket No. 10-208

Dear Ms. Dortch:

Please find enclosed for filing in the above dockets the Application for Review on behalf of Allband Communications Cooperative.

We are also sending a copy via e-mail to Cathy Williams, Nicholas A. Fraser, and PRA@fcc.gov, and to Staff member Amy.Bender@fcc.gov, and to the Commission's copy contractor at fcc@bcpiweb.com.

Respectfully submitted,

ALLBAND COMMUNICATIONS COOPERATIVE

By its counsel

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DLK/cd
Atts.

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

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)	
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APPLICATION FOR REVIEW

ALLBAND COMMUNICATIONS COOPERATIVE

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Dated: August 24, 2012

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APPLICATION FOR REVIEW

Allband Communications Cooperative (Allband), pursuant to Section 1.115 of the Commission's rules, 47 C.F.R. § 1.115, respectfully requests Commission review of the Wireline Competition Bureau's (WCB's) July 25, 2012 Order in these dockets (**Attachment 3** hereto).

Allband respectfully requests the Commission to: (1) Extend the WCB Waiver from three years to fifteen years - through the year 2026 when Allband's Rural Utilities Service (RUS) loan will be repaid; and (2) Grant a Waiver of the Benchmarking Rule (regression caps imposed on capital and operating expenses) for the same fifteen year period (which relief was denied in the July 25 WCB Order). This requested relief is necessary to enable Allband to: (a) continue providing voice (and broadband) service; (b) paying the remainder of Allband's RUS loan; and (c) continuing operations. This requested extended waiver (to 2026) will also ensure that the Commission's Order,¹ and the WCB Order, as applied to Allband, complies with constitutional and statutory provisions applicable to the Commission.

I. BACKGROUND

Allband appreciates the WCB's approval of a three (3) year waiver of section 54.302 of the Commission's rules, which established a \$250 per line per month cap on high-cost universal service support (\$250 cap). Absent this waiver, Allband would have been unable to continue making payments on its RUS loan, to provide voice or broadband access service to its customers, or to continue operations as a viable telecommunications cooperative. In particular, Allband

¹ *Connect America Fund, et al*, WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011) (*USF/ICC Transformation Order*); *pets. for review pending sub nom. In re FCC 11-161*, No. 11-9900 (10th Cir., filed Dec. 8, 2011); 47 C.F.R. §§ 54.302, 36.621(a)(5).

appreciates the WCB's recognition of Allband's unique circumstances² and the compelling need for a waiver and the efficiency of its operations..³

Allband asserts, however, that the very short three year period of the waiver of the \$250 cap⁴ is insufficient. WCB's dismissal of Allband's request for waiver of the benchmarking rule (regression caps imposed on capital and operating expenses) on the basis of mootness is also erroneous. While Allband is not currently capped by the benchmarks,⁵ Allband assertions against the benchmarking rule are still not moot because, as demonstrated in this application: (i) these benchmarking caps will be applicable to Allband in subsequent years, and (ii) waiver of such caps will avoid Allband incurring wasteful expense to soon refile another waiver request.

II. ALLBAND REQUESTS THAT THE COMMISSION EXTEND THE TIME PERIOD OF THE WAIVER OF THE \$250 CAP TO FIFTEEN YEARS

Allband requests that the Commission modify the WCB's waiver to extend the waiver of the \$250 cap from three to fifteen years (through the year 2026) so that Allband has sufficient and predictable support (as required by the Communications Act of 1934, as amended) to continue to provide quality voice and broadband services over the life of the network investments and loan commitments incurred to deliver such services. While a three year waiver has halted an immediate cessation of Allband's operations, the WCB appears to have a number of misconceptions⁶ about the ability of Allband to (a) reduce its expenses within that three year timeframe, or at any foreseeable future time, to meet the \$250 cap, or (b) increase its penetration to a level sufficient to

² *In the Matter of Allband Communications Cooperative Petition for Waiver of Certain High-Cost Universal Service Rules*, Order in WC Docket No. 10-90, Released July 25, 2012, paragraph 11, footnoted deleted (Waiver Order).

³ Id., paragraph 12, footnotes deleted.

⁴ Id., paragraph 1.

⁵ Id., Paragraph 17.

⁶ Id., paragraph 14, footnote deleted.

reduce support per-line to meet the cap or (c) generate sufficient additional revenue to be less reliant on federal support revenues, or (d) renegotiate RUS loan terms.

A three year waiver is clearly insufficient to achieve the expectations identified by the WCB. At the end of the three year waiver, Allband will be in the same position as when it filed the existing Waiver Petition -- namely -- Allband will face substantial revenue losses resulting from full application of the \$250 cap.⁷ Allband would thus soon be forced to again file a waiver petition in late 2013 or early 2014 at an estimated cost of \$50,000, and the WCB would again be forced to expend many hours of staff time reviewing the new waiver petition. Moreover, the uncertainty surrounding the ability to obtain such a “follow-on” waiver will greatly frustrate Allband’s efforts to operate during the three-year term of the current waiver.⁸

Given the nature of its service area, Allband asserts: there exists no feasible way in the next three years, or on a longer term basis, for Allband to (a) sufficiently reduce expenses, and/or (b) to increase penetration or revenues sufficiently to meet the \$250 cap, even if *all* non-fixed expenses were eliminated and *100 percent* penetration were achieved. Finally, although Allband is eager to work with RUS to modify loan terms, Allband understands that RUS has limited, if any, ability to modify such terms without Congressional approval because any RUS loan modification

⁷ Based on data already presented in Allband’s Waiver request, application of the cap will reduce support levels by approximately \$900,000, representing approximately a 55 percent loss of revenue. As stated in its February 3, 2012 Waiver Petition, a loss of this magnitude – whether it occurs in 2012 or 2015 – will render Allband incapable of (a) providing voice (and broadband) service, (b) paying the remainder of its RUS loan and (c) continuing operations.

⁸ This uncertainty leaves Allband in a tenuous position that limits Allband’s access to capital needed for network upgrades and new lines of business necessary to attract and retain customers, a result that is counter-productive to the goal of reducing Allband’s reliance on universal service support and to resolving uncertainty as to the long-term viability of Allband. The current short-term waiver unquestionably causes customers, employees, and vendors to question the viability of Allband over the next three years, as the company merely sustains operations on “borrowed time” in the absence of a more robust waiver.

in this instance would increase the cost of the loan and thus give rise to a “budget event.”⁹

Allband therefore requests that the Commission extend the length of the WCB approved waiver from three to fifteen years (through the year 2026 when the RUS loan will be repaid). The grant of a longer term waiver will eliminate the incurrence of wasteful expenses by Allband to file repetitive waiver petitions, and by WCB to review duplicative waiver petitions. The better alternative is for WCB and Allband to work together to enhance services, reduce costs where possible, expand Allband’s markets and revenues, and reduce Allband’s reliance on USF support over time.

III. ALLBAND EXPENSES CANNOT BE REDUCED TO MEET THE \$250 CAP

Allband must forthrightly advise the Commission that Allband cannot realistically meet the \$250 cap in three years, as the WCB Waiver Order contemplates, or even through the year 2026 (when the RUS loan will be repaid).

A. Even complete elimination of all non-fixed expenses would not enable Allband to meet the \$250 cap in three years

Based on cost data filed in Allband’s February 3, 2012 Waiver Petition, Table 1 included in **Attachment 1** hereto shows a breakdown of Allband’s current federal support funding per-line for Interstate Access Common Line (ICLS) and High Cost Loop Support (HCLS)¹⁰ by major cost grouping. Table 1 shows that of the total federal support of \$669 per-line, per-month, \$238 per-line per-month of support is provided for Allband’s non-fixed expenses (Plant Related; Network,

⁹ 112th Congress, 2d Session, H. R. 3581, IN THE SENATE OF THE UNITED STATES, dated February 9, 2012, AN ACT To amend the Balanced Budget and Emergency Deficit Control Act of 1985 to increase transparency in Federal budgeting, and for other purposes, Title V Fair Value, Section 504 under Budgetary Treatment states regarding RUS loans that:

(e) MODIFICATIONS.--An outstanding direct loan (or direct loan obligation) or loan guarantee (or loan guarantee commitment) shall not be modified in a manner that increases its costs unless budget authority for the additional cost has been provided in advance in an appropriations Act.

¹⁰ In Table 1, the \$669 per-line, per -month federal support (\$8,030 annually) does not include Local Switching Support (LSS) of \$45 per-line, per-month (\$87,840 annually). The annual support of \$8,569 (\$714 per-line, per-month) shown in the Allband Waiver Petition included LSS support.

Customer and Corporate Operations; and Other Expense). Some of these expenses are under the company's control to some degree to maintain and operate the network, to bill and resolve customer problems, to provide corporate management and engineering, to meet legal, accounting, and regulatory costs, etc. However, expense savings in these areas may be limited if quality service is to be provided to customers, electricity is paid for to power the network, regulatory reporting and costing requirements are met, etc.

However, even if the non-fixed expenses were totally eliminated, clearly an unrealistic expectation, Allband's federal support funding for fixed costs would be \$431 per-line, per-month – still well above the \$250 cap. Non-fixed expenses are modest and there is little room for reductions, particularly given Allband's obligation to provide quality services. Elimination of even a minimal amount of these expenses would be unreasonable if Allband is to provide reliable voice or broadband services to existing and additional customers.

Moreover, under the best case scenario imaginable, Allband's situation will not change in three years. The WCB Order itself acknowledges that Allband is presently operating efficiently, and that its costs are modest and reasonable.¹¹ As shown in Table 1, Allband's non-fixed expenses cannot be reduced sufficiently for Allband to meet the \$250 per-line, per-month cap, within three years or beyond.

