

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
Regulation of Business Data Services for Rate- of-Return Local Exchange Carriers	)	WC Docket No. 17-44
	)	
Petition for Declaratory Ruling or Waiver of the Oklahoma Incumbent Local Exchange Carrier Affiliates of Hilliary Communications LLC	)	WC Docket No. 24-82

**COMMENTS  
OF  
NTCA–THE RURAL BROADBAND ASSOCIATION**

NTCA–The Rural Broadband Association (“NTCA”)<sup>1</sup> hereby submits these comments in response to the Public Notice<sup>2</sup> released by the Federal Communications Commission’s (“Commission”) Wireline Competition Bureau (“WCB”) that seeks comment on a Petition for Declaratory Ruling, or in the alternative, waiver filed by Hilliary Communications, LLC (“Hilliary” or “Petitioner”).<sup>3</sup> As discussed further below, Hilliary’s acquisition of Southwest Oklahoma Telephone Company, Inc. (“SWOT”) *after* the latter elected incentive regulation for its business data services (“BDS”) does not, pursuant to Section 61.50 of the Commission’s

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<sup>1</sup> NTCA represents approximately 850 independent, community-based telecommunications companies and cooperatives and more than 400 other firms that support or are themselves engaged in the provision of communications services in the most rural portions of America. All NTCA service provider members are full service rural local exchange carriers and broadband providers, and many provide fixed and mobile wireless, video and other competitive services in rural America as well.

<sup>2</sup> *Wireline Competition Bureau Seeks Comment on Petition for Declaratory Ruling or Waiver of Section 61.50 of the Commission’s Rules Filed by Hilliary Communications LLC*, WC Docket Nos. 10-90, 17-144, 24-82, Public Notice, DA 24-250 (rel. Mar. 14, 2024).

<sup>3</sup> *Petition for Declaratory Ruling or Waiver of Section 61.50 of the Commission’s Rules Filed by Hilliary Communications LLC*, WC Docket Nos. 10-90, 17-144 (fil. Mar. 11, 2024) (“Petition”).

rules<sup>4</sup> or the *Enhanced A-CAM Order*,<sup>5</sup> compel all entities affiliated with Petitioner to now do the same.<sup>6</sup>

Issuance of a Declaratory Ruling as sought by Hilliary would be consistent with Section 61.50 of the Commission’s rules as well as the *Rate-of-Return BDS Order*.<sup>7</sup> The provisions of Section 61.50(a) that allow eligible rate-of-return carriers to elect incentive regulation for their BDS services do indeed require that such election apply to each affiliated entity as well – but critically, the language therein is framed in the *present tense*, meaning it logically applies to entities that are, at the specific time such a BDS election is made, affiliated with each other.<sup>8</sup> In this case, Hilliary acquired SWOT *after* the latter elected incentive regulation for its BDS services. Had the Commission intended to require that entities *subsequently* affiliated with an electing entity *also* elect incentive regulation, it is reasonable to assume it would have made that clear. Compelling OWT and MPT to transition to incentive regulation now, only because SWOT

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<sup>4</sup> 47 C.F.R. § 61.50.

<sup>5</sup> *Connect America Fund*, WC Docket No. 10-90, et al., Report and Order, Notice of Proposed Rulemaking, and Notice of Inquiry, FCC 23-60 (rel. July 24, 2023) (“*Enhanced A-CAM Order*”).

<sup>6</sup> As noted in the Petition, three entities affiliated with Hilliary – SWOT, Oklahoma Western Telephone Company, Inc. (“OWT”) and Medicine Park Telephone Company, Inc. (“MPT”) – all elected Enhanced ACAM support. SWOT elected to transition to incentive regulation for its BDS services prior to its acquisition by Hilliary. Petition, pp. 1-2. The Petition asserts that neither Section 61.50(a) of the Commission’s rules nor the *Enhanced A-CAM Order* require OWT and MPT to convert their BDS to incentive regulation merely because they are now affiliated with SWOT. *Id.*

<sup>7</sup> *Regulation of Business Data Services for Rate-of-Return Local Exchange Carriers*, WC Docket No. 17-144, et al., Report and Order, Second Further Notice of Proposed Rulemaking, and Further Notice of Proposed Rulemaking, FCC 18-146 (rel. Oct. 24, 2018) (“*Rate-of-Return BDS Order*”).

