

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

In the Matter of	)	
	)	
Lifeline and Link Up Reform and Modernization	)	WC Docket No. 11-42
	)	
Telecommunications Carriers Eligible for Universal Service Support	)	WC Docket No. 09-197
	)	
Connect America Fund	)	WC Docket No. 10-90

**ORDER DENYING STAY PETITION**

**Adopted: November 6, 2015**

**Released: November 6, 2015**

By the Chief, Wireline Competition Bureau:

**I. INTRODUCTION**

1. On October 16, 2015, Assist Wireless, LLC, Easy Telephone Services Company d/b/a Easy Wireless, TerraCom, Inc., and True Wireless, LLC (Petitioners) filed a petition for partial stay of the *2015 Lifeline Reform Order*, pending judicial review.<sup>1</sup> For the reasons discussed below, we deny the Petitioners' request for stay.

**II. BACKGROUND**

2. In 2000, the Federal Communications Commission adopted Tribal Lifeline and Link Up support, establishing that customers living on "Tribal lands" are eligible to receive enhanced support.<sup>2</sup> The Commission further defined "Tribal lands" to include "any federally recognized Tribe's reservation, Pueblo, or Colony, including former reservations in Oklahoma," and "near reservation" areas.<sup>3</sup> Until this year, the Commission had not defined the boundaries of the "former reservations in Oklahoma" for purposes of enhanced Lifeline support. Moreover, various maps at the state and federal levels defining the boundaries of the former reservations in Oklahoma are inconsistent.<sup>4</sup> In practice, based on informal guidance provided by staff of the Commission in 2004, the Universal Service Administrative Company (USAC) had distributed Tribal support in Oklahoma based on a map hosted on the Oklahoma Corporation Commission's (OCC) website.<sup>5</sup>

<sup>1</sup> Joint Petition for Partial Stay of Assist Wireless, LLC, Easy Telephone Services Company d/b/a Easy Wireless, TerraCom, Inc., and True Wireless, LLC, WC Docket Nos. 11-42, et al., (filed Oct. 16, 2015) (Joint Petition).

<sup>2</sup> See *Federal-State Joint Board on Universal Service et al.*, CC Docket No. 96-45 et al., Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 15 FCC Rcd 12208, 12235, para. 42 (2000) (*2000 Tribal Order*).

<sup>3</sup> See *2000 Tribal Order*, 15 FCC Rcd at 12218-19, paras. 17-18 (citing 25 C.F.R. § 20.1(r), (v)).

<sup>4</sup> See *Lifeline and Link Up Reform and Modernization et al.*, WC Docket No. 11-42 et al., Second Further Notice of Proposed Rulemaking, Order on Reconsideration, Second Report and Order, and Memorandum Opinion and Order, 30 FCC Rcd 7818, 7906, para. 258 (rel. June 22, 2015) (*2015 Lifeline Reform Order*).

<sup>5</sup> See *id.*

3. On June 18, 2015, the Commission adopted the *2015 Lifeline Reform Order* or *Order*, further modernizing the Lifeline program.<sup>6</sup> In the *Order*, the Commission departed from the staff's prior informal guidance and interpreted "the former reservations in Oklahoma" within section 54.400(e) of the Commission's rules to be defined by "the geographic boundaries reflected in the Historical Map of Oklahoma 1870-1890 (Oklahoma Historical Map)."<sup>7</sup> The Commission concluded that its use of the Oklahoma Historical Map to interpret the relevant term in its rules "comport[s] with the complex legal history within Oklahoma and uphold[s] our government-to-government responsibilities to the Oklahoma Tribal Nations, while also improving administration of the Lifeline program and distribution of enhanced Tribal support."<sup>8</sup> The Commission also provided a transition period of 180 days from the effective date of the *Order*, in order to ensure that all affected parties have sufficient time to transition to the Oklahoma Historical Map, making the interpretation effective on February 9, 2016.<sup>9</sup> During that transition period, the Commission directed the Office of Native Affairs and Policy (ONAP), in coordination with the Bureau and other Commission Bureaus and Offices, to consult with the Tribal Nations in Oklahoma to ensure the accuracy and operational effectiveness of the boundaries as presented in the Oklahoma Historical Map.<sup>10</sup>

4. On October 16, 2015, Petitioners filed a petition for partial stay of the *Order* insofar as it relates to the implementation of the Oklahoma Historical Map, pending judicial review of the *Order*. Petitioners request a ruling on their petitions by November 6, 2015, "[t]o allow adequate time to seek a judicial stay[.]"<sup>11</sup>

### III. DISCUSSION

5. In determining whether to stay the effectiveness of one of its Orders, the Commission applies the traditional four-factor test employed by the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit").<sup>12</sup> To qualify for the extraordinary remedy of a stay, a petitioner must show that: (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm absent the grant of preliminary relief; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest would favor grant of the stay. For the reasons described below, we conclude that Petitioners have failed to meet the test for this extraordinary equitable relief.