B. Fixed expenses cannot be reduced within three years to a level that will allow Allband to fall below the \$250 cap

The fixed expenses shown in Table 1 are not under Allband's control and will only be reduced as the investment Allband previously placed to provide service to its customers (in reliance upon the USF program) is depreciated. Table 2 (included as **Attachment 1** hereto) shows

¹¹ *In the Matter of Allband Communications Cooperative Petition for Waiver of Certain High-Cost Universal Service Rules*, Order in WC Docket No. 10-90, Released July 25, 2012, paragraph 12, footnoted deleted; for instance, Allband's Corporate Operations expense is well below the Commission's cap.

the impact on Allband's USF support funding for fixed costs adjusted for depreciation (while keeping non-fixed expense and property tax constant):¹² As this Table shows, depreciation of investment does reduce Allband's need for Federal support over time. However, by year three (2015), when the Waiver granted by the WCB expires, the reduction will be insufficient to reduce Allband's need for federal support funding to meet the \$250 cap. In fact, this chart shows that, by the year 2026 when the RUS would be paid off, USF funding support for fixed costs would still be required.

IV. INCREASED PENETRATION WILL NOT REDUCE ALLBAND'S PER-LINE FUNDING REQUIREMENTS TO A LEVEL SUFFICIENT TO MEET THE \$250 CAP

The obvious next question will be: "If expenses cannot be reduced sufficiently to eliminate the need for such support, could revenues be grown to reduce the need for support below the \$250 cap?" The straightforward answer is "no," given the addressable markets in Allband's service area.

As the WCB Order notes, Allband's basic service (voice) penetration is 69% and its broadband penetration is 36%.¹³ The WCB apparently expects that by 2014, if there is increased penetration, the support funding above the cap may be unnecessary.¹⁴ However, this is also an unrealistic expectation. In Allband's July 24, 2012 ex parte presentation in WC Docket 10-90, Allband noted that it currently has 147 voice customers out of a possible 212 (69% penetration).¹⁵ If Allband achieved maximum service penetration (100%), it could provide service to an additional 65 customers (212 less 147). Table 3 (included in **Attachment 1** hereto) shows the effect of

¹² The support for these expenses may change minimally because of their allocation reliance on investments.

¹³ *In the Matter of Allband Communications Cooperative Petition for Waiver of Certain High-Cost Universal Service Rules*, Order in WC Docket No. 10-90, Released July 25, 2012, footnote 44.

¹⁴ *Id.*, paragraph 15.

¹⁵ In Allband's Waiver request it indicated that it had 163 lines. This is composed of 147 customer voice lines and 16 company official voice lines.

increased penetration on support levels per-line, per-month, assuming (unrealistically): 100% penetration, no additional investments to serve existing or new customers, and no change in expenses over 2012 levels.

As one would expect, increased penetration with no cost increases would reduce the monthly support requirement per-line over time. However, as Table 3 also shows, the required support still exceeds the \$250 cap through the year 2026 when the RUS loan will be paid.¹⁶ The WCB Order¹⁷ apparently also assumes that revenues from additional voice and broadband customers could help offset the need for support.¹⁸ This analysis unrealistically assumes that Allband already has facilities constructed to all of the homes that currently do not have service, when in fact some new drops and distribution plant would be needed to provide such service. As a consequence, the revenues generated would simply offset a portion of the additional plant costs and operational (non-fixed costs)

¹⁶ Although no change in the rate of return had been adopted, the Commission did discuss possible changes to the rate of return in the November 18, 2011 Report and Order and Further Notice of Proposed Rulemaking at paragraph 1057, where it observed that: "...preliminary analysis would conservatively suggest that the authorized interstate rate of return should be no more than 9 percent..." See: *Report And Order And Further Notice Of Proposed Rulemaking, In the Matter of, Connect America Fund, A National Broadband Plan for Our Future, Establishing Just and Reasonable Rates for Local Exchange Carriers, High-Cost Universal Service Support, Developing an Unified Intercarrier Compensation Regime, Federal-State Joint Board on Universal Service, Lifeline and Link-Up, Universal Service Reform – Mobility Fund* in WC Docket No. 10-90, GN Docket No. 09-51, WC Docket No. 07-135, WC Docket No. 05-337, CC Docket No. 01-92, CC Docket No. 96-45, WC Docket No. 03-10, and WT Docket No. 10-208. Released November 18, 2011, paragraph 1057.

Allband does not agree with this preliminary analysis, but if the rate of return were reduced to 9 percent, Allband still would not be able (even in conjunction with penetration increases) to reduce support to a level necessary to meet the \$250 cap in the three year period of the waiver granted by the WCB or by the year 2026. This rule change would at the most reduce Allband's support requirement by \$30 per-line, per-month.

¹⁷ The additional revenues that could be generated if 100% penetration were achieved are: Voice = 65 lines times \$19.90 local rate times 12 months = \$15,522 annually **plus** Broadband = 134 lines times \$34.99 broadband rate times 12 months = \$56,264 annually **equals** Total additional revenues at 100% penetration = \$71,786 annually.

¹⁸ *In the Matter of Allband Communications Cooperative Petition for Waiver of Certain High-Cost Universal Service Rules*, Order in WC Docket No. 10-90, Released July 25, 2012, paragraph 14.

to serve these customers. Additionally, because of the territory Allband serves, it is unrealistic to expect that a significant number of additional customers will take service from Allband.

Consequently, there is no reasonable expectation (even with the unrealistic assumption that Allband can achieve 100 percent penetration with no additional costs) that in three years, or even by the year 2026, revenues will increase sufficiently for Allband to offset the revenues lost as a result of the \$250 cap.

V. A WAIVER EXTENSION BEYOND THE THREE YEARS GRANTED IN THE WAIVER ORDER WILL SAVE BOTH ALLBAND AND COMMISSION RESOURCES

The above analysis shows that, even assuming several unrealistic revenue growth and cost reductions assumptions, Allband cannot reduce its support requirements below the \$250 cap within the three year time frame of the current waiver. Even if steps might be taken to reduce its per-line support levels, Allband's support requirements will remain above the \$250 cap through the year 2026. Given these irrefutable facts, Allband is unclear what the WCB believes can be done to resolve the issue within the three years referenced in its Waiver Order.¹⁹

Even with maturing operations, and concomitant reductions in its operating costs and increases in revenues over time, it remains evident that limited options or actions exist for Allband to meet the \$250 cap in USF support in three years, or even through the year 2026. The inevitable result would be that Allband will be back in the same position in two years – needing to file substantial information similar to its initial waiver petition. Indeed, the WCB anticipates the likelihood of this result.²⁰

Allband has shown here that “all reasonable steps” – and even several unrealistic steps – would still preclude Allband from bringing its need for USF support below the \$250 cap by 2015. It therefore makes little practical or financial sense to require Allband to file an additional waiver

¹⁹ Id., paragraphs 13-14.

²⁰ Id, paragraph 16.

petition in late 2013 or early 2014, costing at least \$50,000 (and to expend Commission staff resources to review the waiver petition) when the results are so clear right now. As a consequence, Allband requests that the waiver of section 54.305 of the Commission's rules (the \$250 per-line, per-month cap) be extended until the year 2026.

Additionally, Allband requests that the Commission clarify paragraph 15 of the Order wherein the WCB states that Allband "... may receive the lesser of high-cost universal service support based on its actual costs or the annualized total high-cost support that it received for the period January 1, 2012 through June 30, 2012." The support received for HCLS during 2012 is based on 2010 costs. This precludes recovery of additional fixed or sunk costs for 2011 that were incurred prior to the effective of the FCC's Transformation Order. If there is to be a cap, it should be based on the support Allband would receive based on 2011 costs. The fact that the Order uses 2010 investments and costs, and excludes 2011 incurred investments and costs, exacerbates the unlawfulness and arbitrariness of the Order as applied to Allband.

VI. ALLBAND REQUESTS THAT THE COMMISSION GRANT ALLBAND A WAIVER OF THE BENCHMARK RULE (REGRESSION CAPS)

Allband also requests the Commission to grant Allband's request for a waiver of the benchmark rule (regression caps) and to specifically rule that Allband's request is not moot, in contrast to WCB Waiver Order.²¹ While Allband notes that the benchmark rule does not currently place a cap on Allband, this does not render as moot Allband's waiver request. As Table 4 (included in **Attachment 1** hereto) shows, the anticipated operation of the benchmarking rule as modified by the WCB²² will significantly reduce and cap Allband's support funding over time.

²¹ Id., paragraph 17, footnote deleted.

²² *In the Matter of Connect America Fund, High Cost Universal Service Support*, Order in WC Docket Nos. 10-90 and 05-337, Released April 25, 2012.

Paradoxically, this negative result stems primarily from reductions in net investment in the benchmarking (regression) model. Net investment reductions due to depreciation reduce Allband's reliance on support (a good thing) as shown in Tables 2 and 3 (**Attachment 1**), previously, but under the perverse nature of the benchmarking model as presently structured, Allband is penalized and will almost certainly "fall back" into the caps in the near future.²³

Allband also asserts that the Commission's imminent application of the benchmarking rule to Allband is arbitrary and capricious because it is contrary to the statutory requirement of Section 47 U.S.C. § 254(b)(5) that USF support be "specific, predictable, and sufficient", so as to promote the goals of providing universal service to difficult-to-serve rural areas. The Commission Order does not even focus on how the regression cap comports with Section 254(b)(5)'s requirement.

