IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

IN RE: FCC 11-161	)))	No. 11-9900

OPPOSITION OF FEDERAL COMMUNICATIONS COMMISSION TO MOTION FOR STAY OF ADMINISTRATIVE ORDER OR, IN THE ALTERNATIVE, FOR A WRIT OF MANDAMUS

INTRODUCTION

Respondent Federal Communications Commission (the "FCC" or "Commission") opposes the motion for stay or, in the alternative, a writ of mandamus, filed by the National Telecommunications Cooperative Association ("NTCA"). NTCA asks this Court to stay implementation of an Order issued by the Commission's Wireline Competition Bureau ("Bureau") that adopted a methodology for imposing limits on the capital and operating expenses that rate-of-return regulated local exchange carriers ("LECs") may recover through the federal universal service fund. *Connect America Fund*, 27 FCC Rcd 4235 (WCB 2012) ("*Regression Order*"). The Commission's prior rules gave rate-of-return LECs the incentive to incur excessive costs to maximize their universal service subsidies. The new methodology addresses that problem by reducing subsidies to LECs with excessive costs and redistributing that support to promote broadband deployment – both of which will benefit consumers.

NTCA has satisfied none of the criteria for a stay, much less a stay in the context of this request for extraordinary mandamus relief. NTCA asks this Court to grant it relief on the grounds that rate-of-return LECs are entitled to recover all of their expenditures – irrespective of whether they were prudently made – through the federal universal service fund. That premise has been soundly rejected by the courts, which have held that universal service subsidies are to benefit *customers*, not *carriers*. *Alenco Commc'ns, Inc. v. FCC*, 201 F.3d 608, 620 (5th Cir. 2000); *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1103 (D.C. Cir. 2009).

At least as important, NTCA's speculative and conclusory claims fail to demonstrate irreparable harm. Two waiver procedures enable rate-of-return LECs to request reinstatement of any subsidies lost as a result of the *Regression Order*. Notably, although NTCA relies on declarations asserting alleged harm for individual carriers, none of those carriers has sought a waiver. Even beyond that, NTCA does not contend that the economic harm caused by the modest reductions in support resulting from the benchmarks, which are being phased-in over 18 months, imminently threaten the existence of *any* carrier.

Finally, the interests of other parties and the public in reforming high-cost universal service support weighs against a stay. Staying implementation of the *Regression Order* would perpetuate the problematic incentives and funding inequities associated with the Commission's existing rules and delay much-needed reforms intended to benefit consumers.

BACKGROUND

1. The availability of reasonably priced telecommunications services in all parts of the nation, known as "universal service," is a longstanding goal of telephone regulation. *See* 47 U.S.C. § 151. Pursuant to that goal, federal universal service programs have, among other things, subsidized service in rural and insular areas. *See, e.g., Federal-State Joint Board on Universal Service,* 18 FCC Rcd 22559, 22573 (¶ 25) (2003).

2. "Rural LECs face special obstacles" because "[r]ural areas where telephone customers are dispersed and terrain is unaccommodating are … the most expensive to serve." *Alenco,* 201 F.3d at 617. Thus, for decades, the Commission has "subsidize[d] high-cost rural LECs to reduce the rates they must charge their customers." *Id.* High cost loop support ("HCLS")[1] – a subsidy mechanism for rural, rate-of-return LECs – "helps offset the non-usage based costs associated with the local loop in areas where the cost to provide voice service is relatively high

[1] "Loop costs include the costs of the depreciated cable, wire, and circuit equipment used to provide local service, the depreciation and maintenance expenses associated with that local plant, and the corporate operations expenses related to the provision of local service." *Alenco,* 201 F.3d at 617.

compared to the national average cost per line." *Connect America Fund*, 26 FCC Rcd 17663, 17743 n.347 (2011) ("*Transformation Order*").

3. HCLS comes from the federal universal service fund ("USF"). The USF is financed primarily by assessments paid by providers of interstate telecommunications services. *See* 47 C.F.R. § 54.706. Such contributions are to be made on "an equitable and nondiscriminatory basis" to support "the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service." 47 U.S.C. § 254(d). Fund "assessments are calculated by applying a quarterly 'contribution factor' to the contributors' interstate revenues, and contributors almost always pass their contribution assessments through to their customers." *Rural Cellular Ass'n*, 588 F.3d at 1099.