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<sup>6</sup> *2015 Lifeline Reform Order*, 30 FCC Rcd 7818.

<sup>7</sup> *Id.* at 7903, para. 257 (citing Oklahoma Historical Map, 1870-1890, Plate 6, Webb Publishing Company, Oklahoma City, OK (1917) (Copyright 1917, George Rainey, Enid, OK; Engraved George F. Cram Company, Chicago, IL)); 47 C.F.R. § 54.400(e).

<sup>8</sup> *Id.* at 7904, para. 259.

<sup>9</sup> *See id.* at 7903-04, paras. 257, 260, 265. The Commission established that the *Order* would be effective 30 days after publication in the Federal Register. *Id.* at 7917, para. 298. The *Order* was published in the Federal Register on July 14, 2015. *See* Federal Communications Commission, Lifeline and Link Up Reform and Modernization, Telecommunications Carriers Eligible for Universal Service Support, Connect America Fund, Final Rule, 80 Fed. Reg. 40923, 40929-30 (July 14, 2015).

<sup>10</sup> *See 2015 Lifeline Reform Order*, 30 FCC Rcd at 7907, para. 265. If, based on these consultations, the Bureau finds that the Commission should depart from the Oklahoma Historical Map for purposes of interpreting section 54.400(e) of the Commission's rules, the Bureau, in coordination with ONAP, is directed to recommend to the Commission an order that would further revise the Commission's interpretation of the appropriate boundaries for the former reservations in Oklahoma. *See id.* at 7907, para. 266.

<sup>11</sup> Joint Petition at 2.

<sup>12</sup> *See Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977) (*Holiday Tours*); *Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958) (*VA Petroleum Jobbers*).

**A. Petitioners are Unlikely to Prevail on the Merits**

6. Petitioners have failed to demonstrate that they are likely to succeed on the merits. The Commission's determination that the "former reservations in Oklahoma" are most accurately defined by the geographic boundaries reflected in the Oklahoma Historical Map does not run afoul of the Administrative Procedure Act (APA). Petitioners assert that the Commission violated the APA because the Commission was allegedly required to provide notice and seek comment on the adoption of the Oklahoma Historical Map and the *Order* is arbitrary and capricious.<sup>13</sup> These contentions lack merit.

7. *The APA Did Not Require the Commission to Provide Notice and Seek Comment Prior to Interpreting the Meaning of "Former Reservations in Oklahoma."* Petitioners argue that the Commission violated the APA by failing to provide notice and seek comment on the Oklahoma Historical Map.<sup>14</sup> However, as the Commission explained in the *Order*, the Commission did not change section 54.400(e) of the Commission's rules or adopt a construction inconsistent with that rule, but rather interpreted for the first time what is meant by "former reservations in Oklahoma" within section 54.400(e) of the rules.<sup>15</sup> The Commission simply "advise[d] the public of the agency's construction of the . . . rules which it administers."<sup>16</sup> As a result, the Commission is not required to provide notice and seek comment under the APA.<sup>17</sup>

8. *The Decision to Use the Oklahoma Historical Map Was Not Arbitrary or Capricious.* Petitioners raise multiple arguments that the Commission's decision to use the Oklahoma Historical Map was arbitrary and capricious, none of which are persuasive.<sup>18</sup> First, Petitioners contend that the Commission neglected to consult with Tribal governments and failed to explain the lack of consultation in the *Order*.<sup>19</sup> However, the Commission's policy is to "consult with Tribal governments prior to implementing any regulatory action or policy that will significantly or uniquely affect Tribal governments, their land and resources."<sup>20</sup> As an initial matter, Petitioners have not demonstrated that the action taken in the *Order* meets that standard, i.e., that it is a "regulatory action or policy" and that it will "significantly or uniquely" affects Tribal governments, their land, and resources. Unlike a new rule that changes Commission policy—such as questions in the *Further Notice* that accompanied the *Order* regarding whether the Commission should alter the existing rule that provides enhanced Tribal support for low-income recipients residing on Tribal lands<sup>21</sup>—in the *Order*, the Commission merely adopted a formal interpretation of the existing rule and did so by using a recognized BIA map of former reservations in Oklahoma. Petitioners also overlook the fact that, despite not having taken an action of the sort contemplated by the policy on Tribal consultation, the *Order* nevertheless provides a lengthy transition period before the interpretation takes effect and explicitly directs ONAP, in coordination with other Commission Bureaus and Offices, "to engage in government-to-government consultation with the Tribal

