

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

**ORDER**

**Adopted: June 26, 2012**

**Released: June 26, 2012**

By the Chief, Wireline Competition Bureau:

**I. INTRODUCTION.**

1. On or after May 25, 2012, Silver Star Telephone Company (Silver Star), Blue Valley Telecommunications (Blue Valley), East Ascension Telephone Company (EATEL), and a group of rural trade associations (the Rural Associations) (collectively, the Petitioners) each filed a petition requesting a stay of the Wireline Competition Bureau’s *HCLS Benchmarks Implementation Order*, which adopted a methodology for limiting reimbursable capital and operating costs within the high-cost loop support (HCLS) program.<sup>1</sup> Specifically, the Petitioners seek a stay of the implementation of that methodology and the initial limits or “benchmarks” that result from the methodology until the Commission acts on the Petitioners’ concurrently filed applications for review.<sup>2</sup> For the reasons stated below, we deny the petitions for stay.

**II. BACKGROUND**

2. In the *USF/ICC Transformation Order*, the Commission comprehensively reformed universal service funding for high-cost, rural areas.<sup>3</sup> As a component of those reforms, the Commission

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<sup>1</sup> Silver Star Telephone Company, Inc., Petition for Stay, WC Dockets No. 10-90, 05-337 (filed May 25, 2012) (Silver Star Petition); Blue Valley Telecommunications, Inc., Petition for Stay, WC Docket Nos. 10-90, 05-337 (filed June 22, 2012) (Blue Valley Petition); East Ascension Telephone Company, Inc., Petition for Stay, WC Docket Nos. 10-90, 05-337 (filed May 25, 2012) (EATEL Petition); National Exchange Carrier Association, et al., Petition for Stay, WC Docket Nos. 10-90, 05-337 (filed May 25, 2012) (Rural Associations Petition); *see also Connect America Fund; High-Cost Universal Service Support*; WC Docket Nos. 10-90, 05-337, Order, DA 12-646 (rel. Apr. 25, 2012) (*HCLS Benchmarks Implementation Order*).

<sup>2</sup> Silver Star Petition at 1; Blue Valley Petition at 1; EATEL Petition at 1; Rural Associations Petition at 1; *see also* Silver Star Telephone Company, Inc., Application for Review, WC Dockets No. 10-90, 05-337 (filed May 25, 2012); Silver Star Telephone Company, Inc., Supplement to Application for Review, WC Docket Nos. 10-90, 05-337 (filed June 22, 2012); Blue Valley Telecommunications, Inc., Application for Review, WC Docket Nos. 10-90, 05-337 (filed June 22, 2012); East Ascension Telephone Company, Inc., Application for Review, WC Docket Nos. 10-90, 05-337 (filed May 25, 2012); National Exchange Carrier Association, et al., Application for Review, WC Docket Nos. 10-90, 05-337 (filed May 25, 2012).

<sup>3</sup> *See 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 a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform—Mobility Fund*; WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, WT Docket No. 10-208, 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).

adopted a benchmarking rule intended to limit the expenses of those rate-of-return carriers' very high costs compared to their similarly situated peers, while further encouraging other rate-of-return carriers to advance broadband deployment.<sup>4</sup> The Commission also sought comment on a specific methodology to limit reimbursable capital and operating expenses within HCLS and directed the Wireline Competition Bureau (Bureau) to finalize a methodology after receiving public input on the proposal.<sup>5</sup>

3. In the *HCLS Benchmarks Implementation Order*, the Bureau adopted a specific methodology for establishing benchmarks for capital expenses (capex) and operating expenses (opex) that will be used in the formula that determines HCLS.<sup>6</sup> The methodology built on the analysis proposed in the *USF/ICC Transformation Order*, but also included several changes in response to comments from interested parties, input from two peer reviewers, and further analysis by the Bureau.<sup>7</sup> Although the capex and opex benchmarks will be implemented on July 1, 2012, the Bureau decided to phase in the financial impact of the benchmarks to give those carriers that will experience HCLS reductions time to make any necessary adjustments and file any necessary waiver requests.<sup>8</sup> As a result, carriers will not experience the full impact of benchmarks on support amounts—which will decrease support for some carrier but increase support for others—until January 1, 2014.<sup>9</sup>