As a result, Allband requests that the Commission grant a waiver extending through 2026 of the benchmarking rule (regression model or rule caps on capital and operating expense).

VII. THE GRANT OF THE WAIVER RELIEF REQUESTED BY ALLBAND COMPORTS WITH CONSTITUTIONAL AND STATUTORY PROVISIONS APPLICABLE TO THE COMMISSION, AND WITH PREVAILING JUDICIAL PRECEDENT.

The Commission's grant of Allband's waiver requests would comport with constitutional and statutory provisions applicable to the Commission, and also prevailing judicial precedent.²⁴

²³ Note that this is a best estimate of the likely effect, although the model is so non-transparent that any estimate is simply that. For the analysis presented in Table 4, 2012 USC HCL support data was used by Allband as the base (Calendar year ending 12/31/2010 investment and expense amounts). To estimate the regression impact, Allband adjusted only accumulated depreciation and depreciation expense, including the related regression variables, for future years. All other variables were held constant. Data modifications were only made for Allband, while data for other companies in the population were held constant. The regression analyses were performed through STATA version 12.1. Table 4 represents the modified results of the regression. Absent better WCB estimates of the operations of the model over time, the representations here should be taken as the best evidence of how the model is likely to operate.

²⁴ In support of these assertions, Allband also incorporates by reference its legal assertions included in its February 3, 2012 Waiver Petition and its June 27, 2012 Stay Petition previously filed in these dockets.

A. Constitutional Violations and Breach of Contract Issues

Absent the grant of an extended waiver (or stay), Allband respectfully asserts that the WCB's Order, as applied to Allband, would fail to comply with applicable constitutional provisions and would also effect a breach of contract by the United States relative to Allband's loan contracts with the Rural Utility Service (RUS).

As to constitutional violations, the WCB's Order transgresses the Fifth Amendment which prohibits the confiscatory taking of property as a violation of the Takings Clause and substantive Due Process.²⁵ Without correcting the immediate, unconstitutional confiscatory impact of the Commission's Order by granting an extended Waiver (or Stay) as requested herein, the WCB Order will destroy Allband as an entity, to the detriment of the cooperative's customer-members, and their membership equity interests. The Order would destroy the security (the USF revenues) pledged to ensure the payment of RUS loans and would sharply curtail or disallow, for USF reimbursement purposes, the recognition of lawful and reasonable expenses incurred by Allband to provide service and to meet numerous state and federal regulatory requirements.²⁶ The result would be a confiscatory taking, as established by the United States Supreme Court when evaluating the constitutional requirements applicable to ratemaking. In *Bluefield Waterworks & Improvement Co. v Public Service Comm'n of West Virginia*, 262 U.S. 679, 692-693; 42 S. Ct. 675 (1923), the Court stated in relevant part:

²⁵ The effect of the Commission's Order, as applied to Allband and a very small "selected" class of similarly placed entities, also resembles an unconstitutional Bill of Attainder which the United States Supreme Court applied against Congressional or legislative acts. See, *United States v Lovett*, 328 U.S. 303, 315 (1946). Such a small, selected class of similarly situated companies may have been identified and deliberately targeted prior to the Commission's Order for differential punitive treatment, as being outside of the "market-based" economic model favored by the Commission, applied inflexibly by the Commission in this instance.

²⁶ The immediate and adverse impact upon Allband resulting from the WCB Order to Allband is well documented in Allband's February 3, 2012 Waiver Petition (and attachments), and in Allband's June 27, 2012 Petition for Stay (with attachments), and in the information discussed earlier in this Application.

“What annual rate will constitute just compensation depends upon many circumstances, and must be determined by the exercise of a fair and enlightened judgment, having regard to all relevant facts.... The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties...”²⁷

Under yet additional judicial precedent, the Commission's Order (and the WCB Order) as applied to Allband must also be consistent with the requirements of *Hope Natural Gas* allowing for returns “sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.” The Commission's Order should not “jeopardize the financial integrity of the compan[y], either by leaving [it] insufficient operating capital or by impeding [its] ability to raise future capital” and should permit returns sufficient “to compensate current equity holders for the risk associated with their investments.”²⁸ As applied to Allband here, the Commission’s Order (and WCB Orders) would similarly serve to destroy the financial soundness of Allband, and its ability to maintain and support its credit and to raise the money necessary for the proper discharge of its public duties, contrary to this Court precedent.

The Commission, serving in part as a rate-making agency, is not exempt from the above constitutional requirements. The Commission does not possess the constitutional or statutory authority to fashion orders designed to selectively destroy companies, or to pick winners and losers, and to dictate nationwide economic restructurings not expressly authorized by statute,

²⁷ The Court had previously recognized such a taking in *Covington & Lexington Tpk. Rd. Co. v Sandford*, 164 U.S. 578, 597 (1896) and there is a long line of cases following this holding. For example, *Pa. Coal Co. v Mahon*, 260 U.S. 393, 415 (1922) held the government may effect a taking without physical occupation or appropriation if it “goes too far...”; The “power to regulate is not a power to destroy...” *R. R. Comm'n Cases*, 116 U.S. 307, 331 (1886).

²⁸ *Duquesne Light Co. v Barasch*, 488 U.S. 299 at 312 (1989), *Fed. Power Comm'n v Natural Gas Pipeline Co.*, 315 U.S. 575, 603 (1942) (Black, J. concurring), and *Fed. Power Comm'n v Hope Natural Gas Co.*, 320 U.S. 591 (1944), at 601 and 603

whether such destructive outcomes were intended or not.²⁹ The Commission here should recognize the “economic impact of the regulation” on Allband, and “the extent to which the regulation has interfered with distinct investment-backed expectations,” and “the character of the governmental action.”³⁰

Allband also asserts in these dockets that the Commission’s Order (and the WCB Orders) effect a regulatory reversal which is unlawful and unreasonable. The Commission's Order constitutes the kind of retroactive regulatory action the United States Supreme Court rejected in *United States v Winstar Corporation*, 518 U.S. 839; 116 S. Ct. 2432 (1996), in which the Federal Home Loan Board promulgated rules to encourage investors in good standing to take over ailing banking thrifts by counting goodwill as an asset, with a premise the rules would not change. However, subsequently Congress forbid such thrifts from using goodwill credits for required reserves -- a retroactive reversal of policy that rendered the Appellant (*Winstar*) insolvent. The Court ruled such Congressional action constituted a breach of contract permitting awards of damages to *Winstar* and other thrifts that had contracted with the FHLB to take over ailing thrifts, and that suffered damages or harm from Congress' change in the rules. Here, just like the situation in *Winstar*, Allband entered into contracts with the RUS, taking out loans in reliance upon the premise that Commission regulatory rules and orders governing the USF under the 1996 Act would remain unchanged (or would not be retroactively changed), particularly where all parties

²⁹ Even if there is dispute as to whether the Commission is not a rate-making agency for purposes of its confiscation of Allband's property, the Constitutional prohibition against non-possessory regulatory taking is clearly established in *Lucas v South Carolina Coastal Council*, 505 U.S. 1003, 1015; 112 S. Ct. 2886 (1992), which held a non-possessory regulation may constitute a per se taking if it deprives the owner of “all economically beneficial or productive use of land.” The Commission's Order here literally will deprive Allband of the use of its property, absent a waiver.

³⁰ While the Commission Order may not directly constitute a physical invasion of Allband's property, its impact is the same because at some near point Allband's assets will be claimed by creditors or successors in interest (See, *Penn Central Transportation Co. v City of New York*, 438 U.S. 104, 124 (1978)).

knew that the ongoing USF revenues constituted an absolute prerequisite to repay the loan principal and interest.³¹

Without a grant of an extended waiver (or stay) by the Commission, both Allband and the RUS would be harmed by the Commission's retroactive reversal of its previous interpretation and application of the 1996 Act, and from the new changes to the USF program. Allband, supported by *Winstar, supra*, asserts its contracts with RUS need not contain promises to refrain from regulatory change in order to establish a breach of contract action against the federal government. Similar to the *Winstar* situation, Allband also urges that, based upon estoppel and fairness considerations, the Commission should refrain from reversing or disregarding previous regulatory orders and decisions, and should not apply its Order (or WCB Orders) retroactively to Allband.

The U.S. Supreme Court has reiterated the presumption against retroactive legislation in other cases (e.g. *Landgraf v USI Film Products, et al*, 511 U.S. 244, 265 (1994); *Bowen v Georgetown University Hospital*, 488 U.S. 204 (1988)). The Constitution also includes several provisions that prohibit or otherwise restrict retroactive law-making and agency action (e.g. the Ex Post Facto Clause (Art. I, §9, C1. 3); the Contracts Clause (Art. I, §10. C1. 1); the Bills of

³¹ To be clear, Allband also respectfully asserts herein that the Commission's Order, and the WCB Order, absent the grant of an extended waiver (or stay) as requested herein, would also constitute a breach of contract by the United States Government (including overall its subsidiary agencies such as the FCC, the RUS and the USF) relative to the loan agreements and contracts between the RUS and Allband, and would constitute an unlawful interference by the Commission in the already existing loan contracts upon which Allband has relied upon and under which Allband has performed. Allband asserts that there exists a binding reciprocal contractual obligation between Allband's duty to pay the principal and interest on its RUS loans (undertaken to construct Allband's network) and the continued payment from the USF to cover the RUS loan payments. The same is true for a reasonable level of USF support to cover operating and maintenance costs of Allband's network and to make it possible for Allband to provide universal service to its service territory as originally contemplated by the 1996 Act, previous regulatory orders of this Commission, and all stakeholders involved in the establishment of Allband for that very purpose.

