

**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

TO: The Commission

**PETITION FOR STAY OF  
NATIONAL EXCHANGE CARRIER ASSOCIATION, INC.  
NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION  
ORGANIZATION FOR THE PROMOTION AND ADVANCEMENT OF SMALL  
TELECOMMUNICATIONS COMPANIES, and  
WESTERN TELECOMMUNICATIONS ALLIANCE**

May 25, 2012

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**Attachments:**

**Declaration A:** Declaration of Mark Gailey, President & General Manager, Totah Communications, Inc.

**Declaration B:** Declaration of Glenn Lovelace, Chief Executive Officer, Peñasco Valley Telephone Cooperative, Inc. (PVT)

**Declaration C:** Declaration of Godfrey Enjady, Mescalero Apache Telecom, Inc. (MATI)

## EXECUTIVE SUMMARY

The Commission should stay implementation of the benchmarking methodology and initial benchmarks (or caps) adopted by the Wireline Competition Bureau in its April 25, 2012 *Order* until such time as the Commission acts upon the separate *Rural Associations' Application for Review* filed on this date. At a minimum, the Commission should stay implementation of the benchmarking methodology and initial benchmarks until the Bureau corrects acknowledged study area boundary data inaccuracies and other methodological errors and structural flaws that produce invalid, unreasonable, unpredictable, and unlawful CapEx and/or OpEx caps. As demonstrated herein, the Rural Associations' petition for stay satisfies the four-prong test set forth in *Virginia Petroleum Jobbers Association v. FPC*, and should be immediately granted.

The Rural Associations are likely to prevail on the merits of their simultaneously filed *Application for Review* before this Commission. First, the Bureau's benchmarking methodology and the resulting caps violate section 254 by rendering high cost loop support (HCLS) unpredictable and insufficient. The Bureau's benchmarking methodology does not provide RLECs adequate information regarding the capital expenditures and/or operating expenses responsible for them exceeding a particular cap for 2012. More importantly, the methodology and caps fail to provide RLECs with any reasonable ability to predict the extent to which capital expenditures and/or operating expenses may need to be reduced or maintained, going forward, to avoid exceeding particular caps in future years. Additionally, the methodology provides insufficient support by limiting support on the basis of an arbitrary 90th percentile limit without considering whether a particular RLEC's expenditures were prudent based on existing

circumstances. Rather than identifying alleged “outliers” and examining whether their operating conditions warrant the level of support received, the mechanical and undiscerning caps ensure that significant numbers of RLECs will receive insufficient support contrary to the statutory mandate for universal service.

Second, the Bureau has conceded that study area boundary data within the model are inaccurate, and it would therefore be arbitrary and capricious to use the caps to reduce the HCLS of various RLECs. As the Commission knows, reviewing courts do not owe judicial deference to agency determinations based upon data that the agency indicates are incorrect. The benchmarking methodology also contains a number of modeling errors that should cause the Commission to set it aside.

As also shown herein, the sheer volatility and unpredictability of the regression analysis-based caps will cause irreparable harm to RLECs. When critical cost recovery revenues can change radically and unpredictably from year-to-year, RLECs cannot plan for investments in infrastructure with long useful lives. Investors or lenders will almost certainly be less interested in putting scarce capital at risk in a capital-intensive space where there is little, if any, predictability as to the revenues that can be anticipated over the lives of long-term network loans. The loss of investor and lender relationships and goodwill cannot be measured in monetary terms or alleviated by increases in universal service support during future years. The harm to consumers who may experience a decline in service quality and/or higher rates, and the loss of consumer good will for RLECs, also cannot be undone in future years.

The Rural Associations further demonstrate that interested parties will not be injured by the grant of the requested stay. Moreover, the public interest favors the grant

of the requested stay. Given that most of the broadband deployed to date by RLECs is not capable of delivering the Commission's targeted 4/1 Mbps broadband speed, these technically and legally flawed caps run the substantial risk of "locking in" lower-speed broadband for much of rural America for years, if not decades, to come.

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WESTERN TELECOMMUNICATIONS ALLIANCE**

Pursuant to section 1.43 of the Commission’s Rules, 47 C.F.R. § 1.43, the Rural Associations listed above, representing rural rate-of-return regulated incumbent local exchange carriers (RLECs), respectfully request the Commission stay implementation of the benchmarking methodology and initial benchmarks (or caps) adopted by the Wireline Competition Bureau (Bureau) in its *Order* issued April 25, 2012 in the captioned proceeding<sup>1</sup> until such time as the Commission acts upon the separate *Rural Associations’ Application for Review* filed this date.<sup>2</sup> At a minimum, the Rural Associations request the Commission stay implementation of the benchmarking methodology and resulting caps until such time as the acknowledged study area boundary data inaccuracies and other methodological errors and structural flaws that produce

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<sup>1</sup> Connect America Fund, WC Docket No. 10-90, High-Cost Universal Service Support, WC Docket No. 05-337, Order, DA 12-646 (rel. Apr. 25, 2012) (*Order*).

<sup>2</sup> Application for Review of National Exchange Carrier Association, Inc., National Telecommunications Cooperative Association, Organization for the Promotion and Advancement of Small Telecommunications Companies, and Western Telecommunications Alliance, WC Docket Nos. 10-90 and 05-337, filed May 25, 2012 (*Rural Associations’ Application for Review*).

patently invalid, unreasonable, unpredictable, and unlawful CapEx and/or OpEx caps are remedied.