4. The Petitioners each seek to stay the implementation of the methodology adopted in the *HCLS Benchmarks Implementation Order* until the Commission considers their applications for review.<sup>10</sup> The Petitioners claim, among other things, that the adopted methodology and resulting benchmarks are both unlawful and defective,<sup>11</sup> and that reductions in support as a result of the benchmarks will cause irreparable harm to some companies.<sup>12</sup> The National Cable & Telecommunications Association (NCTA) and CTIA each filed an opposition to the petitions for stay.<sup>13</sup>

### III. DISCUSSION

5. In determining whether to stay the effectiveness of one of its orders, the Commission applies the four factor test established in *Virginia Petroleum Jobbers Ass'n v. FPC*, as modified in *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*<sup>14</sup> Under this standard, a petitioner must demonstrate that: (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm if a stay is

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<sup>4</sup> *Id.* at 17741-47, paras. 210-26.

<sup>5</sup> *Id.* at 17743-47, paras. 214-26, 18059-62, paras. 1079-88, 18285-94, App. H.

<sup>6</sup> *HCLS Benchmarks Implementation Order* at 1, para. 1.

<sup>7</sup> *Id.* at 6, para. 11.

<sup>8</sup> *Id.* at 2-3, para. 5.

<sup>9</sup> Beginning July 1, 2012, support will be reduced by twenty-five percent of the difference between the support calculated using the study area's reported cost per loop and the support as limited by the benchmarks, unless that reduction would exceed ten percent of the study area's support as would otherwise be calculated based on the National Exchange Carrier Association (NECA) cost data. Beginning January 1, 2013, support will be reduced by fifty percent of the difference. Beginning January 1, 2014, support will be limited in full by the benchmarks. *Id.*

<sup>10</sup> Silver Star Petition at 1; Blue Valley Petition at 1; EATEL Petition at 1; Rural Associations Petition at 1.

<sup>11</sup> *See, e.g.*, Silver Star Petition at 2; Blue Valley Petition at 2; EATEL Petition at 2; Rural Associations Petition at 2.

<sup>12</sup> *See, e.g.*, Silver Star Petition at 6; Blue Valley Petition at 6; EATEL Petition at 5; Rural Associations Petition at 10.

<sup>13</sup> NCTA, Opposition to Petitions for Stay, WC Docket Nos. 10-90, 05-337 (filed June 1, 2012) (NCTA Opposition); CTIA, Opposition to Applications for Review and Requests for Stay, WC Docket Nos. 10-90, 05-337 (filed June 1, 2012) (CTIA Opposition).

<sup>14</sup> *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); *Washington Metropolitan Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977).

not granted; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest favors granting a stay.<sup>15</sup> The relative importance of the four criteria will vary depending on the circumstances of the case,<sup>16</sup> but a showing of irreparable injury is a critical element in justifying a request for stay of an agency order.<sup>17</sup>

6. In the instant case, we conclude that the Petitioners have satisfied none of the four factors in the stay calculus. Critically, they have failed to demonstrate irreparable injury. Nor have they shown that they are likely to prevail on the merits of their claims, that other interested parties will not be harmed if a stay is granted, or that a stay would serve public interest. Accordingly, we find that a stay is not warranted.

#### A. The Petitioners Would Not Suffer Irreparable Harm

7. The Petitioners fail to show that they would be irreparably harmed if a stay is not granted. In claiming irreparable harm, the Petitioners assert that the benchmarks, by limiting support, will threaten the ability of carriers to invest in their networks and offer current services at current prices, and ultimately will be disruptive to their employees and customers.<sup>18</sup> The Rural Associations also claim that the regression analysis-based benchmarks are unpredictable and that the alleged unpredictability will make it difficult to obtain financing for investments.<sup>19</sup> Silver Star and Blue Valley add that the alleged unpredictability makes it difficult to predict the model's future impact.<sup>20</sup>

8. To warrant injunctive relief, an injury must be “both certain and great; it must be actual and not theoretical.”<sup>21</sup> Petitioners must provide “proof indicating that the harm [they allege] is certain to occur in the near future.”<sup>22</sup> Moreover, economic loss does not, by itself, constitute irreparable harm unless it threatens the very existence of the movant's business.<sup>23</sup>

9. The Petitioners have not met that standard. Silver Star and Blue Valley allege that the loss of support will threaten their very existence, but their statements on that matter are unsupported and conclusory.<sup>24</sup> The other Petitioners do not claim that loss of support will threaten carriers' existence in the near future. Moreover, the Petitioners' other allegations, such as the ones pertaining to the

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<sup>15</sup> *Id.*; see also *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008).