4. On November 18, 2011, the Commission released the *Transformation Order*. That order comprehensively overhauls universal service funding for high-cost, rural areas "to preserve and advance voice and broadband service while ensuring fairness for consumers who pay into the universal service fund." *Regression Order* ¶ 1. Among many reforms, the Commission adopted a new rule designed to "provide better incentives for carriers to invest prudently and operate efficiently" with universal service support. *Transformation Order* ¶ 219. Pursuant to the new rule, the Commission will use regression analysis to establish

"benchmarks," or caps, that limit the reimbursable capital and operating expenses in the formula used to determine HCLS for rate-of-return LECs. *Id.* ¶ 214.

The Commission found the benchmarking rule necessary because "[u]nder [the] current HCLS rules, a company receives support when its costs are relatively high compared to a national average – without regard to whether a lesser amount would be sufficient to provide supported services to its customers." *Id.* ¶ 219. As a consequence, "[t]he current rules fail to create incentives to reduce expenditures." *Id.* Worse still, "because of the operation of the overall cap on HCLS, carriers that take prudent measures to cut costs … may actually lose HCLS support to carriers that significantly increase their costs in a given year." *Id.* The benchmarking rule addresses these problems by "plac[ing] limits on the HCLS provided to carriers whose costs are significantly higher than other companies that are similarly situated," and by redistributing any support that is relinquished "to those carriers whose … cost[s are] not limited by operation of the benchmark methodology." *Id.* ¶ 220. "To the extent costs above the benchmark are disallowed under this new rule," however, "companies are free to file a petition for waiver to seek additional support." *Id.* ¶ 222, citing *id.* ¶¶ 539-544 (establishing a waiver process for carriers that can demonstrate that universal service support reductions would threaten their financial viability and imperil service to consumers).

While the Commission adopted the benchmarking rule in the *Transformation Order*, it sought additional public comment on how best to implement it. *Id.* ¶ 216. In a Further Notice of Proposed Rulemaking ("FNPRM"), the Commission solicited feedback on "a specific methodology for capping recovery for capital expenses and operating expenses using quantile regression techniques and publicly available cost, geographic and demographic data." *Id.*; *see also* App. H. The Commission directed its Wireline Competition Bureau to finalize the benchmarking methodology by July 1, 2012, after considering the record compiled in response to the FNPRM. *Id.* ¶ 217.

5. On April 25, 2012, the Bureau adopted a benchmarking methodology that "builds on the analysis proposed" in the FNPRM "but also includes several changes in response to … comments from two peer reviewers[,] … interested parties[,] and … further analysis by the Bureau." *Regression Order* ¶ 4. "These changes significantly improve the methodology while redistributing funding to a greater number of carriers to support continued broadband investment." *Id.* In this regard, while "support to approximately 100 study areas with very high costs relative to similarly situated peers will be limited," the Bureau predicted that "approximately 500 study areas will receive additional, redistributed support to fund new broadband investment." *Id.*

The benchmarking methodology relies on publicly available data. *See id.* ¶ 11. In particular, study area boundaries are based on data from "Tele Atlas …, a widely-used commercially available comprehensive source." *Id.* ¶ 24. In addition, to address any concerns with the accuracy of that data, the Bureau established a "streamlined, expedited waiver process for carriers affected by the benchmarks to correct any errors in their study area boundaries." *Id.* ¶ 27.

With the Order, the Bureau released a Public Notice describing the company-specific capped values that will be used in the HCLS formula. *Id.* ¶ 5 & App. B. Those values will be used from July 1, 2012 through December 31, 2012 to calculate HCLS for LECs whose costs exceed the benchmarks. *Id.* The Bureau further determined that it should "phase-in the application of these limits" to mitigate the impact on rate-of-return LECs. *Id.* ¶ 5. Between July 1, 2012 and December 31, 2012, HCLS will only be reduced by 25 percent of the difference between (1) the support calculated using a LEC's reported costs and (2) the LEC's support as limited by the benchmarks, unless that reduction would exceed 10 percent of the LEC's support as calculated absent the benchmarking rule. *Id.* Beginning on January 1, 2013, support will be reduced by 50 percent of that difference. *Id.* Rate-of-return LECs will not face the full impact of any reductions in HCLS under the new benchmarking rule until January 1, 2014.