Attainder Clauses (Art. I, §9, C1. 3, and §10, C1. 1); and the Due Process and Takings Clauses of the Fifth Amendment.

The United States Supreme Court's June 21, 2012 decision in *Federal Communications Commission, et al v Fox Television Stations, Inc.*, 567 U.S. ____; 132 S. Ct. 2307; 183 L. Ed. 2d 234 (2012), also made rulings that have analogous application here. While that case involved First Amendment free speech issues, the Supreme Court in *Fox* invalidated the FCC's orders on the basis, in part, that the FCC orders failed to give the broadcasters sufficient notice of what would be considered a violation of FCC's previous orders. The Court stated in relevant part (slip op, pp 11-13):

A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required. See *Connally v. General Constr. Co.*, 269 U. S. 385, 391 (1926) (“[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law”); *Papachristou v. Jacksonville*, 405 U. S. 156, 162 (1972) (“Living under a rule of law entails various suppositions, one of which is that ‘[all persons] are entitled to be informed as to what the State commands or forbids’” (quoting *Lanzetta v. New Jersey*, 306 U. S. 451, 453 (1939) (alteration in original))). This requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment. See *United States v. Williams*, 553 U. S. 285, 304 (2008). It requires the invalidation of laws that are impermissibly vague. A conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained “fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.” *Ibid.* As this Court has explained, a regulation is not vague because it may at times be difficult to prove an incriminating fact but rather because it is unclear as to what fact must be proved. See *id.*, at 306.

Even when speech is not at issue, the void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. See *Grayned v. City of Rockford*, 408 U. S. 104, 108–109 (1972)....

* * *

...The Commission's lack of notice to Fox and ABC that its interpretation had changed so the fleeting moments of indecency contained in their broadcasts were a violation of §1464 as interpreted and enforced by the agency “fail[ed] to provide a person of ordinary intelligence fair notice of what is prohibited.” *Williams, supra*, at 304. This would be true with respect to a regulatory change this abrupt on any subject, but it is surely the case when applied to the regulations in question, regulations that touch upon “sensitive areas of basic First Amendment freedoms.... [cite omitted].

Allband asserts, for example, that the benchmark (regression) rule is vague, unpredictable, and ever-changeable, which by itself fails to meet the Due Process requirements of notice and avoidance of vagueness as clarified in *Fox*. A carrier such as Allband cannot know with any reasonable guidance or certainty as to what expenses will be allowable from one-year to the next, thereby violating Due Process principles and the statutory requirements of Section 254(b)(5), that USF support be sufficient and predictable, as discussed *infra*.

The Supreme Court in *Fox* also noted that the FCC order's waiver of a penalty or forfeiture (similar to another accommodation such as a temporary waiver) also does not cure the Due Process problem, stating in relevant part (slip op, p 14):

...This "policy of forbearance," as the Government calls it, does not suffice to make the issue moot. Brief for Petitioners 31. Though the Commission claims it will not consider the prior indecent broadcasts "in any context," it has the statutory power to take into account "any history of prior offenses" when setting the level of a forfeiture penalty. See 47 U. S. C. §503(b)(2)(E). Just as in the First Amendment context, the due process protection against vague regulations "does not leave [regulated parties] . . . at the mercy of *noblesse oblige*." *United States v. Stevens*, 559 U. S. ___, ___ (2010) (slip op., at 18). Given that the Commission found it was "not inequitable to hold Fox responsible for [the 2003 broadcast]," 21 FCC Rcd., at 13314, and that it has the statutory authority to use its finding to increase any future penalties, the Government's assurance it will elect not to do so is insufficient to remedy the constitutional violation.

The Supreme Court in *Fox* (slip op pp 14-15) also found that "reputational injury" provided further reason for granting relief from the FCC order, stating:

In addition, when combined with the legal consequence described above, reputational injury provides further reason for granting relief to Fox. Cf. *Paul v. Davis*, 424 U. S. 693, 708–709 (1976) (explaining that an "alteration of legal status... combined with the injury resulting from the defamation" justifies the invocation of procedural safeguards). As respondent CBS points out, findings of wrongdoing can result in harm to a broadcaster's "reputation with viewers and advertisers.".... The challenged orders could have an adverse impact on Fox's reputation that audiences and advertisers alike are entitled to take into account.

The Supreme Court also refused to find that the notice required by Due Process was obliquely provided by some other FCC Order, stating in relevant part (slip op, p 15):

An isolated and ambiguous statement from a 1960 Commission decision does not suffice for the fair notice required when the Government intends to impose over a \$1 million fine for allegedly impermissible speech....

The Supreme Court in *Fox* thereupon ruled that the FCC's standards as applied were vague, and that the FCC's orders "must be set aside." The Court noted that it "...resolves these cases on fair notice grounds under the Due Process Clause." (slip op, p 17).

Allband asserts that the Commission order, and the WCB Orders, as applied to Allband, similarly violates Due Process principles. Allband reasonably relied upon the 1996 Act, and all of the regulatory orders, decisions, and actions which endorsed Allband and induced Allband into committing to significant RUS loan commitments, along with other contractual and operational commitments and costs. Now, in 2011 and 2012, this Commission and the WCB attempts to reverse its interpretations and decisions as applied to Allband by 180 degrees. The Commission Order, at the same time, did not provide Allband any fair notice of this change that meets constitutional standards of Due Process. The Commission's Order purports to curtail USF revenues upon which both Allband and the RUS, and Allband and its customers/members, and the general public, relied upon to fund the long-term loan commitments and payment requirements.

Allband asserts that the Commission Order comprises in essence a violation of the "doctrine of invitational error" -- to induce a party to undertake substantial commitments based upon promised USF revenues, to be followed by Commission action to punish Allband for following the regulatory scheme by a post-hoc retroactive reduction of the promised funds needed to support the investment already incurred under the promised structure. This constitutes an egregious violation of both substantive and procedural Due Process principles.

B. Violations of Commission’s statutory jurisdiction and authority.

The Commission’s application of the per-line cap to Allband would also constitute a violation by the Commission of the plain language of the 1996 Act, and the goals, objections, and intent of Congress in enacting the 1996 Amendments. The 1996 Act governs and controls this Commission's jurisdiction, authority, and discretion,³² and establishes clear and specific mandates relative to Universal Service Fund (USF) matters.³³

Allband has met all of these statutory goals, objectives and requirements of the 1996 Act, commencing with Allband’s formation in 2003 and the subsequent design and build-out of a modern communications system by Allband starting in 2005, and continuing to the present. Allband has

³² Statutes must be interpreted in accordance with the goals, objectives, and intent of Congress. *Schneidewind v ANR Pipeline Company*, 485 U.S. 293; 108 S. Ct. 1145 (1988).

³³ For example, Section 254 lays out the principles and policies to be applied “for the preservation and advancement of universal service (Section 254(b), 47 U.S.C. 254(b)); Section 254(b)(1) establishes the principle that “Quality services should be available at just, reasonable, and affordable rates.”; Section 254(b)(2) mandates that “Access to advanced telecommunications and information services should be provided in all regions of the Nation.”; Section 254(b)(3) provides:

(C) ACCESS IN RURAL AND HIGH COST AREAS.--Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.

Section 254(b)(5) requires that “There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.”; Section 254(d) provides for contributions by carriers “to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service.”; Section 254(e) provides that universal service support provided to Eligible Telecommunications Providers “should be explicit and sufficient to achieve the purposes of this section.”; Section 254(g) provides in part that certain rates charged by providers “to subscribers in rural and high cost areas shall be no higher than the rates charged by each such provider to its subscribers in urban areas.”; Section 254(h)(1)(A) provides that a carrier should provide services necessary to a “health care provider that serves persons who reside in rural areas in that State at rates that are reasonably comparable to rates charged for similar services in urban areas in that State.”; Section 254(i) provides that “The Commission and the States should ensure that universal service is available at rates that are just, reasonable, and affordable.”

also placed full reliance on various orders or directives of this Commission, the Michigan Public Service Commission (MPSC), and loan decisions of the Rural Utility Services (RUS).

In contrast, the per-line cap applied to Allband under the Commission's Order violates the plain language, and the goals, objectives, and intent of Congress as stated above. As applied to Allband, the Order would drastically reduce USF revenues needed to cover capital investment and costs already incurred by Allband in accordance with the 1996 Act. The Commission's Order constitutes an unwarranted retroactive reversal of the Acts provisions as implemented by this Commission, the RUS, NECA, the USF, and the MPSC, and as relied upon by Allband. The Order as applied to Allband is counter-productive and destructive of the purposes and objectives for the USF as established by the Act.³⁴

A fundamental defect in the Commission's Order (and the WCB Orders) is the failure to apply the Order on a prospective economic basis, in favor of applying it retroactively to Allband, and by ignoring the continuing USF funds necessary to support already incurred investment and costs undertaken by Allband under RUS-approved loans. A missing reality derived from the FCC Order (and the WCB Orders) is the recognition that the advancement of all the stated reform goals and policies of the FCC Order can be fully achieved without destroying Allband and its taxpayer funded RUS loans³⁵ Allband asserts that the financial commitments and obligations incurred by

³⁴ The Order explicitly violates Sections 254(b)(5), 254(d), and 254(e) that require "specific, predicable and sufficient Federal and State mechanisms to preserve and advance universal service" (Section 254(b)(5), that provides for contributions by carriers for such mechanisms (Section 254(d), and that require that universal service support be provided to Eligible Telecommunications Providers that is "explicit and sufficient to achieve the purposes of this section" (Section 254(e)), among other provisions.