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<sup>13</sup> See Joint Petition at 11-14.

<sup>14</sup> See *id.* at 11-13.

<sup>15</sup> See *2015 Lifeline Reform Order*, 30 FCC Rcd at 7904-05, para. 260 n.523.

<sup>16</sup> See *id.* (quoting *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1204 (2015); *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 99 (1995)).

<sup>17</sup> See *Perez*, 135 S. Ct. at 1206.

<sup>18</sup> See Joint Petition at 13-14.

<sup>19</sup> See *id.* at 13.

<sup>20</sup> *Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*, Policy Statement, 16 FCC Rcd 4078, 4081 (rel. June 23, 2000).

<sup>21</sup> See *2015 Lifeline Reform Order*, 30 FCC Rcd at 7873-77, paras. 158-71. The Commission directed ONAP, in coordination with the Bureau, to engage in government-to-government consultation with Tribal Nations on the questions in the *Further Notice* regarding the rules for enhanced Tribal Lifeline support. *Id.* at 7877, paras. 170-71.

Nations in Oklahoma” prior to the implementation of the Oklahoma Historical Map.<sup>22</sup> As a result, Petitioners’ arguments that the Commission has neglected to consult with Tribal governments in a manner consistent with its stated policy and to explain its lack of consultation both fail.

9. Second, Petitioners argue the *Order* is arbitrary and capricious because it failed to explain how lands previously considered “former reservations” could be excluded from “former reservations” under the *Order*.<sup>23</sup> This argument too is unpersuasive because the *Order* sets forth the Commission’s reasons for departing from USAC’s past practice, which was based on informal guidance from Commission staff.<sup>24</sup> The Commission explained that it interpreted “former reservations in Oklahoma” to be defined by the geographic boundaries reflected in the Oklahoma Historical Map because that interpretation more accurately “comports with the complex legal history within Oklahoma,”<sup>25</sup> and “improv[es] administration of the Lifeline program and distribution of enhanced Tribal support.”<sup>26</sup> The *Order* also explains that the Oklahoma Historical Map “represents actual former reservation boundaries prescribed by Acts of Congress – both laws and treaties,”<sup>27</sup> provides more clarity for the address-based eligibility criteria used in the Lifeline program,<sup>28</sup> and “ensure[s] that funds are allocated for the intended purpose of assisting those living on Tribal lands, which typically have lower adoption rates for telecommunications services.”<sup>29</sup>

10. Third, contrary to another claim by Petitioners,<sup>30</sup> the Commission accounted for any impact the interpretation will have on carriers and subscribers, by ensuring that affected parties have sufficient time to transition to the Oklahoma Historical Map.<sup>31</sup> Moreover, Lifeline-eligible subscribers in areas formerly treated as residing on “former reservations in Oklahoma” under past USAC practice will remain eligible for the basic Lifeline discount just like other similarly situated subscribers.<sup>32</sup>

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<sup>22</sup> See *2015 Lifeline Reform Order*, 30 FCC Rcd at 7903, 7907, paras. 257, 265. The *Order* even directs the Bureau, in coordination with ONAP, to recommend an order to the Commission that would further revise the Commission’s interpretation of the “former reservations in Oklahoma” if the Bureaus finds, based on the consultations, that the Commission should depart from the Oklahoma Historical Map to better reflect section 54.400(e) of the Commission’s rules. *Id.* 7907, para. 266.

<sup>23</sup> See Joint Petition at 14.

<sup>24</sup> It is well-established that informal staff guidance is not binding on the Commission. See, e.g., *Vernal Enterprises, Inc. v. FCC*, 355 F.3d 650, 660 (D.C. Cir. 2004). See also *Cnty. Care Found. v. Thompson*, 318 F.3d 219, 227 (D.C. Cir. 2003) (“There is no authority for the proposition that a lower component of a government agency may bind the decision making of the highest level.”); *Comcast Corp. v. FCC*, 526 F.3d 763 (D.C. Cir. 2008) (“[A] long line of cases in this circuit . . . unambiguously holds that an agency is not bound by unchallenged staff decisions.”).