6. The Bureau's *Regression Order* is subject to review by the Commission itself. *See* 47 C.F.R. § 1.104(b); 47 U.S.C. § 155(c)(4). Under established law, a petition for review cannot be filed in federal court until a party has sought such review and the Commission has acted. *Int'l Telecard Ass'n v. FCC*, 166 F.3d 387, 388 (D.C. Cir. 1999). Consistent with those requirements, on May 25, 2012, NTCA sought Commission review of the *Regression Order*. That application remains pending.

7. On May 25, 2012, East Ascension Telephone Company, Silver Star Telephone Company, and a group of trade associations representing rural LECs (including NTCA) each filed a petition requesting an administrative stay of the *Regression Order* until the full Commission considers their applications for review of that Order. On June 22, 2012, Blue Valley Tele-Communications, Inc. filed a petition requesting the same relief.

The Bureau denied the stay requests on June 26, 2012.[2] *Connect America Fund*, 2012 WL 2457343 (WCB June 26, 2012) ("*Stay Denial Order*"). The Bureau found that the petitioners had not demonstrated that they were likely to succeed on the merits of a judicial challenge to the *Regression Order* (¶¶ 11-14) and that, because of the opportunity for waivers, they would not suffer irreparable

[2] The Bureau may deny a request for an administrative stay under authority delegated to it by the Commission. *See* 47 C.F.R. § 0.291 (delegation of authority to Wireline Competition Bureau).

injury under the benchmarks (¶¶ 7-10). The Bureau also determined that a stay would harm other parties (¶¶ 15-16) – notably, the rate-of-return LECs that will be the beneficiaries of redistributed HCLS – and that the public interest is not served by delaying much-needed universal service reform that will promote broadband deployment (¶ 17).

ARGUMENT

NTCA seeks a stay of the *Regression Order* or, in the alternative, a writ of mandamus directing the Commission to rule on its pending Application for Review before implementing that Order. Mot. 1, 3-4. At the outset, we note that this Court lacks jurisdiction to review the *Regression Order*, because that Order was issued by the Wireline Competition Bureau on delegated authority. *See* 47 U.S.C. § 155(c)(7) ("The filing of an application for review … shall be a condition precedent to judicial review of any order, decision, report or action made or taken pursuant to a delegation" of authority to FCC staff); *Int'l Telecard Ass'n*, 166 F.3d at 388. Until the Commission rules on NTCA's pending Application for Review, NTCA's motion for a judicial stay pending review of the Bureau Order is "incurably premature." *Int'l Telecard Ass'n*, 166 F.3d at 388; *see also Desktop Direct Inc. v. Digital Equipment Corp.*, 993 F.2d 755, 760 (10th Cir. 1993) (denying stay when court lacked jurisdiction over the underlying appeal).

NTCA incorrectly claims that "this Court's jurisdiction over the appeal of the *Transformation Order* … permits it to stay implementation of the *Regression Order*." Mot. 4. The *Regression Order* was issued after the *Transformation Order*, and it is based on a different rulemaking record. *See Transformation Order* ¶¶ 216-217; *Regression Order* ¶¶ 4, 11. That record is not before this Court and, as discussed above, a party cannot petition for judicial review of FCC Bureau decisions. Moreover, NTCA's motion clearly seeks a stay of the benchmarking *methodology* adopted in the *Regression Order*, not the benchmarking *rule* adopted in the *Transformation Order*, because it is the implementation of the rule through the *Regression Order*'s methodology that allegedly harms NTCA's members. *See, e.g*, Mot. 10-14 (arguing that the methodology produces inaccurate and unpredictable results).

Thus, this Court must treat NTCA's motion as a petition for a writ of mandamus under the All Writs Act, 28 U.S.C. § 1651. *Reynolds Metal Co. v. FERC*, 777 F.2d 760, 762 (D.C. Cir 1985). "Mandamus is a drastic remedy, and is 'to be invoked only in extraordinary situations.'" *Barclaysamerican Corp. v. Kane*, 746 F.2d 653, 654 (10th Cir. 1984), quoting *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980). "Although a simple showing of error may suffice to obtain reversal on direct appeal, a greater showing must be made to obtain a writ of mandamus." *Id.* at 655. This Court has held that "[t]hree conditions must be met before a writ of mandamus may issue":

> First, … the party seeking issuance of the writ must have no other adequate means to attain the relief he desires. Second, the petitioner must demonstrate that his right to the writ is clear and indisputable. Finally, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.