<sup>16</sup> See, e.g., *Davis v. Pension Ben. Guar. Corp.*, 571 F.3d 1288, 1291 (D.C. Cir. 2009).

<sup>17</sup> See *Winter*, 555 U.S. at 22 (“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 the second factor).

<sup>18</sup> Silver Star Petition at 6-7 (“The known impact of the model in 2012 and 2013 threatens Silver Star's ability to maintain its customer base and repay its loans.”); Blue Valley Petition at 6-7 (“The known impact of the model in 2012 and 2013 threatens Silver Star's ability to maintain its customer base and repay its loans.”); EATEL Petition at 5 (stating that loss of HCLS will likely “cause significant operational issues, threaten the company's ability to invest in broadband, and ultimately be highly disruptive for EATEL customers and employees”); Rural Associations Petition at 11-12 (explaining that, as RLECs reduce their capital expenditures and operating expenses to avoid being impacted by the caps, they will “be unable to add, expand or improve services” and consumers will suffer “declining services at higher prices”).

<sup>19</sup> Rural Associations Petition at 10-11.

<sup>20</sup> Silver Star Petition at 6-7; Blue Valley Petition at 5-6.

<sup>21</sup> *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*; see also *Brady v. National Football League*, 640 F.3d 785, 794-95 (8th Cir. 2011).

<sup>24</sup> See Silver Star Petition at 6-7; Blue Valley Petition at 6-7. See also *Wisconsin Gas Co.*, 758 F.2d at 674 (“Bare allegations of what is likely to occur” are not sufficient because the test is whether the harm “will in fact occur.”).

benchmarks' likely effect on their employees and customers, rely on hypothetical chains of events that may or may not occur.<sup>25</sup> We note that two of the three declarations submitted by the Rural Associations come from carriers that have costs well below—and thus not affected by—the initial set of benchmarks.<sup>26</sup>

10. In any event, there is no irreparable harm to Petitioners given the availability of two separate waiver provisions.<sup>27</sup> First, while the Petitioners contend that the benchmarking methodology produces inaccurate results because it relies on inaccurate study area boundary data,<sup>28</sup> the *HCLS Benchmarks Implementation Order* provides a streamlined, expedited waiver process for carriers affected by the benchmarks to correct any errors in their study area boundaries.<sup>29</sup> Importantly, if such a waiver request is granted and a true-up is required, a carrier's support amounts will be true-up back to the date that the benchmarks became effective (*i.e.*, July 1, 2012).<sup>30</sup> Two rate-of-return carriers have already taken advantage of this streamlined waiver process.<sup>31</sup> Second, Petitioners may avail themselves of the waiver process adopted in the *USF/ICC Transformation Order* by demonstrating that “reductions in current support levels would threaten [the Petitioners'] financial viability, imperiling service to consumers in the areas they serve.”<sup>32</sup> Accordingly, we conclude that the Petitioners have failed to show irreparable harm.

11. Additionally, even though we conclude that the Petitioners have not demonstrated irreparable harm, we observe that any disruption the benchmarks may cause the Petitioners will be limited by the Bureau's decision to phase in the impact of benchmarks on support amounts over 18 months. This gradual phase-in will allow time for the Bureau to act on individual petitions for waiver and for the Commission to consider the arguments raised in the applications for review. Specifically, when the benchmarks are implemented on July 1, 2012, support will be reduced by only twenty-five percent of the

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<sup>25</sup> See, e.g., Silver Star Petition at 7; Blue Valley Petition at 7; EATEL Petition at 5; Rural Associations Petition at 12 (“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”).

<sup>26</sup> See Rural Associations Petition at Attach. A (Declaration of Mark Gailey, President & General Manager, Total Communications, Inc.), B (Declaration of Glenn Lovelace, Chief Executive Officer, Penasco Valley Telephone Cooperative, Inc.); *HCLS Benchmarks Implementation Order* at App. B. We also note that Blue Valley filed its petition nearly two months after the *HCLS Benchmarks Implementation Order* was adopted—barely a week before the benchmarks were set to be implemented. This suggests that Blue Valley was in no apparent rush to seek a stay, which seemingly undercuts its irreparable harm argument. See Blue Valley Petition at 1.