<sup>25</sup> *2015 Lifeline Reform Order*, 30 FCC Rcd at 7903-05, paras. 257, 259-62.

<sup>26</sup> *Id.* at 7904, para. 259.

<sup>27</sup> *Id.* at 7906, para. 263.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 7906, para. 262 (citing *2000 Tribal Order*, 15 FCC Rcd at 12235, para. 51).

<sup>30</sup> See Joint Petition at 14.

<sup>31</sup> See *2015 Lifeline Reform Order*, 30 FCC Rcd at 7903-04, 7906-07, paras. 257, 260, 264-67.

<sup>32</sup> See generally 47 C.F.R. § 54.403. There is no entitlement to support except to the extent provided for by Commission rules, and thus insofar as the proper interpretation of our rules results in some reduction in support relative to USAC’s historical practice, that result does not itself undermine the Commission’s interpretation. *Lifeline and Link Up Reform and Modernization et al.*, WC Docket No. 11-42 et al., Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 6656, 6743, 6759, para. 201 n.159, 238 (2012) (*2012 Lifeline Reform Order*).

11. Fourth, Petitioners argue that the *Order* is arbitrary and capricious because it did not reconcile its use of the Oklahoma Historical Map with the Department of the Interior's Bureau of Indian Affairs (BIA) rules for financial assistance and social support programs.<sup>33</sup> The Commission's interpretation of "former reservations in Oklahoma," however, is limited to the administration of the Lifeline program, and other support programs targeted to Tribal communities may properly use different rules that encompass correspondingly different geographic areas.<sup>34</sup> Moreover, Petitioners cannot plausibly claim that the Commission's reliance on the Oklahoma Historical Map is inconsistent with the BIA's views regarding the location of former reservations in Oklahoma. The *Order* explicitly states that the Commission received the Oklahoma Historical Map from BIA and, "consistent with [the Commission's] past and present recognition of the BIA's expertise and its federal trust relationship and responsibilities to Tribal Nations," relied on the Oklahoma Historical Map as a more accurate reflection of "former reservations in Oklahoma."<sup>35</sup> Recognizing the Department of the Interior's "jurisdictional authority over many administrative trust responsibilities with respect to the Tribal lands in Oklahoma," the Commission adopted the Oklahoma Historical Map and departed from the map that had previously been used based on informal guidance from Commission staff in 2004.<sup>36</sup>

12. Finally, Petitioners argue that the *Order* does not take into account problems administering the Oklahoma Historical Map due to uncertainty over the exact boundaries reflected in the map.<sup>37</sup> As described above, the Commission established a transition and consultation period to allow sufficient time for the Commission to consult with relevant Tribal governments, to seek input from the OCC, and to coordinate a seamless transition to the Oklahoma Historical Map.<sup>38</sup> In addition, by providing a formal Commission interpretation of what is meant by the term "former reservations in Oklahoma" found in the rules, the Commission has provided considerably greater certainty than existed prior to the *Order*. That is, until the *Order*, the question of how USAC would determine the boundaries of former reservations in Oklahoma in its administration of the Lifeline program could have changed at any time and without any transition period, whereas now it is the subject of a Commission-level decision which USAC, Commission staff, and all other parties affected are bound to follow.

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<sup>33</sup> See Joint Petition at 14. Petitioners do not reference any specific support program. See *id.* While Petitioners assert that the Commission "modeled its definitions of Tribal territories (including former reservations) on those BIA rules," see *id.*, the Commission previously made clear that that its interpretation of the term "Tribal lands" was not intended to encompass areas identical to any BIA financial assistance and social support programs. See, e.g., *Federal-State Joint Board on Universal Service et al.*, CC Docket No. 96-45, Twenty-Fifth Order on Reconsideration, Report and Order, Order, and Further Notice of Proposed Rulemaking, 18 FCC Rcd 10958, 10966-67, paras. 16-17 (2003) (declining to interpret "Tribal lands" for universal service purposes to fully reflect revised BIA rules governing areas receiving assistance, and making clear that the scope of Tribal lands would not automatically match BIA rule changes, while citing BIA's continued provision of assistance in certain areas as one factor supporting the decision not to revise the Commission's definition of "Tribal lands" to omit certain areas even though they were no longer expressly identified in BIA rules (in addition to the Commission's conclusion that this outcome would ensure its rules "remain consistent with the underlying goals of the Commission's enhanced Lifeline and Link-Up programs")).