In re Cooper Tire & Rubber Co., 568 F.3d 1180, 1187 (10th Cir. 2009) (internal citation and quotation marks omitted).

In addition, because NTCA asks the Court to direct the Commission to stay implementation of the *Regression Order*, NTCA must separately show that: (1) it will likely prevail on the merits; (2) it will suffer irreparable harm unless a stay is granted; (3) other interested parties will not be harmed if a stay is granted; and (4) a stay will serve the public interest. *See Pacific Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1231 (10th Cir. 2005). Where, as here, "a preliminary injunction seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme," the Court must evaluate the movant's likelihood of success on the merits, and "the less rigorous fair-ground-for-litigation standard should not be applied." *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003) (internal citation and quotation marks omitted).[3]

Finally, it is well-established that the Commission may rely on its predictive judgment to impose purely prophylactic "caps," like the *Regression Order*'s benchmarks, "to avoid excessive expenditures that will detract from universal service." *Alenco*, 201 F.3d at 620; *see also Rural Cellular Ass'n*, 588 F.3d at 1105.

I. NTCA HAS NOT SHOWN THAT IT IS LIKELY TO SUCCEED ON THE MERITS.

A. NTCA Has Failed To Demonstrate That The Benchmarking Methodology Is Unpredictable.

NTCA contends that the *Regression Order*'s benchmarking methodology fails the statutory requirement that federal universal service mechanisms to be "specific and predictable." Mot. 10.

While the Act requires federal universal service mechanisms to be "specific, predictable, and sufficient," 47 U.S.C. § 254(b)(5), this Court has emphasized that "the FCC may exercise its discretion to balance th[ose] principles … against one another when they conflict." *Qwest Corp. v. FCC*, 258 F.3d 1191, 1200 (10th Cir. 2001) ("*Qwest I*") (subsequent history omitted). In adopting the benchmarking rule – which "reduces HCLS only to the extent that a carrier over-spends relative

[3] Insofar as NTCA asks this Court to direct the Commission to act on its pending Application for Review, Mot. 1, 4, the application was filed only on May 25, 2012, so there is no "unreasonable Commission delay" warranting a writ of mandamus. *See Telecomms. Res. & Action Ctr. v. FCC*, 750 F.2d 70, 75 (D.C. Cir. 1984).

to its peers" – the Commission balanced the principles of sufficiency and predictability "to ensure that carriers as a whole receive a sufficient (but not excessive) amount of HCLS." *Regression Order* ¶¶ 41-42.

NTCA complains that the benchmarking methodology is unpredictable because "RLECs will find it difficult, if not impossible, to accurately predict the effects of annual changes to the caps." Mot. 10. But in putting forth that contention, NTCA has made clear that what it seeks "is not merely predictable funding mechanisms, but predictable market outcomes" – something to which the Act does not entitle rate-of-return LECs. *Alenco*, 201 F.3d at 622. To satisfy section 254(b)(5), "the methodology governing subsidy disbursements" need only be "plainly stated and made available to LEC's." *Id*. The *Regression Order* easily satisfies that standard: it provides a detailed technical appendix explaining the benchmarking methodology (in Appendix A), and a companion Public Notice (in Appendix B) describing the company-specific capped values that will be used from July 1, 2012 through December 31, 2012 to determine HCLS amounts. Moreover, the Bureau posted on the FCC website additional information explaining the benchmarking methodology – including links to all data sources relied upon.[4]

[4] *See* http://transition.fcc.gov/wcb/iatd/neca.html

Beyond that, NTCA's argument, even on its own terms, fails to demonstrate that the benchmarking methodology injects uncertainty into HCLS disbursements. *See* Mot. 10-12. It has always been the case that carriers do not know how much they will receive in future periods. As the Commission explained, "the fact that an individual company will not know how the benchmarks affect its support levels until after investments are made is no different from the current operation of high-cost loop support, in which a carrier receives support based on where its own cost per loop falls relative to a national average that changes from year to year." *Transformation Order* ¶ 220.; *see also Regression Order* ¶ 41; *Stay Denial Order* ¶ 13. "If anything, support will now be more predictable for most carriers because the new rule discourages companies from exhausting the fund by over-spending relative to their peers." *Regression Order* ¶ 41; *see also Transformation Order* ¶ 220.