³⁵ The destruction of Allband and its loans has virtually no impact upon the USF and the surcharges collected nationwide to fund the USF. The amount of Allband's receipts from the ratepayer supported USF, much of which goes to paying the taxpayer-supplied RUS loans, is infinitesimal compared to the total annual USF budget. In fact, using the data appearing on Appendix B of the Wireline Bureau's April 25, 2012 Order, the total amount "saved" by imposition of the \$3,000 per line cap for all companies exceeding the cap, would total still an extremely small portion of the total USF budget. See Allband General Manager Ron Siegel's

Allband in accordance with the 1996 Act and the orders and policies of this Commission and the RUS, cannot and need not be retroactively undone. Allband's past investment is presently promoting and advancing universal service objectives.

Allband also asserts that the Commission order fails to adequately explain how the impact of the per-line caps and regression rule comports with or is consistent with the Congressional mandate in Section 254(b)(3) that rural customers have access to telecommunications and information services at rates that "are reasonably comparable to rates charged for similar services in urban areas". As applied to Allband, the impact of the Order is to destroy the provision of the referenced services, let alone to comply with this rate comparability mandate. Moreover, Congress must have recognized that its mandates of "specific, predictable, and sufficient Federal and State mechanisms to preserve and advance universal service" in Section 254(b)(5) was integrally related to accomplish the objectives stated in Section 254 (b)(3).³⁶

In contrast to its current approach, the Commission should fashion an approach that promotes future investment to promote universal service, without retroactively destroying the cost reimbursement revenues promised to support the already incurred investment and costs represented by existing RUS loan to promote universal service. Such *ipsi dixit* "policy" reversals by this Commission serve to undercut the credibility of the Commission, and creates uncertainty that will stifle investment toward universal service and toward communication infrastructure generally, on a longer term basis.

affidavit (Attachment 1, page 5, paragraph 12, which references Table 1, page 6) attached to Allband's June 27, 2012 Stay Petition filed in these dockets. These relatively small amounts do not support the rationale for invoking the per-line cap as articulated in the FCC Order, and particularly on a retroactive basis.

³⁶ These statutory requirements of the 1996 Act, including predictable and sufficient USF support, are mandatory. *Quest v FCC*, 258 F.3d, at 1199-1200. The mandatory nature of these requirements of Section 254(e) are clear from the plain language stated by Congress. *Texas Office of Public Utility Counsel v FCC*, 183 F.3d 393, 412 (5th Cir. 1999).

Absent the grant of an extended waiver (or stay) as requested herein, the FCC Order (and WCB Orders), as applied to Allband, would be contrary to the goals and objectives of Congress, and of Congressional intent, in adopting the universal service provisions of the 1996 Act. While Allband recognizes that the federal courts grant some deference to federal agency interpretations and policy choices in administering a statute, there exists little or any “headroom” for such deference in this situation where the Commission is attempting to reverse its own previous orders, policies, and interpretations, and to retroactively impact Allband (and the RUS) which have reasonably relied upon the 1996 Act and this Commission’s previous orders, policies, and interpretations. The Courts often do not grant deference to agency policy or interpretational reverses, and particularly so where such reliance and detrimental impacts exist.³⁷

C. Violations of the Administrative Procedures Act

Allband also respectfully asserts that the Commission’s Order (and the WCB Orders), absent the grant of an extended Waiver (or Stay), would also be arbitrary and capricious, and irrational, as applied to Allband, and would violate the Administrative Procedures Act, 5 U.S.C. § 706(2)(A) through (F).

Despite Allband’s filings and other efforts to participate in the Commission’s rulemaking process leading to its Order, the FCC Order (and the WCB Orders) have not yet fully grasped Allband’s unique status and compelling arguments. The FCC Order appears to legislatively override, without explanation or concern, previous orders of the Commission and of the MPSC, and decisions of the RUS, which led to the creation of Allband’s network (to bring telephone and broadband facilities to new areas). If not remedied by the grant of an extended Waiver or Stay, this sharp and largely unexplained reversal of orders and decisions upon which Allband and its

³⁷ *Federal Communications Commission, et al v Fox Television Stations, Inc.*, 567 US ____ (2012), U.S. Supreme Court Docket No. 10-1293; *United States v Winstar Corp.*, 518 US 839 (1996); *California ex rel Bill Lockyer v U.S. Department of Agriculture*, 575 F3d 999 (USCA 9th Circ, 2000)

customer members, and no doubt RUS itself, relied upon is arbitrary and capricious. The result is an inexplicable retroactive reversal of previous orders and decisions of this Commission, the MPSC, and the RUS, upon which Allband and its customer/members, and the public itself, relied upon in committing to the financial obligations of the RUS loans, among others, and in expending the time and resources to provide telephone and broadband network in the unserved areas now served by Allband.³⁸ The FCC Order (unless ameliorated as to Allband by the grant of an extended Waiver and Stay) would be an example of unlawful and unreasonable retroactive decision-making, much in the same sense that the U.S. Supreme Court found unsustainable in *United States v Winstar Corporation*, 518 U.S. 839; 116 S. Ct. 2432 (1996).

The sudden, unforeseen, and short timeframe upon which overly large USF revenue reductions would be imposed upon Allband also appears irrational, as it would destroy Allband's recently established telephone and broadband network and services, and would strand the recent investment in same, and would result in direct losses to federal taxpayers as represented by the ensuing default by Allband of its RUS loans. This result would also be contrary to the purported policy goals of the Commission itself in its FCC Order. Such Commission action would not promote broadband, but would needlessly destroy the promotion of broadband in the areas where Allband has successfully made such services available. Similarly, this destructive result cannot be rationally justified on the basis that Allband has been, or is, inefficient and imprudent in its use of USF revenues or in its cost inaccuracies. No evidence exists that any action of Allband has been unreasonably costly or imprudent, as the July 25 WCB Order confirms. After all, all of its actions have been closely monitored and have been approved by regulatory authorities, including the RUS.

³⁸ Allband respectfully disagrees with the apparent Commission's premise that all future USF revenues can be readjusted and reduced, irrespective of the fact that the USF revenues were approved (and relied upon) as the very security to ensure the payment of the RUS loans that financed the build out of the network in the first instance. There exists an integral link or nexus between the planned USF revenue streams that were committed and approved to support the RUS loans and the other obligations created by the loans.

There also exists no evidence that any other entity is capable of, or even interested in, providing the telephone and broadband services in Allband's service area.

The arbitrary nature of the Commission's Order, particularly as applied to Allband, is highlighted by the manner in which it punishes Allband for pursuing and implementing national policies to promote universal service in rural areas, as intended by Congress in the 1996 Act, and as set forth in federal and state orders and decisions thereafter, upon which Allband relied in constructing its network, in committing to federal loans, and in commencing operations.

The Commission's Order also fails to recognize that, unlike unsubsidized carriers, Allband as a local exchange carrier and Eligible Telecommunications Carrier (ETC) is assigned several public service responsibilities listed in Section 214(e) and elsewhere that are not assigned to non-ETC carriers. This further supports the preservation of existing USF funding for Allband.

D. The mootness doctrine does not apply to Allband's Waiver and Stay Petitions, and to the requested relief in this Application.

Allband also asserts that the July 25, 2012 WCB order denying Allband's February 3, 2012 Waiver Petition and June 27, 2012 Stay Petition, in part upon mootness, is erroneous.³⁹ The July 25, 2012 WCB order requires Allband to soon become subject to the per-line cap and regression limitations, and to be forced to repeat the expensive, time-consuming, and counter-productive process of again filing waiver and stay petitions. This repetitive process fails to recognize that Allband's circumstances are not likely to change in such a short time frame, and serves to require

³⁹ As detailed in earlier sections of this Application, the July 25, 2012 WCB Order providing for only a three (3) year waiver, and denying a waiver of the regression order of its April 25, 2012 Order, does not really address the kind of waiver relief that is appropriate to address Allband's circumstances, and is far too short and fleeting in nature. Quite simply, the availability of a waiver, and particularly such a short-term and uncertain waiver as granted to Allband in WCB's July 25 Order, cannot transform an unlawful rule or order into a lawful one. *Fox v FCC, supra; Home Box Office, Inc. v FCC*, 567 F.2d 7, 50-51 (D.C. Cir., 1977); *Alltel Corp. v FCC*, 838 F.2d 551, 561 (D.C. Cir. 1988).

Allband to engage in wasteful costs that detract from efforts to focus upon providing expanded or enhanced services to the public.

The mootness doctrine also does not apply to situations like this whereby near-term actions or decisions are applied to repetitive situations that only serve to evade review.⁴⁰ The WCB Order fails to recognize that the mootness doctrine has an exception providing for review where the issues involved are of continuing public interest, capable of repetition, yet also capable of evading review.⁴¹ The WCB orders do not make Allband's assertions and requested relief in these dockets moot. At most, the orders simply delay the application of the impact of the Commission's Orders and Rules to Allband for an unrealistically short period of time, and serve in reality to continue to apply the Order and Rules to Allband in a manner that contravenes constitutional and statutory law.

VIII. CONCLUSION

There is no realistic way for Allband to (a) sufficiently reduce expenses, and/or (b) to increase penetration or revenues sufficiently to fall below the \$250 cap. Even if all non-fixed expenses are eliminated and 100 percent penetration is achieved, the goal of reducing support revenues to \$250 or less per-line cannot be achieved for the duration of the RUS loan period. Finally, although Allband is eager to work with RUS to modify loan terms, RUS cannot modify the terms without Congressional approval. It is unlikely that this can be achieved because any RUS loan modification for Allband would increase the cost of the loan.