### **I. Applicable Stay Standard**

The Commission follows the four-prong test for stays set forth in *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958), as modified in *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). Hence, the Rural Associations will show that: (1) they are likely to prevail on the merits; (2) their members will suffer irreparable harm absent a stay; (3) interested parties will not be harmed if the requested stay is granted; and (4) the public interest favors grant of the stay.

### **II. The Rural Associations Are Likely to Prevail on Merits**

Although the Bureau took steps to address some of the technical concerns raised by the Rural Associations and other commenters (including the Commission's own peer reviewers) with respect to the caps, the Bureau's benchmarking methodology and the resulting caps remain both unlawful and defective for the many reasons set forth in the *Rural Associations' Application for Review*. For example, the caps are calculated on the basis of study area boundary data that are admittedly incorrect,<sup>3</sup> they impose seemingly random cost recovery limits that have little, if any, tether to cost per customer,<sup>4</sup> they incorporate new independent variables that introduce new errors into support

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<sup>3</sup> *Order*, ¶¶27-28.

<sup>4</sup> *Rural Associations' Application for Review*, pp. 4-6.

calculations,<sup>5</sup> and they fail to comport with the statutory call for predictability and sufficiency in universal service support.<sup>6</sup>

For these reasons and as further explained herein, the Rural Associations are likely to prevail on the merits of their simultaneously filed *Rural Associations' Application for Review* before this Commission, or, if necessary, on the merits of judicial appeal.

**A. The Bureau's Benchmarking Methodology and the Resulting Caps Violate Law by Rendering High Cost Loop Support Unpredictable and Insufficient**

Section 254 of the Act requires federal universal service support mechanisms to be specific, predictable and sufficient.<sup>7</sup> In stark violation of these statutory mandates, the Bureau's benchmarking methodology and the resulting caps render future High Cost Loop Support (HCLS) unpredictable and, for many carriers, insufficient.

The record shows the actual initial effects of the rule, released only two months before taking effect, to be substantially at odds with the proposed rule released by the Commission only last November. The record also shows that RLECs will find it difficult, if not impossible, to predict with any reasonable accuracy the effects of annual updates of the caps.<sup>8</sup>

Predictability requires the methodology governing universal service support disbursements to be plainly stated and made available to RLECs and other eligible

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<sup>5</sup> *Id.*, pp. 10-13.

<sup>6</sup> *Id.*, pp. 15-20.

<sup>7</sup> *See*, for example, 47 U.S.C. §§ 254(b)(5) and 254(e).

<sup>8</sup> *Rural Associations' Application for Review*, pp. 16-17.



telecommunications carriers (ETCs).<sup>9</sup> However, the Bureau's model and caps are moving and indecipherable targets that fail to provide carriers sufficient guidance as to the extent capital expenditures and/or operating expenses may need to be reduced or maintained in any given year to avoid exceeding particular unpredictable caps in future years. Moreover, whereas the *Order* claims to set benchmarks for "similarly situated" RLECs,<sup>10</sup> careful review indicates that there are in fact no such comparator groups. Instead, each RLEC is impacted by overall trend lines based upon independent variable data for all other RLECs included in the model. Hence, rather than being able to monitor and benchmark investment and operating behavior against an identifiable set of similarly situated RLECs, individual HCLS recipients have the impossible task of trying to "predict" how their model-specified caps may shift based upon the acts or omissions of the universe of RLECs included in the model.<sup>11</sup>

Already, many RLECs have been both puzzled and shocked by the nature and magnitude of the changes between the preliminary model presented in the *USF/ICC Transformation Order*<sup>12</sup> and the final caps adopted in the *Order*. Some RLECs that were not limited by the preliminary formulas are now limited by the current caps. Other

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<sup>9</sup> *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 622 (5<sup>th</sup> Cir. 2000).

<sup>10</sup> *Order*, ¶10.

<sup>11</sup> The Commission expressly directed the Bureau to develop a methodology that compared companies' costs to "similarly situated companies" and to use statistical techniques to determine which companies would be deemed "similarly situated." *USF/ICC Transformation Order* at ¶217. As explained in the *Rural Associations' Application for Review*, the formulas do not comply with this directive. *Rural Associations' Application for Review*, pp. 13-14.

<sup>12</sup> Connect America Fund *et al.*, Report and Order and Further Notice of Proposed Rulemaking, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92 and 96-45, GN Docket No. 09-51 and WT Docket No. 10-208, FCC 11-161, released November 18, 2011 (*USF/ICC Transformation Order*).

RLECs that were indicated to receive reduced support from the preliminary formulas were surprised to find that they are scheduled to receive much larger reductions in HCLS under the current formulas.<sup>13</sup> All companies are subject to further unknown and unpredictable changes as further methodology changes are introduced by the Bureau.

In all cases, both immediate “winners” and “losers” under the caps stand perplexed as to what happens next. Specifically, and as the declarations attached hereto confirm,<sup>14</sup> they cannot discern with any reasonable likelihood whether any action they take this year to be allegedly “more efficient” or “more prudent,” taken together with the imperceptible acts or omissions of other unidentified and unidentifiable RLECs, will result in a gain or loss of support two years later and beyond under annually shifting caps. The *Order* does not provide sufficient information to make the composition and workings of the benchmarking methodology transparent, such that affected RLECs continue to have little or no understanding of the reasons for these changes. This unpredictable volatility in rural carriers’ benchmark levels and resulting HCLS will be exacerbated significantly during the next two years as inaccurate study area boundary data is corrected, and during future years as annual HCLS data submissions are entered into the formulas and the equations and independent variables are corrected, modified or otherwise further adjusted. In sum, the lack of clear and plainly stated “business rules” for RLECs introduces substantial risk and harm to the entire industry and, more importantly, for rural consumers.