Contrary to NTCA's argument, the benchmarks will not "change quickly or unexpectedly," or by a large order of magnitude. *Stay Denial Order* ¶ 13. While NTCA claims that "individual HCLS recipients must … guess how model-specified caps may shift based upon all other RLECs' actions," Mot. 11, the Bureau found that this allegation was "unfounded." *Stay Denial Order* ¶ 13. The Bureau explained that "even if carriers with expenses greater than the benchmarks reduce their costs to the benchmarks, the benchmarks will remain the same." *Id.*

Nor does the methodology constitute an "opaque, moving process." Mot. 11. The Bureau has already announced the company-specific caps that will be used from July 1, 2012 through December 31, 2012, s*ee Regression Order,* Appendix B, and "to provide carriers with more certainty regarding the impact of the fifty-percent phase-in in 2013," the Bureau will use those same caps in 2013, "which enables carriers to estimate their 2013 support now." *Id.* ¶ 45.

B. NTCA Has Failed To Demonstrate That The Benchmarking Methodology Produces Inaccurate Results.

NTCA further contends that the benchmarking methodology contains "material errors" because it relies on study area boundary data that "contain inaccuracies." Mot. 12. Under this Court's precedent, that allegation – without more – would not warrant a remand, let alone the "drastic remedy" of mandamus. *Barclaysamerican Corp.,* 746 F.2d at 654.

At the outset, the *Regression Order*'s benchmarking methodology "is in the nature of rate-making and deserves strong deference to agency expertise." *Qwest I*, 258 F.3d at 1206; *cf. Sorenson Commc'ns v. FCC,* 659 F.3d 1035, 1046 (10th Cir. 2011). It "is meant to *estimate* the costs of providing service," so "[i]t need not reflect physical reality in all respects if it produces reasonably accurate estimates." *Qwest I,* 258 F.3d at 1206 (internal quotation marks omitted). *See Humana of Aurora, Inc. v. Heckler,* 753 F.2d 1579, 1582 (10th Cir. 1985) ("an agency need not await perfect data before taking regulatory action"). Nor can

NTCA demonstrate that, "*overall*," the benchmarking methodology "produces such inaccurate results that it cannot form the basis of rational decision-making." *Qwest I*, 258 F.3d at 1206. Indeed, one of the benefits of the model design chosen by the Bureau is that any inaccurate information for individual carriers is unlikely to affect the resulting benchmarks that affect all carriers. *Stay Denial Order* ¶ 15.

In any event, while the Bureau is in the process of updating the study area boundaries used in the model, it has made available a "streamlined, expedited waiver process" to correct any errors in an individual LEC's study area boundaries. *Regression Order* ¶ 27. If a carrier successfully obtains a waiver, its support amounts will be adjusted ("trued-up") if necessary to the amount to which the carrier was entitled before the *Regression Order* methodology went into effect. *Id*. ¶ 27 n.79. Carriers will thus be made whole if they demonstrate a material error. Using the waiver process, the Commission has already granted waivers to two rate-of-return LECs. *Stay Denial Order* ¶ 10. This waiver process, which will address any errors affecting individual carriers, undermines NTCA's legal argument. *See, e.g., Vermont Pub. Serv. Bd. v. FCC,* 661 F.3d 54 (D.C. Cir. 2011) (finding a waiver process provided a reasonable means to update stale line count data used in a model for determining universal service support); *Rural Cellular Ass'n,* 588 F.3d at 1104 (discussing, with approval, a waiver process used to provide certain wireless carriers additional support should an interim cap render universal service funding insufficient); *Alenco*, 201 F.3d at 622 (finding a single carrier's reduced rate of return under an operating expenses cap "at most … presents an anomaly that can be addressed by a request for a waiver"). Even more clearly, there is no reason to grant NTCA's request (Mot. 13) for extraordinary interim relief until the Commission compiles new study area boundary data. *See Stay Denial Order* ¶ 15 ("a waiver for the individual carrier affected – rather than a stay of the benchmarks altogether – is the appropriate remedy where data inaccuracies occur").

