IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

RURAL CELLULAR ASSOCIATION, CELLULAR SOUTH LICENSES, INC., NE COLORADO CELLULAR, INC., CELLCOM COMPANIES, CAROLINA WEST WIRELESS, INC., BLUEGRASS CELLULAR, INC., and LEACO RURAL TELEPHONE COOPERATIVE,	)	
Petitioners,	)	Case No. 08-1284 Case No. 08-1285 Case No. 08-1286
v.	)	
FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, Respondents.	)	

OPPOSITION OF FEDERAL COMMUNICATIONS COMMISSION TO MOVANTS' MOTION FOR STAY PENDING JUDICIAL REVIEW

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INTRODUCTION

Respondent Federal Communications Commission opposes the joint motion for stay pending judicial review filed October 9, 2008, by the Rural Cellular Association and several wireless telecommunications carriers (collectively "Movants").[1] Movants ask this Court to stay an FCC Order imposing an interim cap on the amount of high-cost universal service support distributed to competitive eligible telecommunications carriers ("CETCs"). *High-Cost Universal Service Support,* 23 FCC Rcd 8834 (2008) ("*Order*"). Faced with annual high-cost support payments that had ballooned from $2.6 billion in 2001 to $4.3 billion in 2007, the FCC concluded, after seeking comment on the proposal in a Notice of Proposed Rulemaking, that the interim cap was needed to "stabilize high-cost universal service support and ensure a specific, predictable, and sufficient fund" pending comprehensive reform of the rules that led to this growth. *Order* ¶ 22.

Movants have satisfied none of the criteria for a stay and ask this Court to grant them relief on the basis of little more than their disagreement with the FCC's reasonable predictive judgment that additional growth in high-cost support could render universal service unsustainable. Under the deferential standard of review applicable to predictive judgments, Movants are highly unlikely to prevail on the merits of that claim. Further, Movants' one-paragraph argument on irreparable

[1] It appears that at least two Movants – Cellcom Companies and Carolina West Wireless, Inc. – did not participate in the FCC rulemaking that resulted in the *Order* on review and thus are not proper parties. *See* 47 U.S.C. § 405(a).

harm, Mot. 19, is vague and conclusory, and it is belied by Movants' three-month delay in seeking a stay.

REGULATORY FRAMEWORK

"Universal service has been a fundamental goal of federal telecommunications regulation since the passage of the Communications Act of 1934." *Alenco v. FCC,* 301 F.3d 608, 614 (5th Cir. 2001). The FCC traditionally employed a regime of implicit and explicit subsidies to support carriers serving customers in rural, insular, and other areas where the cost of providing service is relatively high. Without such support, telephone service in many of these areas would have been prohibitively expensive, discouraging subscribership.

When Congress sought to open local telecommunications markets to competition in the Telecommunications Act of 1996, which amended the Communications Act of 1934 (the "Act"), it recognized that fundamental changes to the universal service regime would be needed since implicit universal service subsidies would not be sustainable in a competitive environment. *Texas Office of Public Utility Counsel v. FCC,* 183 F.3d 393, 406 (5th Cir. 1999) ("*TOPUC*"). Accordingly, "[t]o attain the goal of local competition while preserving universal service, Congress directed the FCC to replace the [existing] patchwork of explicit and implicit subsidies with 'specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.'" *Id.* at 406 (quoting 47 U.S.C. § 254(b)(5)). *See also* 47 U.S.C. § 254(e) (universal service support should be "explicit"). To accomplish this task, Congress delegated to the FCC broad discretion to balance the "difficult policy choices" associated with implementing the new universal service provisions. *TOPUC*, 183 F.3d at 411.

The Act established procedures and timetables for the FCC to fulfill those duties. Congress directed the FCC to establish a Federal-State Joint Board ("the Joint Board") to "coordinate federal and state interests" related to universal service. *TOPUC*, 183 F.3d at 406. Addressing initial implementation, the Act required the Joint Board to "recommend changes … to implement … [the new universal service provisions] … and a specific timetable for completion of such recommendations," within nine months after passage. 47 U.S.C. § 254(a)(1). The Act then directed the FCC to "initiate a single [rulemaking] proceeding to implement the recommendations from the Joint Board … and … complete such proceeding within 15 months" of enactment. 47 U.S.C. § 254(a)(2). Having met those initial implementation deadlines by adopting new rules, *see TOPUC*, 183 F.3d at 406, the Act now requires the FCC to "complete any proceeding to implement subsequent recommendations from any Joint Board on universal service within one year after receiving such recommendations." 47 U.S.C. § 254(a)(2).