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<sup>13</sup> *Rural Associations’ Application for Review*, pp. 14-15.

<sup>14</sup> *See*, Declaration A (Declaration of Mark Gailey, Totah Communications), B (Declaration of Glenn Lovelace, Peñasco Valley Telephone Cooperative), and C (Declaration of Godfrey Enjady, Mescalero Apache Telecom) hereto.

In addition to its crippling and unlawful unpredictability, the benchmarking methodology provides insufficient support for many RLECs by limiting support mechanically on the basis of an arbitrary 90<sup>th</sup> percentile limit. This is done without consideration of whether the particular RLEC's capital expenditures and operating expenses were reasonable and prudent based upon the actual circumstances under which it must serve its customers. For example, from the experience of East Ascension Telephone Company, it appears that the model is biased (either intentionally or inadvertently) to reduce HCLS to RLECs with larger numbers of customers by setting benchmarks on the basis of total cost data rather than per-loop cost data.<sup>15</sup> Moreover, some RLECs will have reductions in supportable expenses of up to \$534 per customer during the second half of 2012, even with the Bureau's 25 percent transition adjustment and "10 percent of study area HCLS" backstop.<sup>16</sup> These limitations double for 2013, and double again for 2014.<sup>17</sup> Thus, rather than identifying alleged "outliers" and examining whether their operating conditions warrant the level of support received (or some other level), the mechanical and undiscerning nature of the caps ensure that some RLECs will receive insufficient support contrary to the statutory mandate for universal service.

**B. The Bureau's Benchmarking Methodology and the Resulting Caps Are Riddled With Material Data and Variable Errors**

The Bureau has admitted that the Tele Atlas wire center data employed to establish RLEC study area boundaries for its benchmarking methodology are riddled with

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<sup>15</sup> *Rural Associations' Application for Review*, p. 5.

<sup>16</sup> *Id.*, p. 15.

<sup>17</sup> *Id.*

inaccuracies.<sup>18</sup> As indicated by actual RLEC study area boundary data provided to the Commission prior to the *Order* by the National Exchange Carrier Association for 357 RLEC study areas, the Tele Atlas data was more than 20 percent inaccurate for 80 study areas, and was 99 percent accurate for only 33 study areas. These study area boundary data errors are particularly material and critical, for they affect the determination of the values for eight of the 18 independent variables in the Bureau’s model (including those for road miles, road crossings, density, portions of households in urban clusters or urbanized areas, soil difficulty index, bedrock, Tribal lands, and national park land).

It would be fundamentally arbitrary and capricious to use the caps to reduce HCLS for various RLECs when the Bureau itself has conceded that study area boundary data within the formulas – and thus the independent variable values, model coefficients and the caps themselves – are inaccurate. Reviewing courts do not owe judicial deference to agency determinations that are based upon data that the agency indicates are incorrect.<sup>19</sup> Rather, courts have found that “[t]he law does not require, nor would it make sense to require, reliance upon [inaccurate] data which might lead to an erroneous result.”<sup>20</sup> For this reason alone, implementation of the benchmarking methodology and the resulting caps should be stayed at least until the Bureau collects and incorporates accurate data for all RLEC study area boundaries, and then re-calculates and uses the appropriate and accurate independent variable data for the actual study areas.

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<sup>18</sup> *Order*, ¶27.

<sup>19</sup> *Borlem, S.A.—Empreedimentos Industrialis and FNV v. United States of America*, 913 F.2d 933 (Fed. Cir. 1990).

<sup>20</sup> *Id.* See also, *Motor Vehicle Manufacturers Assn. v. State Farm Mutual Insurance Co.*, 463 U.S. 29, 43 (1983) (“an agency rule would be arbitrary and capricious if the agency . . . offered an explanation for its decision that runs counter to the evidence before the agency”).

The Bureau's offer to address these massive flaws by permitting RLECs facing dramatic support reductions to submit waiver petitions, even on a "streamlined" basis, is inadequate, unreasonable and unlawful – particularly given that such support reductions are caused at least in part by errors in the Commission's own data.<sup>21</sup> Courts have made abundantly clear that the Commission cannot save an invalid rule by "tacking on" a waiver process.<sup>22</sup> Moreover, even if a limited number of study area boundaries are corrected by self-selecting efforts to seek a "waiver," this will not "fix" inaccurate study area boundaries and incorrect independent variable data throughout the rest of the formulas. Given that the study area boundaries and independent variable data for *all* of the RLEC study areas included in the formulas affect the calculated coefficients and benchmarks, the formulas and the resulting caps must be corrected in their entirety (rather than piecemeal) before being implemented.

In addition to inaccurate study area boundary data, the benchmarking methodology contains a number of technical modeling errors. For example, the formulas use total cost as an independent variable rather than cost per loop, a defect which complicates and distorts the ability of the formulas to compare RLEC costs on a more appropriate and equitable per-loop basis.<sup>23</sup> Likewise, the formula's "age of plant"

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<sup>21</sup> The transitional "phase-in" of the caps is of little solace as well to affected companies. Just because a rule is made slightly less egregious by dulling its impact for a temporary period of time does not render it defensible.

<sup>22</sup> *ALLTEL Corp. v. FCC*, 838 F.2d 551, 561-62 (D.C. Cir. 1988). ("The FCC cannot save an irrational rule by tacking on a waiver procedure. 'The very essence of waiver is the assumed validity of the general rule...' [I]f the Commission's argument were accepted, no rule, no matter how irrational, could be struck down, provided only that a waiver provision was attached. A rule with no rational basis . . . cannot be saved in this fashion." *Id.*, citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1158 (D.C.Cir.1969.)