C. The Benchmarking Methodology Does Not Constitute Retroactive Rulemaking.

Finally, NTCA claims that applying the benchmarks to limit HCLS payments constitutes retroactive rulemaking. Mot. 14-15. That is incorrect. As both the Bureau and the Commission explained, "[t]here is no statutory provision or Commission rule that provides companies with a vested right to continue to receive support at particular levels or through the use of a particular methodology." *Regression Order* ¶ 38; *see also Transformation Order* ¶¶ 221, 293.

The courts agree. In rejecting a challenge to an earlier cap on HCLS, the Fifth Circuit explained that "[t]he Act does *not* guarantee all local telephone service providers a sufficient return on investment." *Alenco*, 201 F.3d at 620. Rather, "[t]he Act only promises universal service, and that is a goal that requires sufficient funding of *customers*, not *providers*." *Id.*; *see also Rural Cellular Ass'n*, 588 F.3d at 1103. Because LECs are not entitled to universal service subsidies, the benchmarks do not "alter[] the *past* legal consequences of past actions," *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 219 (1988) (Scalia, J., concurring), and the presumption against retroactivity does not apply. *See, e.g., DIRECTV, Inc. v. FCC*, 110 F.3d 816, 825-26 (D.C. Cir. 1997).

NTCA responds that the Bureau's view "sidesteps the fundamental concern of applying a new rule to limit recovery of expenses already incurred. Nothing in the statute permits the FCC to so upset settled expectations." Mot. 15. But a rule is not retroactive "merely because it … upsets expectations based in prior law." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269 (1994). Rather, a rule "may nonetheless be sustained in spite of such retroactivity if it is reasonable." *Bowen*, 488 U.S. at 220 (Scalia, J., concurring); *see also DIRECTV*, 110 F.3d at 826. The benchmarking methodology (which takes account of "age of plant") "address[es] 'retroactivity' concerns" by "rais[ing] the cost limits for carriers that have invested recently." *Regression Order* ¶ 40. And as the Bureau explained, providing rate-of-return LECs with a "blanket exception" from its rules for past investments "would have made it impossible to reform the system over any reasonable time period." *Id.* ¶ 39. That determination was plainly reasonable.

II. NTCA HAS NOT SHOWN IRREPARABLE INJURY.

Wholly apart from its failure to demonstrate a likelihood of success on the merits, NTCA has failed to show that its members will suffer irreparable harm if the *Regression Order* is not stayed. "To constitute irreparable harm, an injury must be certain, great, actual and not theoretical." *Heideman*, 348 F.3d at 1189, quoting *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). A movant "must show that the injury complained of is of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm." *Id.* (internal citation and quotation marks omitted).

NTCA's speculative, contingent, and unsubstantiated claims do not come close to meeting these stringent standards. "[E]conomic loss usually does not, in and of itself, constitute irreparable harm," *Heideman*, 348 F.3d at 1189, and "[r]ecoverable monetary loss may constitute irreparable harm only where the loss threatens the very existence of the movant's business." *Wisconsin Gas*, 758 F.2d at 674. NTCA nowhere asserts that the modest HCLS reductions caused by the benchmarks, which are being phased-in over 18 months, imminently threaten the existence of *any* rate-of-return LEC. In fact, "two of the three declarations submitted [by NTCA] come from carriers that have costs well below – and thus not affected by – the initial set of benchmarks." *Compare Stay Denial Order* ¶ 9 n.26 *with* NTCA Mot. Ex. D.

Instead, NTCA contends that the *Regression Order* will make it difficult for rate-of-return LECs to finance long-term investment in new infrastructure. Mot. 15-17. This claim is speculative and does not establish irreparable harm.

Moreover, while NTCA hypothesizes that "RLECs' inability to predict present and future caps will paralyze investment activities and obstruct access to capital," Mot. 17, it fails to explain why other forms of relief, such as waivers or review in the ordinary course, would not be sufficient to address this alleged concern.

Likewise, NTCA's contention that the benchmarks will "result in lost customer goodwill and jobs" (Mot. 15-16) relies on a hypothetical chain of events that may or may not occur, and in all events have not been shown to be imminent. *See, e.g.,* Mot. 17 (*if* rate-of-return LECs face a reduction in HCLS, they "will be forced to forego routine plant upgrades and maintenance and charge higher prices" resulting in "[d]eclining service quality and higher prices" that will "anger consumers and injure [their] business reputations"). Such chains of inference as to what may occur over some unspecified amount of time fall far short of demonstrating any imminent harm, much less harm that is "certain, great, actual and not theoretical." *Heideman*, 348 F.3d at 1189 (internal citation and quotation marks omitted).