The FCC established the Federal Universal Service Fund ("USF") to support its universal service subsidy programs under the Act. USF is financed on the basis of assessments paid by providers of interstate telecommunications services and certain other providers of interstate telecommunications. *See* 47 C.F.R. § 54.706. Fund assessments paid by contributors are determined by applying a quarterly "contribution factor" to the contributors' interstate revenues. *Order* ¶ 6 n.27.

"Fund contributors are permitted to, and almost always do, pass those contribution assessments through to their end-user customers." *Id.*

IMPLEMENTATION OF THE UNIVERSAL SERVICE PROVISIONS

The FCC initially determined that explicit universal service subsidies would be "portable" to any carrier that serves a particular customer. "A competitive carrier that has been designated as an eligible telecommunications carrier" under the Act[2] "shall receive universal service support to the extent that it captures subscribers' lines formerly served by an [incumbent local exchange carrier or "ILEC"] receiving support or new customer lines in that ILEC's study area." *Federal-State Joint Board on Universal Service,* 12 FCC Rcd 8776, 8932 (1997). This is known as the "portability" rule. The FCC also decided that the "least burdensome way to administer... support" would be to provide CETCs the same per-line support as the ILEC, regardless of the CETCs' own costs. *Id.* This is known as the "identical support" rule.

But the rapid emergence of CETCs and the resulting growth in USF expenditures forced the Joint Board to explore modifications to the FCC's rules for high-cost universal service support soon thereafter. In 2002, the FCC asked the Joint Board to review the FCC's rules relating to high-cost support in areas where a CETC is providing service. *See Federal-State Joint Board on Universal Service,*

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[2] Only common carriers designated "eligible telecommunications carriers" ("ETCs") by a State Commission or the FCC pursuant to 47 U.S.C. § 214(e)(2) or (e)(6) may receive universal service support. ETCs must offer the services supported by Federal universal service mechanisms and advertise the availability of those services in media of general distribution. *See* 47 U.S.C. § 214(e)(1). A "competitive," *i.e.*, non-incumbent, ETC is known as a CETC.

17 FCC Rcd 22642 (2002). The Joint Board proposed rule changes concerning the designation of ETCs in high-cost areas and recommended that the FCC modify the identical support rule in a comprehensive review of high-cost mechanisms for all carriers. *See Federal-State Joint Board on Universal Service,* 19 FCC Rcd 2257 (2004). Since that time, the Joint Board has sought comment on proposals to reform high-cost support for both ILECs and CETCs. *Order* ¶¶ 2-3.

In May 2007, the Joint Board recommended that the FCC adopt an interim cap on high-cost support for CETCs while the Joint Board considered proposals for comprehensive reform. *See High-Cost Universal Service Support,* 22 FCC Rcd 8998 (2007) ("*Recommended Decision*"). The Joint Board found that "increased support to [CETCs] which receive high-cost support based on the per-line support that the [ILECs] receive rather than the [CETCs'] own costs" had led to rapid increases in the size of USF. *Recommended Decision* at 9000. "While support to [ILECs] ha[d] been flat or even declined since 2003… in the six years from 2001 to 2006, [CETC] support grew from $15 million to almost $1 billion." *Id.* Based on historical fund growth, the Joint Board concluded that "without immediate action to restrain growth in [CETC] funding, the federal universal service fund [will be] in dire jeopardy of becoming unsustainable." *Id.* at 8999.

Later that month, the FCC released a Notice of Proposed Rulemaking ("NPRM") seeking comment on a proposed interim cap pending comprehensive universal service reform. *See High-Cost Universal Service Support,* 22 FCC Rcd