<sup>27</sup> See, e.g., *Vermont Pub. Serv. Bd. v. FCC*, 661 F.3d 54 (D.C. Cir. 2011) (finding that a waiver process in the Commission's regulations provided a reasonable means for petitioners to update stale line count data used in a model that determines certain high-cost support amounts); *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1104 (D.C. Cir. 2009) (affirming the Commission's use of a waiver provision to provide certain carriers with additional support should an interim cap render their universal service funding insufficient); *Alenco Commc'ns, Inc. v. FCC*, 201 F.3d 608, 622 (5th Cir. 2000) (finding that a single carrier's reduced rate of return under a cap on corporate operations expenses “at most presents an anomaly that can be addressed by a request for a waiver”).

<sup>28</sup> See Rural Associations Petition at 6-8, Silver Star Petition at 3-4.

<sup>29</sup> *HCLS Benchmarks Implementation Order* at 14-15, para. 27.

<sup>30</sup> *Id.* at 14, n.79. We also note that we have initiated a process to collect additional information to confirm study area boundaries. *Comment Sought on Data Specifications for Collecting Study Area Boundaries*, WC Docket Nos. 10-50, 05-337, Public Notice, DA 12-868 (rel. June 1, 2012).

<sup>31</sup> See Letter from Dan Caldwell, Consortia Consulting, Inc. to Marlene H. Dortch, FCC, WC Docket No. 10-90 et al., Attach. (Letter from Jerry Reisenauer, West River Cooperative Telephone Company, to Marlene H. Dortch, FCC (dated June 13, 2012)) (dated June 14, 2012) (West River Petition); Letter from Dan Caldwell, Consortia Consulting, Inc. to Marlene H. Dortch, FCC, WC Docket No. 10-90 et al., Attach. (Letter from Rod Bowar, Kennebec Telephone Company, to Marlene H. Dortch, FCC (dated June 13, 2012)) (dated June 14, 2012) (Kennebec Petition). See also *Connect America Fund, High-Cost Universal Service Support*, WC Docket Nos. 10-90, 05-337, Order, DA 12-995 (Wireline Comp. Bur. rel. June 26, 2012) (granting requests for expedited waiver).

<sup>32</sup> *USF/ICC Transformation Order*, 26 FCC Rcd at 17839-42 paras. 539-44.

difference between the support calculated using the study area's reported cost per loop and the support as limited by the benchmarks.<sup>33</sup> This reduction will be further capped at ten percent of the study area's support as it would otherwise be calculated.<sup>34</sup> By delaying the full impact of the reductions, we have provided companies adequate time to make adjustments and, if necessary, demonstrate that an individual waiver is warranted.<sup>35</sup> We observe that Silver Star, Blue Valley, and EATEL have not sought a waiver. The fact that none of these carriers has sought a waiver provides further evidence that they are not facing imminent harm from implementation of the benchmarking methodology.

#### **B. The Petitioners are Unlikely to Prevail on the Merits**

12. The Petitioners also fail to show that they would likely prevail on the merits. The actions taken by the Bureau to implement the benchmark rule are fully within its delegated authority and are amply supported by a comprehensive record.<sup>36</sup> Silver Star, Blue Valley, and the Rural Associations participated in the proceeding that led to the *HCLS Benchmarks Implementation Order*,<sup>37</sup> and many of the Petitioners' current arguments were fully considered but rejected as inconsistent with the Commission's reform goals.<sup>38</sup>