<sup>23</sup> *Rural Associations' Application for Review*, p. 11.

independent variable measures the age of total Telephone Plant in Service rather than the loop portion of plant, thereby introducing distortions and inaccuracies due to the presence of switching, transport, and special access facilities within formulas that are supposed to estimate only reasonable loop investments and associated operating expenses.<sup>24</sup> Finally, the formulas contain coefficients with counter-intuitive signs (“Percent Urban” in both formulas and “Percent Undepreciated Plant” in the OpEx formula) and coefficients that are not statistically significant (“Soils Difficulty” in the CapEx formula) in its equations, thereby increasing the likelihood of further errors in its benchmarks.<sup>25</sup>

### **III. Irreparable Harm Absent a Stay**

Generally, "irreparable injury is suffered when monetary damages are difficult to ascertain or are inadequate." *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 551-552 (4th Cir. Va. 1994), citing *Danielson v. Local 275*, 479 F.2d 1033, 1037 (2d Cir. 1973). What makes certain types of harm “irreparable” is that “monetary damages are difficult to calculate with much certainty.” *Guidance Endodontics, LLC v. Dentsply Int'l, Inc.*, 633 F. Supp. 2d 1257, 1278 (D.N.M. 2008). For example, economic loss coupled with the loss of goodwill or customers is sufficient to constitute irreparable harm. *See, BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services LLC*, 425 F.3d 964, 970 (11th Cir 2005) (“although economic loss alone does not satisfy the ‘irreparable harm’ standard, the loss of customers and goodwill is an irreparable injury”). Similarly, customer confusion constitutes irreparable harm. *See, Ferrellas Partners, L.P. v. Barrow*, 143 Fed. App. 180, 190 (11th Cir 2005) (“Grounds for irreparable injury include loss of control of reputation,

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<sup>24</sup> *Id.*, p. 12.

<sup>25</sup> *Id.*, pp. 12-13.

loss of trade, and loss of goodwill. Irreparable injury can also be based upon the possibility of confusion."); *See also, Duct-O-Wire Co. v. US Crane, Inc.*, 31 F.3d 506, 509-10 (7th Cir. 1994) (irreparable harm where customer confusion could damage plaintiff's commercial reputation).

The sheer volatility and unpredictability of the regression analysis-based caps will cause irreparable harm to many, if not most or all, RLECs. Broadband and other substantial infrastructure investment projects have useful lives, cost recovery periods and loan repayment terms of 10-to-20 years or more. It is difficult, if not impossible, to plan, approve, or obtain financing for such investments when critical cost recovery revenue streams can change radically and unpredictably from year-to-year based upon the acts or omissions of not only the individual carrier, but the acts and omissions of all 768 carriers included in the model (or of some undetermined and unidentifiable subset of those other carriers). The unpredictability is only exacerbated, of course, by the fact that HCLS is made available on a "two-year lag," meaning that each year's caps will be based upon the acts or omissions of the affected carrier and all other relevant carriers two years prior.<sup>26</sup>

Even if the formulas were based upon accurate study area boundaries and independent variables, lenders and investors would be understandably hesitant to commit substantial mid-term or long-term financing to RLECs whose revenue streams could vary in unpredictable ways from year to year.<sup>27</sup> However, where (as here) the initial caps are unsound and the formulas will be only more volatile when some RLEC study area

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<sup>26</sup> *See*, Declaration B hereto (estimating the potentially wide adverse swing in capped support over the next few years based upon investments undertaken during the past few years pursuant to stimulus efforts).

<sup>27</sup> *See*, Declarations A, B, and C hereto (describing concerns with respect to obtaining access to capital or drawing down upon loans previously obtained to invest in telecommunications networks).

boundaries and independent variables are corrected, investors and lenders are likely to avoid or reject most RLEC investment projects.<sup>28</sup> In fact, the volatility and unpredictability of benchmarked HCLS may be so great during the 2012-2015 period as the Bureau corrects its data and adjusts its formulas that investors and lenders will have little, if any, desire to invest capital in the RLEC industry for most or all of the remainder of the decade. Moreover, the prospect of additional “mid-course” changes to the formulas in subsequent years in a manner that could affect recovery of prior investment only exacerbates this harm. The harm done by these caps to investor and lender relationships and goodwill cannot be measured in monetary terms, or alleviated by potential increases in universal service support during future years. Rather, the harm suffered by RLECs would be irreparable.<sup>29</sup>

The irreparable harm is not limited to RLECs themselves; it will also adversely affect both RLEC customers and RLEC employees. As RLECs reduce their capital expenditures and operating expenses in a haphazard guess as to how to avoid being impacted by the caps two or three years in the future, they will almost certainly be unable to add, expand or improve services for consumers.<sup>30</sup> At the same time, as universal

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<sup>28</sup> CoBank, *ex parte* letter, WC Docket No. 10-90 *et al.*, (fil. May 8, 2012).

<sup>29</sup> The Chairman has long recognized that clear business rules are essential to attract capital to telecommunications and information technology markets. For example, in discussing concerns about the handling of traffic on broadband networks, the Chairman referenced the need for “predictable rules of the road” to avoid depriving “innovators and investors of confidence” in a particular regulatory regime. *Preserving a Free and Open Internet: A Platform for Innovation, Opportunity, and Prosperity*,” Prepared Remarks of Chairman Genachowski, The Brookings Institution, at 4 (Sept. 21, 2009); *see also* Prepared Remarks of Chairman Genachowski, GSMA Mobile World Congress (Feb. 27, 2012), at 4 (“In our work, we’ve recognized that regulatory certainty and predictability promotes investment.”).