9705 (2007).[3] After reviewing the comments submitted by Movants and others in response to that NPRM, in May 2008 the FCC adopted, with few modifications, the Joint Board's *Recommended Decision* and released the *Order* on review imposing an "interim, emergency cap" on the amount of high-cost support available to CETCs. Such action was necessary to "rein in the explosive growth in high-cost universal service support disbursements," which had ballooned from $2.6 billion per year in 2001 to $4.3 billion in 2007 – a 65 percent increase. *Order* ¶¶ 6, 22. The FCC attributed this growth to CETCs: "[w]hile support to incumbent LECs has been flat since 2003, competitive ETC support, in the seven years from 2001 through 2007, has grown from under $17 million to $1.18 billion – an average annual growth rate of over 100 percent." *Id.* ¶ 22. Finding that the "continued growth of the fund at this rate is not sustainable and would require excessive (and ever growing) contributions from consumers" *id.* ¶ 2, the FCC imposed the interim cap "until fundamental comprehensive reforms are adopted … and to ensure that the universal service fund will be sustainable for future years." *Id.* ¶ 7.[4]

[3] In November 2007, the Joint Board submitted its promised recommendations for comprehensive reform of high-cost universal service support. *See High-Cost Universal Service Support,* 22 FCC Rcd 20477 (2007). Based on these recommendations, the FCC released three NPRMs for comprehensive reform of the high-cost universal service support program shortly thereafter. *See High-Cost Universal Service Support*, 23 FCC Rcd 1467 (2008); *High-Cost Universal Service Support,* 23 FCC Rcd 1495 (2008); *High-Cost Universal Service Support*, 23 FCC Rcd 1531 (2008) (collectively "*Reform Notices*").

[4] The FCC did not cap ILEC high-cost support because such support "has been flat" and most ILEC support mechanisms are already capped or are subject to growth limits. *Order* ¶ 6.

As of the effective date of the *Order*,[5] "total annual competitive ETC support will be capped at the level of support that competitive ETCs in that state were eligible to receive during March 2008 on an annualized basis." *Id.* ¶ 1. The interim cap is subject to two exceptions. First, a CETC "will not be subject to the interim cap to the extent that it files cost data" with the FCC "demonstrating that its costs meet the support threshold in the same manner as the [ILEC]." *Id.* Second, the FCC adopted a "limited exception for [CETCs] serving tribal lands or Alaska Native regions." *Id.* The FCC declined to impose a fixed sunset date on the interim cap. Instead, it "commit[ed] to completing a final order on comprehensive reform as quickly as feasible after the comment cycle is completed on the pending *Reform Notices*." *Id.* ¶ 37. Comments on the *Reform Notices* were due April 17, 2008, and reply comments were due June 2, 2008. Section 254(a)(2) requires the FCC to complete any proceeding to implement the Joint Board's recommendations by November 20, 2008.[6]

ARGUMENT

To obtain the extraordinary remedy of a stay, Movants must show that: (1) they will likely prevail on the merits; (2) they will suffer irreparable harm unless a stay is granted; (3) other interested parties will not be harmed if a stay is granted;

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[5] The interim cap became effective on August 1, 2008, 30 days after the *Order* was published in the Federal Register. *See* 73 Fed. Reg. 37,882 (July 2, 2008).

[6] FCC Chairman Martin recently announced his intention to seek an FCC vote in early November on a draft order addressing universal service reform. *See* News Release, "FCC Announces Tentative Agenda for November 4th Open Meeting" (rel. Oct. 15, 2008).

and (4) a stay will serve the public interest. *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1997). Movants do not come close to satisfying this rigorous standard.

I. MOVANTS ARE NOT LIKELY TO SUCCEED ON THE MERITS

Movants raise several challenges to the lawfulness of the FCC's *Order*. None establishes a likelihood of success on the merits.

A. The FCC's Rulemaking Was Proper.

1.a. Movants assert that the Joint Board violated section 254(a) of the Act because the Joint Board did not give notice of and seek comment on the interim cap before it issued the *Recommended Decision*. Mot. 9-11. They also allege that the FCC violated the notice-and-comment rulemaking requirements of the Administrative Procedure Act ("APA"), *see* 5 U.S.C. § 553. Mot. 9. These arguments, however, are not properly before the Court because no party afforded the agency an opportunity to pass upon them before the FCC issued the *Order* on May 1, 2008. *See* 47 U.S.C. § 405(a); *Qwest Corp. v. FCC,* 482 F.3d 471, 474-77 (D.C. Cir. 2007).[7]

b. In any event, the Joint Board was under no obligation to seek notice and comment before recommending the interim cap on CETC support that the FCC