13. Nonetheless, we take the opportunity to once again rebut claims that the benchmarks are unpredictable.<sup>39</sup> The Petitioners claim that the benchmark methodology will violate the predictability requirement in section 254(b)(5) of the Act because it will cause HCLS support amounts to vary from year to year.<sup>40</sup> But the Fifth Circuit Court of Appeals rejected this argument in *Alenco*, a case involving prior universal service rules, and the claim is no more persuasive in this context. As the Fifth Circuit held, the Commission can satisfy the statutory mandate by adopting predictable *rules*, not by ensuring predictable *outcomes*.<sup>41</sup> The Bureau, in the *HCLS Benchmarks Implementation Order*, adopted final rules implementing the benchmarking methodology, and that is all that is required by section 254(b)(5). In any event, it is unlikely that the benchmarks will produce unpredictable funding amounts, for the following reasons. First, the independent variables are likely to behave in predictable ways. Most of the independent variables capture conditions like bedrock or climate that change only slowly if at all. And the two independent variables that are most likely to change are at least partially in carriers' control: the number of loops in service and the fraction of plant that is undepreciated. Second, although the dependent variable (*i.e.*, loop cost) will change as a carrier changes its own costs, it has always been true under the previous rules that a carrier's HCLS is affected by other carriers' costs.<sup>42</sup> Perhaps more

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<sup>33</sup> *HCLS Benchmarks Implementation Order* at 19, para. 43.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 19, para. 44.

<sup>36</sup> *See, e.g., USF/ICC Transformation Order*, 26 FCC Rcd at 17743-47, paras. 214-26, 18059-62, paras. 1079-88, 18285-94, App. H.

<sup>37</sup> *See, e.g.,* Rural Associations Comments, WC Dockets No. 10-90, 05-337 (filed Jan. 18, 2012); Blue Valley Comments, WC Dockets No. 10-90, 05-337 (filed Jan. 18, 2012); Silver Star Reply, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, WC Docket Nos. 10-90, 05-337, 07-135, 03-109, WT Docket No. 10-208 (filed Feb. 17, 2012).

<sup>38</sup> *Compare, e.g.,* Silver Star Petition at 5, and Rural Associations Petition at 3-6 (asserting that it is likely to prevail on the merits because the benchmarking methodology is unpredictable and insufficient), with *HCLS Benchmarks Implementation Order* at 18-19, paras. 41-42 (responding to arguments that implementing the benchmarks will undermine the predictability or sufficiency of support); *see also* NCTA Opposition at 5-6.

<sup>39</sup> *HCLS Benchmarks Implementation Order* at 18, para. 41.

<sup>40</sup> *See, e.g.,* Silver Star Petition at 5; Rural Associations Petition at 3-6.

<sup>41</sup> *Alenco*, 201 F.3d at 622 (explaining that "the Commission reasonably construed the predictability principle to require only predictable rules that govern distribution of subsidies....").

<sup>42</sup> *See* 47 C.F.R. §§ 36.601-31.

importantly, even if carriers with expenses greater than the benchmarks reduce their costs to the benchmarks, the benchmarks will remain the same. That is, concerns that the benchmarks will “shift beneath and among carriers” and will “‘trap’ different carriers in subsequent years” are unfounded.<sup>43</sup> If carriers with costs above 90<sup>th</sup> percentile lower their costs to the 90<sup>th</sup> percentile, the coefficients on the quantile regressions will not change, and therefore the benchmarks will not change.<sup>44</sup> In sum, independent variables will not change quickly or unexpectedly, and we do not expect changes to the dependent variable to lead to large changes in the benchmarks.

14. We also rebut the claim that the benchmarking methodology is riddled with errors that produce inaccurate results (and, correspondingly, insufficient support).<sup>45</sup> We note that the Tenth Circuit in *Qwest I* upheld an FCC cost model also used to determine high-cost universal service support distributions against a similar challenge, explaining that the model at issue “is in the nature of rate-making and deserves strong deference to agency expertise.”<sup>46</sup> It then found that “while Qwest [the petitioner] notes analytic problems with...the model it has not presented any evidence that the model overall produces such inaccurate results that it cannot form the basis of rational decision-making.”<sup>47</sup> As the Tenth Circuit explained, “[t]he model is meant to estimate the costs of providing service,” so “[i]t need not reflect physical reality in all aspects if it produces ‘reasonably accurate estimates.’”<sup>48</sup> The benchmarking methodology, like the model at issue in *Qwest I*, is used to *estimate* the cost to provide telephone service in rural, insular, and high-cost areas. Accordingly, we find no merit to Petitioners’ claims that the caps on capital and operating expenses produced by the benchmarking methodology are arbitrary and capricious simply because the FCC lacks precisely accurate data for each and every of the more than 700 rate-of-return incumbent local exchange carriers (ILECs) whose costs are estimated by the methodology.