<sup>30</sup> *See*, Declarations A, B, and C hereto.



service support becomes increasingly unpredictable and intercarrier compensation revenues dwindle pursuant to a “mechanically declining” recovery mechanism, small rural carriers will need to look to their customers for a greater proportion of cost recovery.<sup>31</sup> Consumers will thus suffer irreparable harm in the form of declining services at higher prices. Moreover, as customers become increasingly dissatisfied with increasing rates, the unavailability of higher-speed broadband services, and/or stagnant or decreasing service quality, they are likely to blame their service providers for the loss or decline in service and the higher prices being charged. The resulting loss of customer goodwill and injury to RLEC reputations constitutes irreparable harm that cannot be measured with certainty in monetary terms. Such irreparable harm will be exacerbated to the extent that some customers become so dissatisfied that they terminate their service.

RLEC investment paralysis will also adversely affect RLEC employees. As employees of rural carriers observe their employers being unable to expand and upgrade their networks and service offerings, and as they see their employers looking for ways to reduce operating expenses and other costs in the face of constantly shifting and fundamentally reductive caps, RLEC employees will reasonably fear that they will eventually lose their jobs. Many RLEC employees, particularly those with in-demand skill sets, are likely to look for and find employment elsewhere – perhaps outside the

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<sup>31</sup> *See*, Declarations A and B hereto. Indeed, the Commission expressly contemplated and encouraged greater cost recovery from end users in the *USF/ICC Transformation Order*, requiring carriers to look first to consumers for recovery of lost access revenues, at least in part, prior to receipt of any ICC-replacement Connect America Fund support. Unfortunately, there is no discussion or assessment whatsoever in that order of how consumers will continue to receive “reasonably comparable” services at “reasonably comparable” rates in light of the various HCLS cuts, a new corporate operations expense cap on interstate common line support, the loss of safety net additive support, and declining eligible recovery for intercarrier compensation revenue shortfalls.

rural communities in question. The loss of such valued and experienced employees, both to the company and to the community, cannot be measured with certainty in monetary terms, and constitutes irreparable harm.

#### **IV. Interested Parties Not Harmed**

No other interested parties will be injured by grant of the requested stay. HCLS is already a capped mechanism; therefore, a stay of the CapEx and OpEx benchmarks that will reduce HCLS disbursements to some RLECs will not require the public to make additional universal service contributions or non-RLEC ETCs to suffer reductions in their universal service support. In addition to the HCLS cap, support is also currently constrained by budget “targets,” both for rate-of-return carriers specifically as well as for the overall High-Cost program. These budget “targets,” together with the fact that the caps are not expected to generate any “savings” for the overall High-Cost program until at least 2014,<sup>32</sup> will further insulate the public at this time from potential universal service contribution increases as a result of the proposed stay.

#### **V. Public Interest Favors Grant of Stay**

RLECs have been instrumental in improving the economic development and quality of life of their rural service areas for many decades, and have accomplished this by making reasonable and prudent investments and expenditures. Notwithstanding loose and unsupported charges of waste or inefficiency, numerous Commission, state commission, Rural Utilities Service, and Universal Service Administrative Company audits, investigations and oversight proceedings over the past decades have found no significant or deliberate problems with respect to RLECs’ regulated operations or their

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<sup>32</sup> *Order*, fn. 29.

use of universal service support. Among others, the Federal-State Joint Board on Universal Service has recognized:

A significant portion of the High Cost Loop fund supports the capital costs of providing broadband-capable loops for rural carriers. Under this system, *rural LECs (RLECs)* have done a commendable job of providing broadband to nearly all their customers. While this program may need adjustments, we recognize its effectiveness in maintaining an essential network for [providers of last resort] and in deploying broadband.<sup>33</sup>

A careful review of the relevant data supports this assessment. Small rural carriers have leveraged universal service support to provide basic digital subscriber line (DSL)-speed broadband, if not greater speeds, to over 92 percent of their customers. They have done this with only minimal recent annual increases in USF support (approximately three percent – on par with the recent annual rate of inflation), and even as their receipts from intercarrier compensation have declined.<sup>34</sup> If anything, small rural carriers are the model of efficiency, doing “more with less” in recent years to promote the availability of broadband at affordable rates.

Given the absence of evidence that RLECs have engaged in significant (much less, widespread) behavior involving unreasonable and/or imprudent investments and expenditures, it makes no sense to foist upon them at this time volatile, unpredictable and inaccurate HCLS caps that are plainly not ready for adoption. Rather, the incomplete, error-riddled and unpredictable models will bring RLEC investment projects to a standstill and chill the availability of financing, while threatening progress in providing

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<sup>33</sup> *High-Cost Universal Service Support, Federal-State Joint Board on Universal Service: Recommended Decision*, WC Docket No. 05-337, CC Docket No. 96-45, FCC 07J-4, at para. 30 (2007) (emphasis added).

<sup>34</sup> See *NECA Trends 2010 - A Report on Rural Telecom Technology*, at 5 (available at [https://www.neca.org/cms400min/NECA\\_Templates/PublicInterior.aspx?id=100](https://www.neca.org/cms400min/NECA_Templates/PublicInterior.aspx?id=100)).

quality and affordable voice and broadband services to rural customers. Given that most of the broadband deployed to date by RLECs is basic DSL-speed and thus *not* capable presently of delivering the Commission's targeted 4/1 Mbps broadband speed,<sup>35</sup> these caps run the substantial risk of "locking in" lower-speed broadband for much of rural America for years, if not decades, to come.