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[7] Movants raised a variation of the section 254(a) argument in an August 4, 2008 request for an administrative stay (and briefly in a subsequently withdrawn petition for reconsideration) *after* the FCC issued the *Order* on review. But they are still barred from presenting the argument to the Court. *See Petroleum Commc'ns v. FCC,* 22 F.3d 1164, 1170-71 (D.C. Cir. 1994) (an argument first raised after the FCC's record has closed is barred by section 405(a)). Movants never raised the APA argument before the FCC.

ultimately adopted. Movants misread the statute: section 254(a)(1) of the Act only requires the Joint Board to provide "notice and opportunity for public comment" as part of its *initial* "proceeding to recommend ... regulations in order to implement" the Act's universal service provisions, which, by statute, had to be completed "9 months after enactment." 47 U.S.C. § 254(a)(1). The Joint Board satisfied this requirement in 1996, *see TOPUC,* 183 F.3d at 406, and the statute imposes no separate notice-and-comment requirement upon the Joint Board in connection with subsequent proceedings. Rather, section 254(a)(2) simply provides that, after the FCC adopts rules based on the Joint Board's initial recommendation under (a)(1), the FCC "shall complete any proceeding to implement any subsequent recommendations from any Joint Board on universal service within one year…." 47 U.S.C. § 254(a)(2). The FCC did just that – it adopted the Joint Board's recommendation to impose the interim cap within one year of the statutory deadline. Contrary to Movants' claim, section 254(a) requires nothing more.

c. Moreover, Movants have no basis to claim lack of notice under section 553 of the APA. The FCC in fact sought comment on the Joint Board's recommendation in a Notice of Proposed Rulemaking, *Notice*, 22 FCC Rcd 9705, and Movants took advantage of that opportunity. The crux of Movants' complaint, therefore, is that the FCC imposed the interim cap over their objections, not that there was a failure of notice.

2. Nor is there merit to Movants' claim that the FCC cannot impose the interim cap because an "interim" rule does not fall within the narrow parameters of the rulemaking required by the first and second sentences of section 254(a)(2) (*i.e.,*

a rulemaking, to be completed within "15 months of enactment" that "include[s] a definition of the services supported" by USF and "a specific timetable for implementation"). Mot. 10-11. As discussed *supra,* the "single proceeding" mentioned in the first sentence of section 254(a)(2) only addresses *initial* universal service rules based on the Joint Board's *initial* recommendation. The FCC enacted such rules in 1997, satisfying the statutory deadline. *See TOPUC,* 183 F.3d at 406. Adoption of those initial rules certainly did not foreclose the FCC's ability to engage in future rulemakings in this area, however. If it did, it would render obsolete section 254(a)(2)'s last sentence, which requires the FCC to "complete any proceeding to implement *subsequent* recommendations from *any* Joint Board on universal service within one year after receiving such recommendations." 47 U.S.C. § 254(a)(2) (emphasis added). Finally, nothing in the text of section 254(a) precludes the Joint Board from recommending an interim rule and the FCC from adopting such a rule following notice-and-comment rulemaking. Indeed, finding that "Congress expressly contemplated that the Commission would adopt an incremental approach to retooling universal service," *Alenco*, 201 F.3d at 616, the Fifth Circuit upheld the FCC's enactment of "transitional" rules which, like the interim cap, imposed cost controls on high-cost support. *See also* 13-14, *infra.*

B. The FCC Acted Reasonably in Adopting the Interim Cap.

Movants also challenge the FCC's judgment that the interim cap was needed to curb explosive growth in universal service high-cost disbursements. Mot. 11-14. But the FCC was faced with dramatic growth in the high-cost portion of USF – growth that it found was largely attributable to CETCs. The record showed that in

2007, high-cost support totaled $4.3 billion – an increase of $1.7 billion, or about 65 percent, since 2001. *Order* ¶¶ 6, 22. Further, "[w]hile support to [ILECs] had been flat" in recent years, CETC support "from 2001 through 2007, ha[d] grown from under $17 million to $1.18 billion." *Id.* ¶ 6. This substantial increase in disbursements helped push the USF contribution factor to 11.7 percent – an all time high – at the time of the Joint Board's *Recommended Decision,* 22 FCC Rcd at 9000. The contribution factor had declined only slightly (11.3 percent) when the FCC adopted the interim cap, *Order* ¶ 6 n.27, and it is now 11.4 percent. *Public Notice,* 2008 WL 4190969 (Sept. 12, 2008). On a record showing actual, substantial increases in USF, the FCC reasonably predicted that allowing high-cost support to grow unabated could "cripple the universal service fund." *Id.* ¶ 22.