<sup>34</sup> We note that at least one other federal program excludes certain higher density geographic areas in Oklahoma from Tribal income assistance programs in Oklahoma. The United States Department of Agriculture's Food Distribution Program on Indian Reservations excludes from eligibility residents of towns or cities in Oklahoma with populations greater than 10,000. See *2015 Lifeline Reform Order*, 30 FCC Rcd. at 7876, para. 170 (citing 7 C.F.R. §§ 254.2(h), 254.5(b)).

<sup>35</sup> See *id.* at 7903, 7905-06, paras. 257, 261-63.

<sup>36</sup> See *id.* at 7904-05, paras. 258, 262.

<sup>37</sup> See Joint Petition at 14.

<sup>38</sup> See *2015 Lifeline Reform Order*, 30 FCC Rcd at 7907, paras. 265-67.

13. For the reasons stated above, Petitioners have failed to demonstrate a likelihood of success on the merits.

**B. Petitioners Will Not Suffer Irreparable Injury**

14. Several general principles govern the irreparable injury inquiry. First, “the injury must be both certain and great; it must be actual and not theoretical.”<sup>39</sup> A petitioner must also “substantiate the claim that the irreparable injury is ‘likely’ to occur. . . . Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will in fact occur.”<sup>40</sup> Further, it is “well settled that economic loss does not, in and of itself, constitute irreparable harm.”<sup>41</sup> There are two exceptions to this rule, neither of which applies to petitioners: (1) when the economic loss threatens the “very existence of the movant’s business,”<sup>42</sup> and (2) when the economic loss is great, certain, and imminent.<sup>43</sup>

15. Petitioners have failed to prove that they will suffer an irreparable injury absent a grant of their stay petitions. TerraCom, Easy Wireless, and Assist Wireless do not claim that their businesses’ “very existence[s]” are threatened, and their alleged economic harms are both unsubstantiated and insufficient to warrant a stay. While True Wireless alleges that it will “likely” be forced to close,<sup>44</sup> this unsubstantiated allegation is insufficient to warrant a stay.

16. *TerraCom, Easy Wireless, and Assist Wireless.* TerraCom, Easy Wireless, and Assist Wireless’s alleged harms are economic losses that do not warrant a stay because they are neither great nor certain. Although Petitioners claim that the new map will also lead to a loss of consumer goodwill,<sup>45</sup> goodwill has been specifically classified as a type of economic loss that is not irreparable.<sup>46</sup> An economic injury sufficiently “great” to warrant a stay must be both “serious in terms of its effect on the [petitioner]” and unrecoverable.<sup>47</sup> The “mere fact that economic losses may be unrecoverable does not, in and of itself, compel a finding of irreparable harm.”<sup>48</sup>

17. Petitioners’ alleged losses are insufficient to warrant a stay. An alleged economic injury is evaluated in “comparison with the overall financial wherewithal of the corporation involved.”<sup>49</sup> Here, Petitioners have not provided any information about their respective financial status or total revenues, and instead have simply asserted that their lost revenue would be significant enough to warrant a stay. The closest Petitioners come to providing revenue figures is their statement that their combined total revenue would be reduced “by over 1.484 million dollars per month,”<sup>50</sup> and that they currently “serve over 170,000 customers in Oklahoma,” the majority of whom will remain eligible for the enhanced subsidy, and all of whom will remain eligible for Lifeline.<sup>51</sup> As a threshold matter, each petitioner has previously

<sup>39</sup> *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

<sup>40</sup> *Wisconsin Gas Co.*, 758 F.2d at 674.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Cardinal Health, Inc. v. Holder*, 846 F. Supp. 2d 203, 211 (D.D.C. 2012).

<sup>44</sup> Joint Petition at Attach. 2 (Declaration of Michael Fina, President, True Wireless), at 2.

<sup>45</sup> Joint Petition at 17.

<sup>46</sup> *Clipper Cruise Line, Inc. v. United States*, 855 F. Supp. 1, 4 (D.D.C. 1994).

<sup>47</sup> *Gulf Oil Corp. v. Dep’t of Energy*, 514 F. Supp. 1019, 1026 (D.D.C. 1981).