Allband therefore requests that the Commission extend the length of the waiver from three to fifteen years (through the year 2026 when the RUS loan will be repaid) in order to avoid the

⁴⁰ For example, the July 25, 2012 WCB Order fails to address the compelling and unique, and large unchangeable factual and financial circumstances applicable to Allband, and to the constitutional and statutory provisions barring Commission application of its rules to Allband as asserted by Allband throughout the proceedings in these dockets.

⁴¹ See *Southern Pacific Terminal Co v Interstate Commerce Comm*, 219 U.S. 498; 31 S. Ct. 279; 55 L.Ed. 310 (1911), *Alton & S.r. Co. v International Ass'n of Machinists & Aerospace Workers*, 150 U.S. App. D.C. 36, 43; 463 F.2d 872, 879 (1972).

expense of Allband filing additional waiver petitions and the WCB expense of reviewing these waiver petitions.

Allband also requests that the Commission clarify paragraph 15 of the WCB Order which states that Allband "... may receive the lesser of high-cost universal service support based on its actual costs or the annualized total high-cost support that it received for the period January 1, 2012 through June 30, 2012." The support received for HCLS during 2012 is based on 2010 costs. This precludes recovery of additional fixed or sunk costs for 2011 that were incurred prior to the effective of the FCC's Transformation Order. If there is to be a cap, it should be based on the support Allband would receive based on 2011 costs.

Allband also asserts that the operation of the benchmarking rule as modified by the WCB will significantly reduce and cap Allband's support funding over time. Allband requests that the Commission initiate a waiver of the benchmarking rule (regression model or rule caps on capital and operating expense) that will extend through the term of the RUS loan (through the year 2026).

Finally, Allband also asserts that Commission grant of Allband's requested relief herein comports with constitutional and statutory mandates, and judicial precedent, and would be decidedly in the public interest.

Respectfully submitted,

ALLBAND COMMUNICATIONS COOPERATIVE
By Its Counsel:

Dated: August 24, 2012

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ATTACHMENT 1

Table 1

Description	FEDERAL SUPPORT FUNDING			
	ICLS	HCLS	ICLS +HCLS Support	Monthly Support Per Line
Return on Net Investment	\$157,464	\$394,658	\$552,122	\$282
Depreciaton Expense	\$71,847	\$165,233	\$237,080	\$121
Property Tax	\$15,915	\$39,750	\$55,665	\$28
Total Fixed	\$245,226	\$599,640	\$844,867	\$431
Plant Related Expense	\$18,324	\$81,749	\$100,073	\$51
Network Operations Expense	\$16,434	\$39,905	\$56,339	\$29
Customer Operations Expense	\$670	\$0	\$670	\$1
Corporate Operations Expense	\$90,374	\$215,146	\$305,520	\$156
Other Expenses	\$0	\$1,419	\$1,419	\$1
Total Non-Fixed	\$125,802	\$338,220	\$464,021	\$238
Total Federal Funding	\$371,028	\$937,860	\$1,308,888	\$669

Table 2

DESCRIPTION	FEDERAL SUPPORT FUNDING				
	2012	2015	2020	2025	2026
Return on Net Investment	\$282	\$239	\$162	\$95	\$81
Depreciaton Expense	\$121	\$126	\$112	\$107	\$107
Property Tax	\$28	\$28	\$27	\$27	\$27
Total Fixed	\$431	\$393	\$301	\$229	\$215
Plant Related Expense	\$51	\$50	\$49	\$49	\$49
Network Operations Expense	\$29	\$28	\$28	\$27	\$27
Customer Operations Expense	\$1	\$1	\$1	\$1	\$1
Corporate Operations Expense	\$156	\$152	\$150	\$149	\$148
Other Expenses	\$1	\$1	\$1	\$1	\$1
Total Non-Fixed	\$238	\$232	\$229	\$227	\$226
Total	\$669	\$625	\$530	\$456	\$441
Cap	\$250	\$250	\$250	\$250	\$250
Required Funding Above the Cap	\$419	\$375	\$280	\$206	\$191

Table 3

DESCRIPTION	FEDERAL SUPPORT FUNDING				
	2012	2015	2020	2025	2026
Return on Net Investment	\$282	\$166	\$112	\$65	\$55
Depreciaton Expense	\$121	\$87	\$77	\$73	\$73
Property Tax	\$28	\$19	\$19	\$18	\$19
Total Fixed	\$431	\$272	\$208	\$156	\$147
Plant Related Expense	\$51	\$35	\$34	\$33	\$33
Network Operations Expense	\$29	\$19	\$19	\$19	\$19
Customer Operations Expense	\$1	\$1	\$1	\$1	\$1
Corporate Operations Expense	\$156	\$106	\$104	\$102	\$101
Other Expenses	\$1	\$1	\$1	\$1	\$1
Total Non-Fixed	\$238	\$162	\$159	\$156	\$155
Total	\$669	\$434	\$367	\$312	\$302
Cap	\$250	\$250	\$250	\$250	\$250
Required Funding Above the Cap	\$419	\$184	\$117	\$62	\$52

Table 4

	FEDERAL USF HIGH COST LOOP SUPPORT					
	2012	2013	2014	2015	2020	2025
Annual USF HCL - Before Benchmarking Rule	\$937,860	\$931,535	\$909,593	\$887,650	\$767,967	\$663,958
Annual USF HCL - After Benchmarking Rule	\$937,860	\$931,535	\$840,562	\$744,193	\$439,207	\$309,165
Impact of Regression	\$0	(\$0)	(\$69,031)	(\$143,458)	(\$328,760)	(\$354,793)

AFFIDAVIT OF RONALD K. SIEGEL JR., GENERAL MANAGER
ALLBAND COMMUNICATIONS COOPERATIVE

I, Ronald K. Siegel Jr., being of lawful age and duly sworn, state as follows:

1. My name is Ronald K. Siegel Jr. My business address is 7251 Cemetery Rd., Curran, MI 48728. My title is General Manager of Allband Communications Cooperative ("Allband"), and I have worked for the cooperative in a management capacity since 2004. I am responsible for overseeing the daily operations of Allband, regulatory affairs, project development, community outreach and the general viability of the cooperative. I have conducted extensive research and project management in Allband's rural area since 2002 and have actively pursued ways to correct the communication digital divide that exists between rural and urban areas in Michigan.

2. I submit this Affidavit in support of Allband Communications Cooperative's request for a review of the Wireline Competition Bureau's (WCB's) Order issued on July 25, 2012.

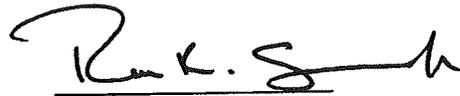
3. Allband respectfully requests that the Commission:
 - a. Extend the Waiver granted by the WCB from three years to fifteen years - through the year 2026 when Allband's Rural Utilities Service (RUS) loan will be repaid.
 - b. Grant a Waiver of the Benchmarking Rule (regression caps imposed on capital and operating expenses) for the same fifteen-year period.

4. I hereby verify that as the General Manager of Allband, I have reviewed the Application for Review and verify the facts asserted and I have supervised the compilation and agree with the content of the application.

STATE OF MICHIGAN)
)
COUNTY OF ALCONA)

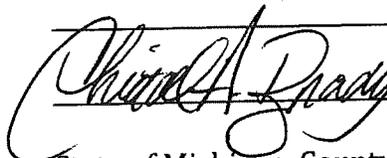
VERIFICATION

I Ronald K. Siegel Jr., being duly sworn upon his oath deposes that the statements contained herein are true and correct to the best of his knowledge, information and belief.



Ronald K. Siegel Jr.
General Manager
Allband Communications Cooperative

Subscribed and sworn to before me
this 23rd day of August, 2012.



Christal A. Brady, Notary Public

State of Michigan, County of: Alpena
My Commission Expires: 2/24/18

**Christal A Brady
NOTARY PUBLIC - STATE OF MICHIGAN
COUNTY OF ALPENA
My Commission Expires February 24, 2018**

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

In the Matter of)	
)	
Allband Communications Cooperative)	WC Docket No. 10-90
Petition for Waiver of Certain High-Cost)	
Universal Service Rules)	

ORDER

Adopted: July 25, 2012

Released: July 25, 2012

By the Acting Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this order, we grant in part and dismiss as moot in part a petition filed by Allband Communications Cooperative (Allband or Company) for a waiver of section 54.302 of the Commission's rules, which established a \$250 per line per month cap on high-cost universal service support ("\$250 cap"), and section 36.621(a)(5) of the Commission's rules, which limits reimbursement of capital and operating costs from high-cost loop support (HCLS).¹ For the reasons discussed below, we grant Allband a waiver of section 54.302 for three years to provide it additional time to take cost-cutting and revenue-enhancing actions in order to improve its financial position and lessen its dependence on high-cost universal service support.