15. In any event, Petitioners have failed to demonstrate that the benchmarking methodology produces inaccurate results. EATEL, for example, complains that inaccurate data for a single carrier are likely to threaten the validity of the regression analysis as a whole.<sup>49</sup> On the contrary, one benefit of quantile regression analysis is that it is relatively stable when compared to ordinary least squares regression.<sup>50</sup> That is, because quantile regression analysis is more resistant to the presence of outliers, inaccurate data for a single carrier are less likely to affect the other carriers’ results.<sup>51</sup> Accordingly, a waiver for the individual carrier affected—rather than a stay of the benchmarks altogether—is the appropriate remedy where data inaccuracies occur.<sup>52</sup>

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<sup>43</sup> Letter from Michael R. Romano, NTCA, to Marlene H. Dortch, FCC, WC Docket Nos. 10-90 et. al, at 1 (filed May 22, 2012); Letter from Michael Romano, NTCA, to Marlene Dortch, FCC, WC Docket Nos. 10-90 et. al, at 2 (filed May 14, 2012).

<sup>44</sup> For the intuition behind this notion, consider the group of numbers 1,2,3,4,5,6,7,8,9,10, and 11. The 90<sup>th</sup> percentile value is 10. If the 11 in the group is lowered to 10, the 90<sup>th</sup> percentile is still 10. The same principle applies to quantile regression. This differs from an ordinary least squares regression-based model where any carrier lowering its cost, even if it does not lower its cost to the benchmark, will lower the benchmark for all.

<sup>45</sup> See, e.g., Rural Associations Petition at 6-9.

<sup>46</sup> *Qwest Corp. v. FCC*, 258 F.3d 1191, 1206 (2001) (“*Qwest I*”) (citing *Southwestern Bell Tel. Co. v. FCC*, 168 F.3d 1344, 1352 (D.C. Cir. 1999)).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> See EATEL Petition at 7.

<sup>50</sup> See *HCLS Benchmarks Implementation Order* at App. A, paras. 60-61.

<sup>51</sup> See *id.*

<sup>52</sup> *HCLS Benchmarks Implementation Order* at 13-14, para. 27; see also *supra* para. 8.

### C. Other Interested Parties Would be Harmed by a Stay

16. Additionally, the Petitioners fail to show that a stay would not harm other interested parties. In fact, granting a stay would harm other interested parties. Although some companies will lose some support when the benchmarks are implemented, others will receive additional, redistributed support.<sup>53</sup> Only about 20% of the study areas with very high costs compared to their similarly situated peers will see their support limited.<sup>54</sup> But approximately 80% of the study areas will receive some of the freed-up support.<sup>55</sup> Granting the Petitioners' requests for stay would harm these other companies and the customers they serve, which would otherwise receive additional funding for broadband investment.<sup>56</sup>

17. Moreover, NCTA and CTIA point out that granting a stay would harm other interested parties—not just rate-of-return carriers. NCTA notes that “[n]o petition addresses the harm to competing providers if the stay requests were to be granted and ROR incumbent LECs were allowed to continue receiving excessive and inefficient amounts of HCLS in areas where the support is not warranted.”<sup>57</sup> NCTA argues that granting a stay that allows a company to continue receiving current levels of high-cost support “would be a waste of limited government resources” and would be “tremendously harmful” to other companies operating in the study area.<sup>58</sup> CTIA notes that if a stay were granted, “other carriers’ customers will be forced to bear the burden of absorbing RoR ILECs’ excessive costs.”<sup>59</sup> CTIA also observes that “the Commission’s new USF regime is dependent upon an overall budget for the fund, and if the Commission delays or fails to implement responsible limits on legacy RoR ILEC funding, it would put at risk other funding priorities.”<sup>60</sup>

### D. A Stay Would Not Be in the Public Interest

18. Finally, we are not persuaded by the Petitioners’ contention that a stay would be in the public interest. Here, the claims of Silver Star, Blue Valley, and the Rural Associations hinge on the assumption that, without a stay, they will be unable to deliver quality and affordable service to their customers.<sup>61</sup> But as discussed earlier, they have failed to demonstrate that the benchmarks would cause them irreparable harm.<sup>62</sup> And even if the Petitioners are threatened with harm, they could avail themselves of the waiver procedures.<sup>63</sup> Moreover, the public has a strong interest in the benchmarks being implemented as currently scheduled. As explained in the *USF/ICC Transformation Order*, the benchmarks are a response to problematic incentives and inequitable distribution of support created by prior rules, which allowed some carriers with high loop costs to recover 100% of their marginal loop costs

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<sup>53</sup> While approximately 20% of the study areas with very high costs relative to their similarly situated peers will see their support limited, approximately 80% of the study areas will receive additional, redistributed support. *See HCLS Benchmarks Implementation Order* at 2, para. 4.