<sup>48</sup> *Nat’l Min. Ass’n v. Jackson*, 768 F. Supp. 2d 34, 53 (D.D.C. 2011).

<sup>49</sup> *Mylan Labs., Inc. v. Leavitt*, 484 F. Supp. 2d 109, 123 (D.D.C. 2007).

<sup>50</sup> Joint Petition at 15 (discussing the revenue differential upon conversion of certain customers to the standard \$9.25 subsidy).

<sup>51</sup> *Id.* (stating that 59,370 customers reside in areas no longer considered Tribal lands).

certified that it does not rely solely on USF disbursements because it has non-Lifeline customers and additional revenue sources.<sup>52</sup> Even assuming, *arguendo*, that Petitioners' gross revenues were limited to Lifeline funds, the projected losses would be insufficient to warrant a stay. Through October, Petitioners together have received USF disbursements of over \$68 million in 2015, with an average monthly disbursement of over \$6.8 million.<sup>53</sup> Accordingly, Petitioners' projected losses are, at most, twenty-two percent of their gross revenues.<sup>54</sup> These projected losses do not warrant a stay, because a loss of "approximately twenty-five percent" of projected gross revenues is insufficient to constitute the type of irreparable injury that warrants a stay.<sup>55</sup> Accordingly, Petitioners' claimed injuries are insufficient to warrant a stay.

18. Petitioners' alleged harms are also recoverable. An economic loss is unrecoverable when an affected party has no recourse to recoup funds it is legally entitled to, thereby necessitating a stay. Both cases Petitioners cite to support their claim that their alleged losses are not recoverable involve already-earned compensation being withheld or taken away.<sup>56</sup> Petitioners' alleged losses are materially different because Petitioners have no legal rights to any greater future USF disbursements than provided for under Commission rules,<sup>57</sup> because they are simply eligible for, and not entitled to, USF funds.<sup>58</sup> As explained above, as interpreted by the Commission, those rules do not provide for enhanced Tribal support in the areas of Oklahoma of concern to Petitioners. Additionally, Petitioners have certified to the Commission that they have revenue streams distinct from the USF, which provides an additional avenue to sustain their businesses.<sup>59</sup> Because Petitioners have not shown that their alleged injuries are unrecoverable, a stay is not warranted.

19. The alleged injuries are also not certain. Petitioners state that they expect that "many of the customers faced with a reduction in services will drop service altogether,"<sup>60</sup> but they do not explain why a customer would prefer to have no phone service instead of phone service at the levels of Lifeline

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<sup>52</sup> Compliance Plan of Assist Wireless, WC Docket No. 11-42 et al., at 4 (filed June 29, 2012) (Assist Wireless Compliance Plan); Compliance Plan of True Wireless, WC Docket No. 11-42 et al., at 34 (filed June 1, 2012) (True Wireless Compliance Plan); Third Revised Compliance plan of TerraCom, WC Docket No. 11-42 et al., at 29 (filed June 19, 2012) (TerraCom Compliance Plan) ("So, TerraCom does not, and does not intend to, offer exclusively Lifeline supported services—and is therefore not exclusively dependent on USAC for its revenue."); Compliance plan of Easy Wireless, WC Docket No. 11-42 et al., at 23 (filed March 4, 2013) (Easy Wireless Compliance Plan) ("The Company generates substantial revenues from non-Lifeline services and, consequently, has not and will not be relying exclusively on Lifeline reimbursement for the Company's operating revenues.").

<sup>53</sup> See USAC Disbursement Tool, <http://www.usac.org/li/tools/disbursements/default.aspx> (providing the disbursement amounts for ETCs by study area code (SAC) for each month, and showing Petitioners' combined 2015 USF disbursements of \$68,447,400.00, thereby producing an average monthly USF disbursement of \$6,844,740 (68,447,400/10)) (last visited October 30, 2015).

<sup>54</sup>  $1,484,000/6,844,740=.217$

<sup>55</sup> *Arrow Air, Inc. v. United States*, 649 F. Supp. 993, 1000 (D.D.C. 1986).