In any event, there can be no irreparable harm "given the availability of two separate waiver provisions." *Stay Denial Order* ¶ 10. First, carriers can avail themselves of the waiver process established by the Bureau to "correct any errors in their study area boundaries." *See Regression Order* ¶ 27. "Importantly, if such a waiver request is granted and a true-up is required, a carrier's support amounts will be trued-up back to the date that the benchmarks became effective." *Stay Denial Order* ¶ 10. In addition, rate-of-return LECs "may avail themselves of the waiver process adopted in the [*Transformation Order*] by demonstrating that 'reductions in current support levels would threaten [their] financial viability, imperiling service to consumers in the areas they serve.'" *Id.*, citing *Transformation Order* ¶¶ 539-44. Finally, the Bureau's decision to phase in the impact of benchmarks over 18 months "provide[s] companies adequate time to make adjustments and, if necessary, demonstrate that an individual waiver is warranted." *Id.* ¶ 11. Because NTCA has an "adequate means to attain the relief [it] desires," it will suffer no irreparable injury, and relief by way of mandamus is unwarranted. *Cooper Tire & Rubber Co.*, 568 F.3d at 1187.

III. A STAY WOULD HARM OTHER PARTIES AND THE PUBLIC INTEREST.

As the Commission explained in the *Transformation Order* (¶¶ 211, 219), the benchmarks are a response to a significant problem. The prior HCLS rules gave rate-of-return LECs an incentive to incur costs with little regard to efficiency or the burden placed on the ratepayers who subsidize those excessive costs through USF assessments on their monthly bills.

NTCA attempts to downplay that finding by arguing that "a stay in 2012 would place no strain on the USF 'budget'" because "a pre-existing cap on HCLS constrain[s] support" such that any savings from the implementation of the benchmarks would be only “$10 million per year.” Mot. 18-19. NTCA misses the point. Because of the longstanding cap on HCLS, “carriers that did take measures to reduce costs to operate more efficiently lost support to their peers that increased costs.” *Stay Denial Order* ¶ 18; *see also Transformation Order* ¶ 219. The benchmarks resolve that inequity by identifying rate-of-return LECs with excessive costs so that the Commission may reduce their HCLS and redistribute any relinquished support to other LECs. *See Transformation Order* ¶ 220. Indeed, while “[o]nly about 20% of … study areas … will see their support limited[,] … approximately 80% of the study areas will receive some of the freed-up support.” *Stay Denial Order* ¶ 16. NTCA has no response to the Bureau’s finding (*id.*) that granting its stay request would harm LECs that would otherwise receive additional funding for broadband investment.

The public interest likewise strongly favors denial of a stay. The benchmarks are intended to address longstanding problems resulting from the prior HCLS rules, which “gave carriers incentives to increase loop costs with little regard to efficiency or the burden on the Fund,” and caused “carriers that did take measures to reduce costs to operate more efficiently” to “los[e] support to their peers that increased costs.” *Regression Order* ¶ 2. “Staying implementation of this rule would perpetuate these problematic incentives and inequities and delay reforms intended to benefit consumers.” *Stay Denial Order* ¶ 18.

CONCLUSION

The Court should deny the motion for stay.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of the Order Governing Motion Practice dated March 13, 2012, I hereby certify that the accompanying Opposition of Federal Communications Commission to Motion for a Stay of Administrative Order Or, In the Alternative, for Writ of Mandamus, contains 4,990 words.

/s/ Maureen K. Flood

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July 12, 2012

CERTIFICATE OF DIGITAL SUBMISSION

I, Maureen K. Flood, hereby certify that with respect to the foregoing:

(1) there are no required privacy redactions to be made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Symantec Endpoint Protection version 11.0.5002.333, and according to the program are free of viruses.

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v.

Federal Communications Commission and United States of America, Respondents.

CERTIFICATE OF SERVICE

I, Maureen K. Flood, hereby certify that on July 12, 2012, I electronically filed the foregoing Opposition of Federal Communications Commission to Motion for a Stay of Administrative Order Or, In the Alternative, for Writ of Mandamus with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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