II. BACKGROUND

2. In the *USF/ICC Transformation Order*, the Commission comprehensively reformed universal service funding for high-cost, rural areas, adopting fiscally responsible, accountable, incentive-based policies to preserve and advance voice and broadband service while ensuring fairness for consumers who pay into the universal service fund.² Among other things, the Commission imposed a presumptive per line cap of \$250 per month on total high-cost universal service support for all eligible telecommunications carriers and found that support in excess of the \$250 cap should not be provided without further justification.³ Consistent with the Commission's goal to provide reasonable transitions so companies affected by reform have time to adapt to changing circumstances,⁴ the Commission phased in the \$250 cap over three years.⁵ From July 1, 2012 through June 30, 2013, carriers will receive no more than \$250 per line per month plus two-thirds of the difference between their uncapped per-line amount and \$250. From July 1, 2013 through June 30, 2014, carriers will receive no more than \$250 per line per

¹ Allband Communications Cooperative Petition for Waiver of Part 54.302 and the Framework to Limit Reimbursable Capital and Operating Costs, WC Docket No. 10-90, WT Docket No. 10-208 (filed Feb. 3, 2012) (Petition); see also *Connect America Fund* et al., WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011) (*USF/ICC Transformation Order*); *pets. for review pending sub nom. In re: FCC 11-161*, No. 11-9900 (10th Cir. filed Dec. 8, 2011); 47 C.F.R. §§ 54.302, 36.621(a)(5).

² *USF/ICC Transformation Order*, 26 FCC Rcd at 17670, para. 11.

³ *Id.* at 17765, para. 274.

⁴ *Id.* at 17671, para. 11.

⁵ *Id.* at 17765, para. 275.

month plus one-third of the difference between their uncapped per-line amount and \$250. Beginning July 1, 2014, carriers shall receive no more than \$250 per line per month.

3. The Commission also adopted section 36.621(a)(5), the HCLS benchmarking rule, which is intended to moderate the expenses of those rate-of-return carriers with very high costs compared to their similarly situated peers, while further encouraging other rate-of-return carriers to advance broadband deployment.⁶ While the Commission set forth a framework for establishing benchmarks, the Commission delegated to the Wireline Competition Bureau (Bureau) the authority to adopt and implement a methodology within the established parameters.⁷ On April 25, 2012, the Bureau adopted the specific methodology for establishing the benchmarks within HCLS.⁸

4. The Commission also instituted a waiver process to allow “any carrier negatively affected by the universal service reforms ... to file a petition for waiver that clearly demonstrates that good cause exists for exempting the carrier from some or all of those reforms, and that waiver is necessary and in the public interest to ensure that consumers in the area continue to receive voice service.”⁹ The Commission stated that it did not “expect to grant waiver requests routinely,” and cautioned petitioners that any requests would be subject to a “rigorous, thorough, and searching review comparable to a total company earnings review.”¹⁰ The Commission also noted that it did not anticipate granting waivers of the \$250 cap for an undefined duration, but would expect carriers to periodically re-validate any need for support above the \$250 cap.¹¹ According to the Commission, even if a carrier demonstrates the need for funding above the \$250 cap, that carrier is only entitled to the amount above the \$250 cap that it can show is necessary, not the amount it was previously receiving.¹² The Commission provided guidance on the types of information that would be relevant for such waiver requests and delegated authority to the Bureau and the Wireless Telecommunications Bureau to rule on all such requests.¹³

III. ALLBAND’S PETITION

5. On February 3, 2012, Allband filed a petition for waiver.¹⁴ Allband requests waiver of sections 54.302 and 36.621(a)(5) of the Commission’s rules. Allband asserts that absent the requested waivers, it will be unable to: 1) provide voice service to any of its customers; 2) pay the principal and interest on its Rural Utilities Service loan; and 3) continue operations as a telecommunications carrier.¹⁵

6. Allband was formed in 2003 as a non-profit member cooperative to serve an unserved, remote area in the lower peninsula of Michigan. In 2005, the Commission recognized Allband as an incumbent local exchange carrier (LEC) and allowed it to become a member of the National Exchange Carrier Association (NECA) and to participate in NECA intercarrier compensation tariffs and pools and

⁶ *Id.* at 17741-47, paras. 210-26.

⁷ *Id.* at 17744, para. 217.

⁸ See generally *Connect America Fund; High-Cost Universal Service Support*, WC Docket Nos. 10-90, 05-337, Order, DA 12-646 (Wireline Comp. Bur. rel. Apr. 25, 2012) (*HCLS Benchmarks Order*).

⁹ *USF/ICC Transformation Order*, 26 FCC Rcd at 17839-40, paras. 539, 540.

¹⁰ *Id.* at 17840, para. 540.

¹¹ *Id.* at 17766, para. 278.

¹² *Id.*

¹³ *Id.* at 17840-42, paras. 542, 544.

¹⁴ Allband Communications Cooperative Petition for Waiver of Part 54.302 and the Framework to Limit Reimbursable Capital and Operating Costs, WC Docket No. 10-90, WT Docket No. 10-208 (filed Feb. 3, 2012) (Petition).

¹⁵ Petition at 1.

to receive federal USF support.¹⁶ The Rural Utilities Service (RUS), an agency of the U.S. Department of Agriculture, provided loans to Allband totaling approximately \$8 million to construct telecommunications facilities.¹⁷

7. Allband states that it currently serves 163 lines and has a customer density of 1.09 lines per square mile.¹⁸ Prior to the issuance of the *USF/ICC Transformation Order*, Allband received \$714 per line per month.¹⁹ According to Allband, federal universal service fund (USF) revenues from the high-cost program constitute 84 percent of Allband's total regulated and unregulated revenues and that at full transition the \$250 cap would reduce Allband's regulated revenues by 55 percent.²⁰ Allband notes that the RUS loan covenant requires that it at least have sufficient revenues to pay the interest on the RUS loans.²¹ Allband contends that it will be unable to make a full annual RUS loan payment, even in the first year of the phase-in of the \$250 cap.²² Allband states that, at best, it will only be able to pay the interest on the loan.²³

8. Allband contends that this revenue loss cannot be made up through rate increases to local customers. According to Allband, its basic local exchange service rate currently is \$19.90 per month,²⁴ and if local customer rates were to increase to compensate for the lost federal USF revenues resulting from the \$250 cap, the total monthly rate would have to increase to \$174.90 in the first year of the phase-in, to \$329.90 in the second year of the phase-in period, and to \$484.90 by the end of the phase-in period.²⁵ Allband also contends that it cannot recover the lost revenues from either its switched intercarrier compensation rates or the Michigan universal service fund.²⁶ Allband notes that federal USF revenues provide \$1,396,728 annually, while non-regulated revenue sources only provide \$76,215 annually.²⁷ In its petition, Allband also estimated that it would lose \$398,435 annually in federal USF support as a result of the HCLS benchmarking rule, based on the methodology set forth in the *Further Notice of Proposed Rulemaking*.

9. The Bureau sought comment on Allband's Petition on February 13, 2012.²⁸ The National Telecommunications Cooperative Association (NTCA) and the National Cable & Telecommunications Association (NCTA) filed comments. NTCA supports Allband's petition, contending that Allband has demonstrated that absent a waiver, it is not financially viable and rural customers would lose service or

¹⁶ *Id.* at 2-3 (citing *In the Matter of Allband Communications Cooperative for Waiver of Sections 69.2(hh) and 69.601 of the Commission's Rules*, 20 FCC Red 13566 (2005)).

¹⁷ *Id.* at 3.

¹⁸ *Id.* at 2, fn. 4.

¹⁹ *Id.* at 6.

²⁰ *Id.* at 6.

²¹ *Id.* at 7.

²² *Id.*

²³ The full annual loan payment is \$638,147, of which \$324,576 is interest. *Id.*

²⁴ *Id.* at 8 (citing *USF/ICC Transformation Order* at ¶ 234 to ¶ 247). Allband's high-speed internet service rate is \$34.99 per month. Petition at Appendix 2, p. 7.

²⁵ *Id.* at 8.

²⁶ *Id.* at 7.

²⁷ *Id.* at 10.

²⁸ See *Wireline Competition Bureau Seeks Comment on Allband Communications Cooperative Petition for Waiver of Certain High-Cost Universal Service Rules*, Public Notice, DA 12-204 (Feb. 13, 2012) (seeking comments by March 14, 2012 and reply comments by March 29, 2012).

incur massive increases in end-user charges.²⁹ NTCA also argues that there is good cause to waive the Commission's rules, noting that 1) Allband's network is new and largely undepreciated; 2) Allband has minimal staff, which perform multiple functions and are paid reasonable wages; and 3) Allband's board members volunteer their time and receive no compensation.³⁰ NCTA, in its filing, states that it does not have a position on Allband's request, but wishes to address issues regarding the waiver process itself.³¹ On March 29, 2012, Allband filed reply comments.³² On June 25, 2012, Allband filed supplemental information in support of its petition.³³ Allband's filing provided more detail regarding various transactions which were discussed in its initial filing. On June 27, 2012, Allband filed a request for immediate, permanent stay of section 54.302 in which it reiterated all of its arguments in its petition seeking waiver and set forth its arguments of why a stay would be warranted.³⁴ On July 24, 2012, Allband filed supplemental information in support of its petition.³⁵

IV. DISCUSSION

10. We conclude that Allband has demonstrated that there is good cause to grant a waiver of section 54.302 of the Commission's rules for three years.³⁶ Based upon a thorough review of the information provided by Allband, including its financial statements, we conclude that a limited waiver is necessary and in the public interest to ensure that consumers in the area continue to receive voice service in areas where there is no terrestrial alternative.³⁷

11. We find that special circumstances support Allband's waiver request. Unlike many other incumbent telephone companies, Allband is a relatively new company, and therefore has significant start-

²⁹ NTCA Comments, WC Docket No. 10-90, WT Docket No. 10-208, at 2 (filed Mar. 14, 2012).

³⁰ *Id.* at 3-4.