Courts properly defer to an expert agency where, as here, an issue concerns a predictive matter within the agency's expertise. *See FCC v. Nat'l Citizens for Broad.,* 436 U.S. 775, 813-14 (1978) (where "factual determinations" are "primarily of a judgmental or predictive nature" … "complete factual support or prediction is not required;" "a forecast of the direction in which future public interest lies necessarily involves deductions based on expert knowledge of the agency."); *see also NAB v. FCC,* 740 F.2d 1190, 1210 (D.C. Cir. 1984); *Fresno Mobile Relay Assoc. v. FCC*, 165 F.3d 965, 971 (D.C. Cir. 1999).

Movants assert that that the FCC's predictive judgment is suspect because CETC support allegedly will grow at a slower rate than the Joint Board predicted. Mot. 11-14. But the FCC did not adopt the interim cap based on the Joint Board's prediction that CETC high-cost support could reach $1.56 billion in 2007; rather, it adopted the interim cap based on its own analysis of past growth and the implications that future growth in CETC high-cost support would have on the USF. *Order* ¶¶ 6, 22. Thus, the fact that CETC high-cost support "only" grew to $1.18 billion in May 2008 does not render the FCC's decision unreasonable. Movants would have this Court stay the *Order* based on their own prediction that the interim cap will produce "less-than-one-percent savings" to the USF. Mot. 11. However, Movants' estimate presumes that the FCC will adopt comprehensive reform measures by November 20, 2008, but there is no guarantee that will happen. In any event, this self-serving estimate is not entitled to the substantial deference accorded the expert agency, which considered evidence from a variety of sources and arrived at a contrary conclusion.

Movants' heavy reliance on the declining *percentage* growth rate of high-cost support (rather than its continuing robust growth in absolute terms) also ignores basic math: a slower rate of growth on a large base ($1.18 billion in support for CETCs in 2007) has a greater impact on total USF size than a faster rate of growth on a very small base ($17 million in 2001, upon CETC entry). Thus, the fact that CETC support is growing at a slower percentage rate than it did upon CETC entry in 2001 does not undercut the FCC's determination that USF could grow to an unsustainable size absent the interim cap.

Movants seemingly would require the FCC to identify the exact point at which the USF would become so large as to risk rendering basic telephone service unaffordable before the FCC could enact cost controls. Mot. 11-14. The courts do not require this degree of exactitude, particularly when an agency enacts interim rules. "Substantial deference must be accorded an agency when it acts to maintain the status quo so that the objectives of a pending proceeding will not be frustrated." *MCI v. FCC,* 750 F.2d 135, 141 (D.C. Cir. 1984); *see also ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 409-410 (D.C. Cir. 2002). "What needs to be shown to uphold the FCC is that 'existing, possibly inadequate rules' had to be frozen to avoid 'compounding present difficulties.'" *MCI,* 750 F.2d at 141.

That standard is easily met here. The FCC attributed the explosive growth in CETC support to its portability and identical support rules. When the FCC adopted these rules, "it envisioned that [CETCs] would compete directly against [ILECs] and try to take existing customers from them." *Order* ¶ 19. But this prediction has "proven inaccurate," *Order* ¶ 19: wireless carriers, which "serve a majority of [CETC] lines, and have received a majority of [CETC] support," *id.* ¶ 20, "do not capture lines from the [ILEC] to become a customer's sole service provider, except in a small portion of households." *Id.* Rather, these carriers generally "provide mobile wireless telephony service *in addition to* a customer's existing wireline service." *Id.* (emphasis added). Furthermore, the rules "promote the sale of multiple wireless handsets in given households." *Id.* ¶ 9. As a result, "many households subscribe to both services and receive support for multiple lines, which has led to a rapid increase in the size of the fund." *Id.* ¶ 21. The interim cap will maintain the stability of the USF until the FCC concludes comprehensive reform, and the FCC's action was thus eminently reasonable.