<sup>54</sup> *See id.*

<sup>55</sup> *See id.*

<sup>56</sup> *HCLS Benchmarks Implementation Order* at 2, para. 4. *See also* NCTA Opposition at 3-4 (“The petitioners also ignore the harm that a stay would cause to consumers in the hundreds of study areas that would receive additional support as a result of the benchmarking methodology.”).

<sup>57</sup> NCTA Petition at 2.

<sup>58</sup> *Id.* at 3.

<sup>59</sup> CTIA Petition at 7.

<sup>60</sup> *Id.*

<sup>61</sup> *See, e.g.,* Silver Star Petition at 7-8; Blue Valley Petition at 6-7; Rural Associations Petition at 13-15.

<sup>62</sup> *See supra* paras. 7-10.

<sup>63</sup> *See supra* para. 9.

above a certain threshold from the federal universal service fund.<sup>64</sup> Because these carriers generally faced no overall limits on their expenditures, they have the incentive to increase loop costs with little regard to efficiency or the burden on the Fund, and without regard to whether a lesser amount would be sufficient to provide supported services to their customers.<sup>65</sup> Meanwhile, because overall HCLS is capped, carriers that did take measures to reduce costs to operate more efficiently lost support to their peers that increased costs.<sup>66</sup> Staying implementation of this rule would perpetuate these problematic incentives and inequities and delay reforms intended to benefit consumers.<sup>67</sup>

#### IV. ORDERING CLAUSES

19. Accordingly, IT IS ORDERED, pursuant to the authority contained in section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and pursuant to sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291 and pursuant to the delegations of authority in paragraphs 210, 217, 226, and 1404 of the *USF/ICC Transformation Order*, 26 FCC Rcd 17663 (2011), that Silver Star's Petition for Stay is DENIED.

20. Accordingly, IT IS ORDERED, pursuant to the authority contained in section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and pursuant to sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291 and pursuant to the delegations of authority in paragraphs 210, 217, 226, and 1404 of the *USF/ICC Transformation Order*, 26 FCC Rcd 17663 (2011), that Blue Valley's Petition for Stay is DENIED.

21. IT IS FURTHER ORDERED, pursuant to the authority contained in section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and pursuant to sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291 and pursuant to the delegations of authority in paragraphs 210, 217, 226, and 1404 of the *USF/ICC Transformation Order*, 26 FCC Rcd 17663 (2011), that EATEL's Petition for Stay is DENIED.

22. IT IS FURTHER ORDERED, pursuant to the authority contained in section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and pursuant to sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291 and pursuant to the delegations of authority in paragraphs 210, 217, 226, and 1404 of the *USF/ICC Transformation Order*, 26 FCC Rcd 17663 (2011), that the Rural Associations' Petition for Stay is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Sharon E. Gillett  
Chief  
Wireline Competition Bureau

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<sup>64</sup> See *USF/ICC Transformation Order* at 17741-42, paras. 211-212; see also *HCLS Benchmarks Implementation Order* at 1-2, paras. 1-2.

<sup>65</sup> *HCLS Benchmarks Implementation Order* at 1-2, para. 2.

<sup>66</sup> *Id.*

<sup>67</sup> We note that Commission action in the universal service context to reign in growth that harms consumers and to promote efficiency has been upheld by a number of courts. See, e.g. *Rural Cellular*, 588 F.3d at 1102-05; *Vermont Pub. Serv. Comm'n*, 661 F.3d at 61-64. See also *Sorenson Commc'ns, Inc. v. FCC*, 659 F.3d 1035 (10th Cir. 2011) (affirming interim FCC rate rules designed to promote efficiency and deter escalating costs of providing Video Relay Service).