Whereas the Commission needs to promote broadband deployment in currently unserved and underserved rural areas, it does not need to accomplish this on the backs of the consumers that RLECs have strived so much to serve. Throughout the last century and the first part of the current one, RLECs have consistently demonstrated a substantial and sustained commitment to serving the high-cost portions of rural America. These small companies have worked long and hard to invest cash flows into quality network plant and to bring high quality voice services and more recently broadband services to their rural customers. However, this job is far from done, and RLECs need to make substantial additional investments (and cover the costs of ongoing operations) to provide their customers with affordable and evolving broadband services. A technically and legally flawed methodology that freezes or substantially discourages RLEC investment and access to capital is not the answer and is not in the public interest.

## **VI. Conclusion**

Given that all four prongs of the *Virginia Petroleum Jobbers Association/Washington Metropolitan Area Transit Commission* standard are satisfied under the present circumstances, the Rural Associations respectfully request that the

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<sup>35</sup> *Id.*; see also *Broadband Performance – OBI Technical Paper No. 4*, FCC, at 4 (available at [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2010/db0813/DOC-300902A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2010/db0813/DOC-300902A1.pdf)).

Commission stay implementation of the benchmarking methodology and the resulting caps adopted in the Bureau's *Order* until such time as the Commission acts upon the Rural Associations' contemporaneously filed *Application for Review*. At the very minimum, the Rural Associations request that the Commission stay implementation of the benchmarking methodology and the resulting caps until such time as the Bureau corrects acknowledged study area boundary data inaccuracies and other errors that produce invalid, unreasonable, and unlawful CapEx and/or OpEx caps.

Respectfully submitted,

**ORGANIZATION FOR THE  
PROMOTION AND  
ADVANCEMENT OF  
SMALL TELECOMMUNICATIONS  
COMPANIES**

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**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

**DECLARATION OF  
MARK GAILEY**

1. My name is Mark M. Gailey. I currently serve as President & G.M. I am submitting this Declaration on behalf of my employer, Totah Communications, Inc. to explain the impacts of the regression analysis formulas adopted by the Wireline Competition Bureau and the resulting caps on capital and operating expenses that may be supported through the High-Cost Loop Support (“HCLS”) component of the Federal Universal Service Fund (“USF”).

2. I have been employed by Totah Communications, Inc. since 1996. Prior to my employment with Totah Communications, Inc., I was employed by Contel of Arkansas/GTE Arkansas from 1987 to 1996. I graduated from Oklahoma State University in May of 1987 with a BS in Business with a major in Marketing and Management.

3. Totah Telephone Co., Inc. came into existence in 1954 when E. R. and Lela Belle Gailey and Mr. Ray League purchased the Ochelata Telephone Company. The company has evolved with communications over the years and changed its name to Totah Communications, Inc. in 2004 to better clarify that it is not simply a telephone company, but a company that provides communications services. The company has 1108 total miles in 2 study areas in Kansas and Oklahoma. Totah provides telephone service to 2508 customers and broadband to 1411

customers in the areas it serves. Our customer density is 1.39 customers per mile in Kansas and 2.25 customers per mile in Oklahoma. We have 2 soft switches, one located in our Kansas Study area, and one located in our Oklahoma study area. Our outside plant is over 99 percent buried plant. We have maintained aerial facilities only where it is too difficult and costly to bury the cable. However, with the rising costs of pole attachment fees from power companies added to the cost of maintaining aerial facilities, we are continuing to evaluate the cost of these aerial facilities. We encounter areas of rock where sawing the rock is required to put bury cable. We even have cable crossing a lake in order to provide service to customers on the other side. The crossing was made in order to avoid the tremendous cost of trying to put in some 20 extra miles of cable in order to provide service. We offer DSL to provide high speed internet to the customers within our service area. Our current speeds are 512k, 768k, 1 meg, 3 meg, 5 meg, and 10 meg.

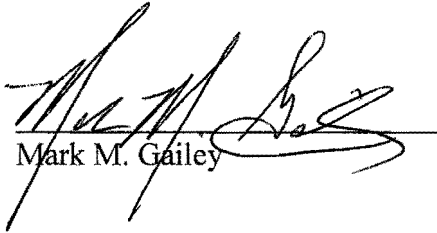
4. As an incumbent telecommunications provider, we have evolved as technology has evolved. When our company first came into being, we provided party line service with a magneto switch requiring an operator to connect customers either locally or for long distance. Our first upgrades were to the dial technology and upgrading our plant from 10 party service to 4 party service. In the 1980s, Totah converted to digital switching and single party lines throughout its network. REA played a very important part in the financing of our network in order to upgrade our services to what our customers wanted and needed in a changing world. Currently, Totah Communications, Inc. has debt in excess of \$13,000,000.00. This debt has been used to upgrade our plant so that we could shorten our local loops and become DSL capable. We have over 60 DLC locations. Most are fiber fed. However for those that weren't, Totah Communications, Inc. applied for and accepted an ARRA grant and loan. We are

currently in the middle of that \$8,000,000.00 upgrade to improve our interoffice network and place fiber to the DLC that currently are not served by fiber. It is impossible to provide reliable Broadband service through a DLC with copper fed T-1 facilities. Fiber optic cable is the only way you can get customers the speeds that they want and need to conduct business over the internet. Fiber also allows for future upgrades and is easier to manage than copper facilities. It is not as susceptible to lightning as is metallic cable. Also, once in place, Fiber can be upgraded with electronic equipment allowing us to avoid the cost of burying cable. Totah Communications, Inc. chose not to place fiber to the Premise at this time because of the uncertainty for the ability to pay back the substantial loans it would take to bury the fiber. We felt that with the fiber fed DLCs we could manage our network more efficiently until the NPRMs on USF and Intercarrier Compensation were resolved.