<sup>56</sup> In *Brendsel v. Office of Fed. Hous. Enter. Oversight*, 339 F. Supp. 2d 52 (D.D.C. 2004), petitioner's already-earned compensation was being withheld, and his stock options would have expired before the merits of his case were heard. In *Texas Children's Hosp. v. Burwell*, 76 F. Supp. 3d 224, 234 (D.D.C. 2014), the court emphasized that the petitioning hospitals treated patients without the ability to pay, and the proposed rule change would lead to the hospitals having already-earned funds recouped from them

<sup>57</sup> *In re FCC 11-161*, 753 F.3d 1015, 1088 (10th Cir. 2014).

<sup>58</sup> *Id. Compare with Hi-Tech Pharmacal Co. v. U.S. Food & Drug Admin.*, 587 F. Supp. 2d 1, 11 (D.D.C. 2008) (Finding that the loss of a *statutory entitlement* to an *exclusive* marketing period for a generic drug could constitute irreparable harm) (emphasis added).

<sup>59</sup> See *supra* n. 52

<sup>60</sup> Joint Petition at 16.

support provided in areas not entitled to enhanced Tribal support. Each customer currently eligible for the enhanced Tribal benefit will remain eligible for the standard \$9.25 benefit, and Petitioners fail to provide any basis upon which to conclude that these customers will choose not to use it. Moreover, Petitioners do not explain why customers who reside in areas not considered Tribal lands under the interpretation in the *2015 Lifeline Reform Order* would switch to a different provider when that different provider would be similarly unable to offer an enhanced Lifeline discount. Finally, the alleged harms are speculative. Easy Wireless states that it “expects” to lose customers, and to be forced to close the majority of its storefront locations.<sup>61</sup> TerraCom states that customers are “likely” to cancel service,<sup>62</sup> and Assist “expects” that it will lose customers and “estimates” that it would have to fire “the majority” of its employees.<sup>63</sup> Without any underlying support, these are the type of “blanket, unsubstantiated allegations of harm”<sup>64</sup> that may not be used to grant a stay.

20. *True Wireless.* True Wireless states that the Commission’s interpretation of “former reservations in Oklahoma” “will likely put True Wireless out of business.”<sup>65</sup> While this would be the type of irreparable injury required for a preliminary injunction if it were borne out by evidence, something more than a “conclusory projection is necessary to show” that True Wireless will actually close as a result of the new map.<sup>66</sup> Projections that do not “offer a projection of future losses,” tie those projections to the company’s current assets, or “state with any specificity” how the projection is reached are not sufficient to prove the type of irreparable harm needed to grant a stay.<sup>67</sup>

21. Here, True Wireless has failed to provide any information beyond its own conclusory projections. It fails to provide any information about its revenue, or any indication of how it reached its conclusion that the Commission’s new map will force it out of business. Instead, it relies only on its president’s declaration that the changes will “likely” force True Wireless out of business. Allowing a mere “bald assertion”<sup>68</sup> of a company’s potential closure would significantly lower the “high bar” that has been set for proving an irreparable injury and granting a stay.<sup>69</sup> Accordingly, True Wireless has not carried its burden of proving the irreparable harm needed to warrant a stay.

**C. The Requested Stay Will Result in Harm to Others and is Contrary to the Public Interest**

22. As described below, we find that the Petitioners failed to demonstrate that the requested stay will serve the public interest and will not harm third parties.

23. Petitioners argue that a partial stay of the *Order* as it relates to the implementation of the Oklahoma Historical Map will not cause harm to any third parties and will serve the public interest.<sup>70</sup> In administering the Lifeline program, the Commission has committed itself to: (1) ensuring the availability

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<sup>61</sup> Joint Petition at Attach. 3 (Declaration of Joseph Fernandez, Owner & President, Easy Wireless), at 3.

<sup>62</sup> Joint Petition at Attach. 4 (Declaration of Dale R. Schmick, Chief Operating Officer, Terracom, Inc.), at 5.

<sup>63</sup> Joint Petition at Attach. 1 (Declaration of Byron Young, Chief Executive Officer, Assist Wireless), at 3-4.

<sup>64</sup> *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 968 F. Supp. 2d 38, 77 (D.D.C. 2013) *aff’d*, 746 F.3d 1065 (D.C. Cir. 2014) *reh’g en banc granted, opinion vacated*, 35 ITRD 2763 (D.C. Cir. 2014) and *judgment reinstated*, 760 F.3d 18 (D.C. Cir. 2014).

<sup>65</sup> Joint Petition at Attach. 2 (Declaration of Michael Fina, President, True Wireless.), at 2.