Indeed, on multiple occasions, the courts have deferred to the FCC's enactment of interim rules based on the agency's predictive judgment that such rules were necessary to preserve universal service. *See, e.g., CompTel*, 309 F.3d at 14-15 (affirming a temporary rule imposing use restrictions on certain transport facilities to avoid disrupting the implicit universal service subsidies embedded in access charges); *Alenco,* 201 F.3d at 620-22 (affirming transitional rules that capped support for ILEC high-cost loops and corporate operation expenses); *Southwestern Bell,* 153 F.3d at 537-539, 549-550 (affirming interim access charge rules and the FCC's refusal to immediately remove all implicit subsidies from access charges to preserve universal service); *CompTel v. FCC*, 117 F.3d 1068, 1074 (8th Cir. 1997) (affirming the FCC's decision temporarily to allow ILECs to recover certain access charges to preserve universal service). Given the substantial deference owed to the agency in these circumstances, and the reasonableness of the FCC's interim action here, Movants are highly unlikely to prevail on the merits.

C. The Interim Cap is Consistent with the Act.

The Fifth Circuit has upheld the FCC's authority to cap high-cost universal service support. *See Alenco,* 201 F.3d at 620-21. When the FCC enacted the cost controls at issue in that case, its judgment was purely predictive – it was not faced with the explosive growth in the USF that led to the interim cap on CETC high-cost support at issue here. The Fifth Circuit affirmed the FCC's purely prophylactic caps anyway, finding that "[t]he agency's broad discretion to provide sufficient universal service funding includes the decision to impose cost controls to avoid excessive expenditures that will detract from universal service." *Id.* The court realized that "excessive funding may itself violate the sufficiency requirements of the Act." *Id.* "Because universal service is funded by a general pool subsidized by all telecommunications carriers – and thus indirectly by their customers – excess subsidization in some cases may detract from universal service by causing rates to unnecessarily rise, thereby pricing some customers out of the market." *Id.* at 620. *Alenco* thus underscores the absurdity of Movants' position that the FCC may not consider the sustainability of the USF when deciding how best to administer the program.[8] Mot. 15-16.

Movants also assert that the FCC placed too much emphasis on sufficiency, to the detriment of other universal service principles in section 254(b), when it "temporarily prioritiz[ed] the immediate need to stabilize high-cost universal service support and ensure a specific, predictable, and sufficient fund." *Order* ¶ 22. Foremost to Movants is the principle of "competitive neutrality," which the Joint Board and the FCC adopted as an "additional" universal service principle pursuant to the authority granted by section 254(b)(7). Mot. 16-17.

But "[r]ather than setting up specific conditions or requirements, § 254(b) reflects a Congressional intent to delegate these difficult policy choices to agency discretion," *TOPUC,* 183 F.3d at 411, and the Commission appropriately

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[8] The FCC's definition of "sufficient" in section 254(b)(5) was remanded in *Qwest v. FCC,* 398 F.3d 1222, 1233-34 (10th Cir. 2005). The Tenth Circuit held that the FCC unreasonably tied "sufficient" to "reasonably comparable" and not the other principles in section 254(b), including affordability. However, the Tenth Circuit was not troubled by language in the FCC's sufficiency definition that was "intended to cap federal support at levels 'only as large as necessary' to meet the statutory goal," *Id.* at 1234. The court stated that "excessive subsidization arguably may affect the affordability of telecommunications services, thus violating the principle in § 254(b)(1)." *Id.* The FCC's imposition of the interim cap poses no conflict with the *Qwest* decision in that it preserves affordability by preventing excessive subsidization.

exercised that discretion here. Moreover, competitive neutrality "has been developed by the FCC through regulation." *Id.* at 430, n.60. The FCC, therefore, is entitled to "broad deference" interpreting "competitive neutrality" and balancing it against other universal service principles. *Id.*[9]

In any event, the FCC did not violate the principle of competitive neutrality when it enacted the interim cap, even if that principle was viewed in isolation. "The Act only promises universal service, and that is a goal that requires sufficient funding of *customers*, not *providers*." *Alenco,* 201 F.3d at 620. "So long as there is sufficient and competitively-neutral funding to enable all customers to receive basic telecommunications services, the FCC has satisfied the Act and is not further required to ensure sufficient funding of every local telephone service provider as well." *Id.* Movants have not demonstrated that the interim cap will undercut adequate telephone services for customers; rather, it might result in a reduction in support to certain providers. Thus, while "all ETCs must be eligible to receive support," competitive neutrality does not "require the Commission to continue to provide identical levels of support to all carriers." *Order* ¶ 17.