³¹ NCTA Comments, WC Docket No. 10-90, WT Docket No. 10-208, at 3 (filed Mar. 14, 2012). NCTA contends that the Commission should make it clear that the overall \$4.5 billion budget, and the automatic steps that are triggered if demand for support exceeds the budget, will continue even if waivers are granted. *Id.* at 3-4. NCTA also argues that the Commission should not assume that increasing high-cost support levels is the only way to address a carrier's concerns regarding the application of the cap.³¹ NCTA states that the Commission should consider whether there are any cost savings or efficiency gains that might be possible. *Id.* at 4. NCTA also claims that the Commission and RUS should work together to address troubled loans. *Id.* at 5. Finally, NCTA argues that the waiver process should be completely transparent. *Id.* at 5-7.

³² Allband Reply Comments, WC Docket No. 10-90, WT Docket No. 10-208 (filed March 29, 2012) (Reply Comments).

³³ Letter from Tom Karalis, Fred Williamson & Associates, Inc., to Marlene Dortch, FCC, WC Docket No. 10-90 et al. (filed June 25, 2012) (Allband Supplemental Filing).

³⁴ Allband Petition for Stay, WC Docket No. 10-90, WT Docket No. 10-208 (filed June 27, 2012) (Stay Petition).

³⁵ Letter from Tom Karalis, Fred Williamson & Associates, Inc., to Marlene Dortch, FCC, WC Docket No. 10-90 et al. (filed June 25, 2012) (Allband Second Supplemental Filing).

³⁶ Generally, the Commission's rules may be waived if good cause is shown. 47 C.F.R. § 1.3. The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest. *Northeast 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. In this context, the Commission has made clear that it envisions granting waivers "only in those circumstances in which the petitioner can demonstrate that the reduction in existing high-cost support would put consumers at risk of losing voice services, with no alternative terrestrial providers available to provide voice telephony service using the same or other technologies that provide the functionalities required for supported voice service." *USF/ICC Transformation Order*, 26 FCC Rcd at 17840, para. 540.

³⁷ *USF/ICC Transformation Order*, 26 FCC Rcd at 17839-40, para. 540.

up costs and undepreciated plant. Allband serves a remote, heavily forested and unserved area in the lower peninsula of Michigan, including portions of four counties that previously had no service.³⁸ Allband's service territory is difficult to serve and has very few customers.³⁹ Allband was formed as a nonprofit in 2003 because no other service provider was willing to provide service to the area.⁴⁰

12. We also find that the public interest would be served by granting a waiver for a limited period of time. Specifically, we find that the record supports Allband's claims that consumers in the area will not be able to continue to receive voice service, absent a waiver in the near-term. In reviewing Allband's financial statements, it appears that the management of Allband is mindful of its expenses and limited financial resources given the size of its business. For example, in our view, the salaries and wages of Allband's seven employees are modest.⁴¹ Similarly, while certain other expenses, such as legal, accounting, and insurance are ongoing and an unavoidable cost of doing business, Allband's level of expenses, on a total dollar basis, are reasonable given the size and age of Allband's operation.⁴² Accordingly, we find that Allband is not in a position to immediately reduce its expenses in these areas. Similarly, given the low population density in Allband's service territory, Allband also will not be in a position to increase its revenues from consumers in the short-term.

13. Nevertheless, consistent with the Commission's direction,⁴³ we do not find it to be in the public interest to grant Allband an unlimited waiver of the monthly per-line limits adopted by the Commission, either in terms of the amount of support provided, or the duration of additional support. While a waiver is appropriate for a discrete period of years given the size and age of Allband's operation, it would be appropriate to reassess its financial condition to determine whether a waiver remains necessary in the future. We would be concerned if Allband's support continues to be significantly greater than the Commission's per-line limit as Allband's operation matures.

14. Therefore, we grant Allband a limited waiver of section 54.302 of the Commission's rules for a period of three years to give Allband a sufficient but not undue amount of time to make a good faith effort to come into compliance with the \$250 cap. During this time, we expect Allband to actively pursue any and all cost cutting and revenue generating measures in order to reduce its dependency on federal high-cost USF support. Specifically, we anticipate that Allband, during this three-year waiver period, will continue efforts to expand its subscriber base to the extent possible⁴⁴ and lower its support needs on a per-line basis, while at the same time taking all necessary steps to reduce its total costs as the company matures. We further note that Allband has expressed its willingness, if necessary, to work with RUS to rework its loan terms.⁴⁵ We envision that this is just one of the steps Allband may take to improve its financial position. Moreover, even if Allband cannot meet the cap in the next three years, a possibility we discuss further below,⁴⁶ the financial information garnered during that time period will enable both Allband and the Bureau to determine what further steps are necessary to reach that goal. The

³⁸ Petition at 2-3.

³⁹ According to Allband, the Company currently serves 163 lines and has a customer density of 1.09 lines per square mile. *Id.* at 2, n. 4.

⁴⁰ *See Id.* at 6.

⁴¹ *See Id.* at Appendix 2, page 5.

⁴² *Id.* at 6. We also note that no party disputed the factual evidence presented by Allband or objected to its request for a waiver.

⁴³ *USF/ICC Transformation Order*, 26 FCC Rcd at 17766, para. 278.

⁴⁴ According to Allband, the Company currently has a telephone penetration rate of 69 percent and an internet penetration rate of 36 percent. *See*, Allband Second Supplemental Filing.

⁴⁵ Petition at 5-6.

⁴⁶ *See infra* para. 16.

three-year waiver also will coincide with the three-year phase-in of the \$250 cap for other carriers. Thus, at the end of the waiver period, the Bureau will not only have available for its consideration Allband's financial information, but the financial information from other carriers who are subject to the \$250 cap and will be able to use this data for comparison purposes.

15. We also implement the limited waiver in a manner designed to ensure that Allband does not receive more high-cost support than necessary. Specifically, effective July 1, 2012 and until June 30, 2015, we grant Allband a waiver of section 54.302 so that it may receive the lesser of high-cost universal service support based on its actual costs or the annualized total high-cost support that it received for the period January 1, 2012 through June 30, 2012.⁴⁷ That is, as Allband takes steps to reduce its costs and increase penetration, as described above, we expect that it will receive less support.

16. At the end of the waiver period, both Allband and the Bureau will be in a better position to determine if Allband will need further relief. If, after taking all reasonable steps to improve its financial position, Allband determines that it still needs additional support above the \$250 cap after June 30, 2015, Allband should file with the Bureau the financial and operational information necessary for the Bureau to determine what further relief is appropriate based on the specific circumstances present at that time. This could include a further waiver or the initiation of a phase-in period (e.g., phasing down to the \$250 cap over an additional three years). This filing, if necessary, shall be made no later than six months prior to the expiration of the three-year waiver period. In that event, Allband should provide its 2012 and 2013 financial statements, documentation of steps taken to improve its financial position, and any other information it deems necessary for the Bureau to evaluate the need for renewal of the waiver in whole or in part. We also would expect Allband to provide its 2014 financial statements as soon as they become available, prior to the expiration of the current waiver. As with any company considering filing a petition for waiver of these rules, Allband is encouraged to communicate with the Bureau in advance of any future filing to ensure that only necessary information is provided to the Bureau in order to accelerate review of the petition.

17. Finally, with regard to Allband's request that the Commission waive the benchmarking rule to limit HCLS for capital and operating costs, we conclude that this request is moot. We note that under the specific methodology ultimately adopted by the Bureau, which occurred after Allband filed its petition, Allband is not capped.⁴⁸ Therefore, the Bureau dismisses Allband's request for a waiver of the benchmarking rule as moot.

18. With regard to Allband's request for a stay of section 54.302, we find that in light of our decision to grant the limited waiver of section 54.302, Allband cannot demonstrate that it will suffer irreparable harm in the near future.⁴⁹ Therefore, the Bureau denies Allband's request for a stay of section 54.302.

⁴⁷ This restriction on Allband's funding level is in keeping with the Commission's directive that a carrier is only entitled to the amount above the cap they can show is necessary, not the amount they were previously receiving. *USF/ICC Transformation Order*, 26 FCC Rcd at 17766, para. 278.

⁴⁸ See *Connect America Fund; High-Cost Universal Service Support*; WC Docket Nos. 10-90, 05-337, Order, DA 12-646 (Wireline Comp. Bur. rel. Apr. 25, 2012) at Appendix B, p. 47.

⁴⁹ A showing of irreparable injury is a critical element in justifying a request for stay of an agency order. See *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) ("Our frequently reiterated standard requires plaintiffs seeking an injunction to demonstrate that irreparable injury is *likely* in the absence of an injunction."); see also *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (denying requests for stay after considering only irreparable harm). Allband also has not persuaded us that the other stay criteria are met here, either.

V. ORDERING CLAUSES

19. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 5(c), 201, and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 155(c), 201, 254, and sections 0.91, 0.291, and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 1.3, that this order IS ADOPTED.

20. IT IS FURTHER ORDERED that the petition for waiver of section 54.302 of the Commission's rules, 47 C.F.R. § 54.302, and the benchmarking rule to limit reimbursements for capital and operating costs, filed by Allband Communications Cooperative, IS GRANTED IN PART, DENIED IN PART, AND DISMISSED AS MOOT IN PART as described herein.

21. IT IS FURTHER ORDERED that the petition for stay, filed by Allband Communications Cooperative, IS DENIED as described herein.

22. IT IS FURTHER ORDERED that, pursuant to section 1.102(b)(1) of the Commission's rules, 47 C.F.R. § 1.102(b)(1), this order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Julie A. Veach
Acting Chief
Wireline Competition Bureau