<sup>66</sup> *Nat’l Min. Ass’n v. Jackson*, 768 F. Supp. 2d 34, 52 (D.D.C. 2011).

<sup>67</sup> *Id.*

<sup>68</sup> *Int’l Internships Programs v. Napolitano*, 798 F. Supp. 2d 92, 100 (D.D.C. 2011) *order vacated, appeal dismissed sub nom. Int’l Internship Programs v. Napolitano*, 463 F. App’x 2 (D.C. Cir. 2012).

<sup>69</sup> *Coal. for Common Sense in Gov’t Procurement v. United States*, 576 F. Supp. 2d 162, 168 (D.D.C. 2008).

<sup>70</sup> See Joint Petition at 17-20.



of voice service to low-income Americans; (2) ensuring the availability of broadband service to low-income Americans; and (3) minimizing the contribution burden on consumers and businesses that pay into the Universal Service Fund to support programs like Lifeline.<sup>71</sup> As Petitioners acknowledge, when the Commission established enhanced Lifeline support for Tribal lands, the Commission sought, among other goals like affordability of service, “to promote telecommunications deployment and subscribership for the benefit of those living on federally-recognized American Indian and Alaska Native tribal lands, based on the fact that American Indian and Alaska Native communities, on average, have the lowest reported telephone subscribership levels in the country.”<sup>72</sup>

24. The *Order*'s adoption of the Oklahoma Historical Map serves the public interest by accurately targeting funds for the enhanced Lifeline subsidy to Tribal lands while minimizing the burden imposed on contributing providers and ratepayers.<sup>73</sup> In contrast, a stay of the *Order* insofar as it related to the Oklahoma Historical Map would not serve the public interest and would harm third parties by disbursing enhanced Lifeline funding for geographic areas that do not qualify as Tribal lands under our interpretation of Section 54.400(e) of the rules, and burdening contributing providers and ratepayers to bear the cost of those disbursements. To the extent that Petitioners argue a stay will serve the public interest because it will allow time for the Commission to consult with Tribal governments,<sup>74</sup> the *Order* already establishes a generous transition period in which ONAP and the Bureau will consult with the Tribal Nations in Oklahoma and any impacted Lifeline subscribers will continue receiving the enhanced Tribal subsidy throughout the transition period.<sup>75</sup> After the *Order*'s transition period is complete, delaying implementation of the Oklahoma Historical Map will not serve the public interest.

25. For the foregoing reasons we conclude that the requested stay is likely to result in harm to harm to third parties and would be contrary to the public interest.

#### IV. ORDERING CLAUSES

26. Accordingly, IT IS ORDERED, pursuant to the authority contained in sections 1, 4(i), 4(j), 5, 201, 205, and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i)-(j), 155, 201, 205, and 254 and the authority delegated pursuant to sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, this Order Denying Stay Petition in WC Docket Nos. 11-42, 09-197, and 10-90 IS ADOPTED.

27. IT IS FURTHER ORDERED that the petition for partial stay of Assist Wireless, LLC, Easy Telephone Services Company d/b/a Easy Wireless, TerraCom, Inc., and True Wireless, LLC IS DENIED.

#### FEDERAL COMMUNICATIONS COMMISSION

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<sup>71</sup> See *2015 Lifeline Reform Order*, 30 FCC Rcd at 7827, para. 15; *2012 Lifeline Reform Order*, 27 FCC Rcd at 6671, para. 25. See also *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 620 (5th Cir. 2000) (“Moreover, excessive funding may itself violate the sufficiency requirements of the Act. Because universal service is funded by a general pool subsidized by all telecommunications providers and thus indirectly by the customers excess subsidization in some cases may detract from universal service by causing rates unnecessarily to rise, thereby pricing some consumers out of the market.”); *Rural Cellular Ass’n v. FCC*, 588 F.3d 1095, 1102-03 (D.C. Cir. 2009) (quoting *Alenco*).

<sup>72</sup> *2000 Tribal Order*, 15 FCC Rcd at 12212, 12219-20, paras. 5, 20; see also Joint Petition at 18.

<sup>73</sup> The Commission notes that eligible Lifeline subscribers impacted by the implementation of the Oklahoma Historical Map will remain eligible for the Lifeline subsidy, but not for additional enhanced Lifeline support intended for Tribal lands.

<sup>74</sup> See Joint Petition at 18.

<sup>75</sup> See *2015 Lifeline Reform Order*, 30 FCC Rcd at 7907, paras. 265-67.

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