Importantly, the per-line high-cost support a CETC receives under the FCC's existing rules is based on the ILEC's costs, not the CETC's own costs. To the extent that a CETC believes it should be entitled to continue to receive the

[9] Movants also assert that the FCC improperly "elevated" the principle that funding be "sufficient" over the guidance that it should be "specific" and "predictable". Mot. 15, *citing* 47 U.S.C. § 254(b)(5). But Movants offer no explanation of how the interim cap is inconsistent with having a specific and predictable universal service mechanism, and the interim cap is in fact consistent with these two principles. *See Order* ¶ 14.

same level of support as the ILEC, the *Order* permits a CETC to obtain a waiver of the interim cap upon "fil[ing] cost data demonstrating that its costs meet the support threshold in the same manner as the incumbent LEC." *Order* ¶ 31. But if the CETC cannot make this showing, it is hard to argue that reducing a CETC's per-line high-cost support below that of the ILEC violates the principle of competitive neutrality. In fact, the FCC found "no record data showing ... that support subject to an interim cap would necessarily result in insufficient support levels" for CETCs. *Id.* ¶ 14.[10]

THE BALANCE OF EQUITIES DOES NOT SUPPORT A STAY

In addition to failing to demonstrate that they have a likelihood of success on the merits, Movants do not come close to showing that the balance of equities tips in their favor.

A. Movants Have Failed to Show Irreparable Harm.

A showing of irreparable injury is a critical element in justifying a request for stay of an agency order. *Wisconsin Gas Co. v. FERC,* 758 F.2d 669, 674 (D.C. Cir. 1985). Movants must establish that the irreparable injury they would suffer without a stay would be "both certain and great," "actual and not theoretical." *Id.* at 674. Movants must provide "proof indicating that the harm [it alleges] is certain to occur." *Id.* Movants' anemic, one-paragraph argument (Mot. 19) fails to do so.

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[10] The availability of the waiver also undercuts Movants' assertion (Mot. 17) that the interim cap will stymie competitive entry in states like Ohio that received no CETC high-cost support as of March 2008. A CETC will be eligible for support in Ohio if it makes the cost showing required by the *Order's* waiver provision.

As an initial matter, Movants' own relaxed pace in this case belies their irreparable harm claims. The *Order* was published in the Federal Register on July 2, 2008, and the interim cap became effective on August 1, 2008. Movants could have sought a stay of the *Order* any time after July 2, 2008, but did not do so until October 9, 2008 – a delay of more than *three months*. If the economic losses Movants face truly met the standard for irreparable injury, they presumably would not have waited so long to seek relief from this Court.

Movants' argument regarding irreparable harm is one paragraph long and relates to only a single party, MTPCS, and even that minimal attempted showing fails. Although Movants allege that the interim cap will hinder petitioner MTPCS's ability to meet build-out requirements imposed by the Montana Public Service Commission, MTPCS has *five years* to satisfy these requirements. Mot. 19. It is therefore unsurprising that MTPCS merely hypothesizes that the "interim cap will delay installation of facilities necessary to expand MTPCS's coverage and bring new services to customers," Mot. Ex. 8 ¶ 18, rather than providing any concrete details of how its deployment will be curtailed. This falls far short of demonstrating imminent harm that is "both certain and great," as well as "actual and not theoretical." *Wisconsin Gas*, 758 F.2d at 674.

In any event, there can be no irreparable harm to MTPCS, or any CETC, because the *Order* includes a waiver provision. Any CETC will be exempt from the interim cap – and can establish entitlement to *needed* universal service support – if it files cost data with the FCC demonstrating that "its costs meet the support threshold in the same manner as the incumbent LEC." *Order* ¶ 31.

B. A Stay is Not in the Public Interest.

Movants are wireless carriers that have a vested interest in maintaining high-cost support, without limit, to subsidize their business plans. But what is good for Movants in these circumstances is harmful to nearly everyone else. Excessive universal service subsidies may affect the affordability of telecommunications services generally, in contravention of the Act's universal service goals. *Alenco,* 201 F.3d at 620; *Qwest,* 398 F.3d at 1234. Consistent with this reasoning, the FCC made a public interest determination that the interim cap will "ensure that the universal service fund will be sustainable for future years," because "continued growth of the fund at this rate is not sustainable and would require excessive (and ever growing) contributions from consumers." *Order* ¶ 2. Staying the effectiveness of the interim cap, in light of the FCC's findings, would be detrimental to the public interest.

CONCLUSION

As shown above, the Court should deny the motion for stay.

Respectfully submitted,

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