5. At present, it is believed that Totah Communications, Inc. will be able to recover for the next 2 years the costs it has incurred thus far to put in its facilities. However, we are not planning to do any upgrades to our network for some time as we are unsure as to how the new Regression Analysis will affect us past 2 to 3 years. The caps make it difficult, if not impossible, to put together a business plan with any certainty past the end of the next 2 years. This not only frustrates broadband deployment and upgrades for our customers, but it also undermines discussions with any lending institutions, which want to have relative comfort that we will be able to service the debt for more than 15 years to come. Because of this uncertainty, we will be limited in our ability to improve our speeds for DSL beyond what we currently provide today. This will make it very difficult for our civic leaders to attract business to the areas we serve.



I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

  
Mark M. Gailey

5/23/2012  
Date

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

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

**DECLARATION OF  
Peñasco Valley Telephone Cooperative, Inc.**

1. My name is Glenn Lovelace. I currently serve as CEO of Peñasco Valley Telephone Cooperative, Inc. (“PVT”). I am submitting this Declaration on behalf of PVT, to explain, as best we can, the impacts of the regression analysis formulas adopted by the Wireline Competition Bureau and the resulting caps on capital and operating expenses that will be supported through the High-Cost Loop Support (“HCLS”) component of the Federal Universal Service Fund (“USF”).

2. I have been employed in the telecommunications industry since 1978. I have worked for Southwestern Bell Telephone Company, AT&T, Fujitsu, Northern Telecom (Nortel), and TManage, Inc. prior to joining PVT in 2006. I have served as CEO for a number of companies since 1998. I hold a BS in Business and Public Administration from the University of Texas at Dallas and an MBA from Harvard University.

3. PVT is a rural telecommunications provider serving 2,350 customers. PVT has 2,823 voice access lines, and 1,223 broadband customers in the State of New Mexico. PVT’s service territory is 4651 square miles, which is approximately the size of Connecticut. PVT’s density is only .5 customers per square mile. PVT has 1.08 access lines per mile of loop plant. PVT is the Carrier of Last Resort designated by the New Mexico Public Regulation Commission, which legally obligates the company to provide telecommunications service to all requesting customers

within its 4651 square miles of service territory. The terrain is extremely rocky and mountainous and has very little water. This rocky and mountainous terrain makes it extremely expensive to plow/rocksaw cable and fiber in PVT's territory.

4. PVT provides voice and broadband services to schools, libraries, rural health care facilities, governmental agencies, and/or other anchor institutions within its service territory at DSL broadband speeds up to 3Mbs/768Kbs. We are in the process of upgrading our plant to be able to provide broadband speeds of 4Mbs/1Mbs or greater through a fiber-to-the-node ("FTTN") platform. PVT continues to upgrade its plant to provide excellent and reliable service. Over the last five years, PVT has invested \$25.9 million in upgrading plant. PVT's net plant totals \$36.3 million and PVT has \$29.8 million in outstanding loans.

5. PVT has attempted, as best it can under the circumstances, to estimate the impacts of the caps on its operations going forward and in light of these relatively recent plant investments. Of course it is difficult, if not impossible, to predict the effects of the caps over any period of time because the coefficients will change each year (starting in 2014) and the data for both PVT and other carriers will change each year as well. Any impact estimate we can make therefore necessarily includes a host of unknowns, at least in terms of the conduct of other carriers and changes to the coefficients. But in an effort to make some sense of the system and assess the potential effect of the caps, we made an assumption to hold constant the coefficients and all other data except our own projections over a multi-year period. This resulted in an estimate of a small loss of HCLS starting in 2013, with that loss increasing quickly to nearly \$800,000 by 2014 and reaching \$2 million by 2019. We believe this estimate is "directionally accurate," although we of course cannot tell for certain because of the potential/likely fluctuation of the model for the reasons explained above.

6. The potential imposition of these caps is particularly surprising given that PVT's network construction project was aimed at deploying a FTTN infrastructure to meet at least the very 4/1 speed the FCC has set as a target. These losses from the caps are then exacerbated by other reductions in support. The total combined projected reduction in support to PVT based on the current order (including the caps and other changes) is an average of \$2.19 million per year from 2012 to 2019. To put this in perspective, this average reduction is approximately **236% of PVT's 2011 net income**. In 2019, the projected **reduction is \$3.3 million, which equals 356% of PVT's 2011 net income**. Such a reduction in revenue will cripple PVT from the onset and will ultimately put us out of business. Although the FCC claims this "reform" will promote efficiency, this is not true for past investments. Investments are made and paid off over a very long period of time, usually 20 years. If the support rules change dramatically, as they have here, past investments that were legitimate and encouraged at the time face the significant risk of going unpaid.

7. If these reductions go into effect as our projections show, PVT's customers will suffer tremendously with quality of service issues for their local phone lines, 911 and broadband. It is likely the customer base would continue to drop as the rates are increased to be able to maintain the existing services and no new services would be added. Much of PVT's territory is so rural that there are no other service providers, including wireless providers, to take over service if PVT should fail. Ultimately, this would leave many of PVT's customers without critical 911 and broadband services.

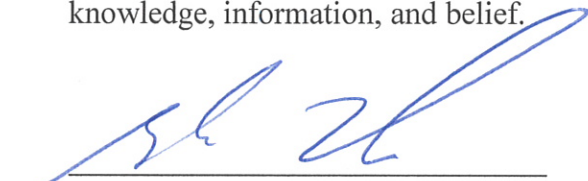
8. We cannot invest without a clear set of fixed guidelines, nor can we manage the impacts of the caps when by virtue of past investments we violate the caps. This plant was placed in service in "good faith" and now the rules have drastically changed, potentially jeopardizing the

repayment of loans. Past investments cannot be changed and, therefore, the rules governing them should be absolute.

For planning purposes, new rules can logically govern new investments. But even there, it is difficult, if not impossible, to manage against the caps on a going-forward basis because the models contain so many unknowns and we are forced to rely on “best guesses” as to how the caps might change in the future.

9. PVT is a current RUS and ARRA borrower and currently has \$29.8 million in outstanding loans. PVT answered the call to deploy an advanced communications network precisely as the FCC and other federal agencies in this administration sought. We planned carefully and are completing a project that is necessary to achieve the very broadband speeds that the FCC has set as a target. And yet PVT looks to be gravely affected by the “reforms” and is now concerned about debt service in the future. The PVT ILEC area is mostly unserved by other carriers due to its lack of density and difficult and sparse geography. There will be no immediate successor if these new and arbitrary rules drive PVT out of business. The rules have changed so dramatically that PVT will be challenged, at the very least, to pay off the debt portion of its “stimulus award”.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

  
\_\_\_\_\_  
Glenn Lovelace

5/23/2012  
\_\_\_\_\_  
Date

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

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Connect America Fund	)	WC Docket No. 10-90
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**DECLARATION OF  
GODFREY ENJADY**

1. My name is Godfrey Enjady. I currently serve as General Manager of Mescalero Apache Telecom, Inc. (MATI). I am submitting this Declaration to explain the impacts of the regression analysis formulas adopted by the Wireline Competition Bureau and the resulting caps on capital and operating expenses that may be supported through the High-Cost Loop Support (“HCLS”) component of the Federal Universal Service Fund (“USF”).

2. I have over 32 years of telecommunications Technician/Analyst and Management experience with CONTEL, GTE-Southwest, and MATI in the installation and repair of residential phone systems, Key and PBAX business systems, data transmission as well as other aspects of Outside Plant, Internet Service Provider and customer relations. I hold numerous certifications from GTE-Technical Schools and the State of New Mexico’s Electrical Bureau.

3. MATI is a wholly-owned enterprise of the Mescalero Apache Tribe and provides service solely to residents of the Tribe. MATI’s service area comprises three exchanges in south central New Mexico covering 720 square miles. MATI serves approximately 1,200 access lines, and its basic local and long distance service is available to 97% of the Tribal members. Furthermore, with the assistance of Rural Utilities Service (RUS) loan, MATI has digital subscriber line (DSL) service available to 92% of its access lines. MATI has accomplished all this while serving an economically disadvantaged area where 84% of the customers are eligible for Lifeline service.

4. As MATI demonstrated in its comments and reply comments to the Commission's Further Notice of Proposed Rulemaking, WC Docket 10-90, etc., released November 18, 2011, the operation of the Quantile Regression Analysis method for limiting HCLS recovery of certain operating and capital expenses would prove to be catastrophic to MATI's efforts to continue providing voice and broadband service to the Mescalero Apache people.

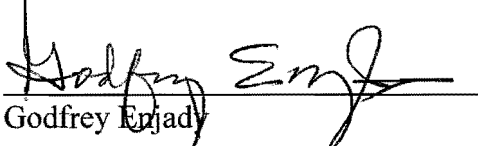
5. The Wireline Competition Bureau's (WCB) April 25, 2012 Order substantially reduced the adverse impact on MATI's HCLS funding related to the QRA mechanism. MATI estimates that, by making the revisions to the QRA model outlined in the WCB's April 25 Order, it will now lose 80% less HCLS than what was originally estimated and that was discussed in MATI's comments and reply comments. However, just because MATI was one of the "fortunate" companies resulting from the WCB's tinkering, MATI cannot decrease its vigilance; indeed, if anything, MATI is more concerned with the QRA after the release of the WCB's Order.

6. The WCB's April 25 Order clearly demonstrates that the QRA mechanism is the very definition of unpredictable and arbitrary. The WCB was able to significantly swing the impacts for some companies to such a degree that the impacted companies are forced to ask the WCB for assistance in determining exactly how the shift happened (See, for example, May 1, 2012 Ex Parte communication by East Ascension Telephone Company). Furthermore, MATI can see nothing stopping this "tinkering" from happening again and again in the future.

7. Due to the extreme unpredictability of the QRA mechanism, MATI is still curtailing its capital expenditure program and looking for additional ways to cut costs (including possible layoffs). This will only serve to hurt MATI's customers, and these results will directly conflict with the Commission's stated intent to bring quality broadband-based services to all Americans.

8. MATI currently has an outstanding loan from RUS. Based on the results of the QRA mechanism the associated impact on the HCLS, and the likely impact on Interstate Common Line Support, MATI is concerned that RUS will, industry-wide, experience higher rates of default, late payments, and other cash-flow related problems, and will be less likely to provide more loans to rural LECs. In addition, it will be very unlikely that MATI and many other rural LECs will be able to meet lending standards, those of RUS and other lenders, due to 1) the known support reductions caused by the QRA, 2) the extreme unpredictability of the QRA mechanism as it now stands, and 3) more revenue losses in the form of ICLS reductions that are as yet unknown.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

  
Godfrey Enjady

May 23, 2012  
Date