<sup>8</sup> Section 61.50(a) states that a “rate-of-return carrier, as defined in § 51.903(g) of this chapter, may elect to offer its business data services subject to incentive regulation pursuant to this section. A rate-of-return carrier may elect to offer business data services subject to incentive regulation pursuant to this section only if all affiliated rate-of-return carriers meeting the requirements of paragraph (b) of this section make the election. A carrier's election under this section is irrevocable.”

did so before becoming affiliated with the former two entities that did not make such a choice, takes all meaning out of the term “elect” as to OWT and MPT. Forcing OWT and MPT to now take a step they declined to take in the past would be entirely at odds with the concept of a voluntary election and the permissive approach taken in the *Rate-of-Return BDS Order*.<sup>9</sup>

In addition, nothing in the *Enhanced A-CAM Order* compels OWT and MPT’s election of incentive regulation for BDS. As the Petition notes, the *Enhanced A-CAM Order* merely offered those that had not made this election in the past another opportunity to do, and this was again framed in purely voluntary terms.<sup>10</sup>

Moreover, the Commission at no time indicated that Hilliary’s acquisition of SWOT, after the latter had elected incentive regulation, required all affiliated entities to do so as well. The Order authorizing the transfer of control of SWOT to Hilliary does not address the issue at all,<sup>11</sup> and it certainly would make utmost sense for the Commission to have addressed the issue at that point had it believed Section 61.50(a) required such a result. As such, as the Petition notes, Hilliary was never given fair notice that its acquisition of SWOT came with such a consequence.<sup>12</sup> In addition, as the Petition also notes, the Commission possesses, and has exercised, authority to adopt conditions upon mergers and acquisitions, and had it believed that

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<sup>9</sup> See *Rate-of-Return BDS Order*, ¶ 16 (stating that “we allow rate-of-return carriers receiving fixed universal service support to *choose* to migrate their BDS offerings to a new, comprehensive, lighter-touch regulatory framework that is better aligned to the competitive realities of the BDS markets they serve. The framework we adopt includes *voluntary* incentive regulation with pricing flexibility for *electing* carriers’ lower capacity (DS3 and below) TDM transport and end user channel termination services.”) (emphasis added).

<sup>10</sup> Petition, p. 6.

<sup>11</sup> *Notice of Domestic Section 214 Authorization Granted*, WC Docket No. 21-378, Public Notice, DA 21-1430 (rel. Nov. 15, 2021).

<sup>12</sup> Petition, p. iii.

requiring all entities affiliated with SWOT to also elect incentive regulation for BDS was necessary to protect the public interest, it could have done so when considering that transaction.<sup>13</sup> Yet it did not, and nothing indicates a reason to do so now. Based on the above discussion, a declaratory ruling as requested by Petitioner would be consistent with the intent of Section 61.50(a) and would account for the fact that the Commission had the opportunity to require OWT and MPT to convert to incentive regulation for BDS but chose not to.

In the alternative, the Commission should grant a waiver of Section 61.50(a) to permit SWOT to revert back to rate-of-return regulation for its BDS. Absent such a waiver, Hilliary could be required to convert OWT and MPT to incentive regulation for BDS services based on the Bureau's *post hoc* interpretation of the rule that it could not have anticipated. As the Petition notes, this would require advance planning to account for exiting the National Exchange Carrier Association's traffic sensitive pool and preparing BDS customers for rate changes, and would be exceedingly costly, disruptive and difficult, if not impossible, to execute by July 1, 2024.<sup>14</sup> Moreover, as the Petition discusses at length, Hilliary lacks the ability and incentive to engage in the type of "gaming" behavior that would otherwise be a concern here,<sup>15</sup> as reverting back to rate-of-return regulation in this case is not the result of advanced planning for gaming purposes but merely done to comply with the Section 61.50(a) provisions on affiliated entities. In addition, as the Petition points out, this provision of Section 61.50(a) was intended to maximize the efficiencies of incentive regulation, yet requiring OWT and MPT to move to incentive regulation instead of allowing SWOT to move back to rate-of-return would have the opposite

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<sup>13</sup> *Id.*, p. 8.

<sup>14</sup> *Id.*, p. 11.

<sup>15</sup> *Id.*, p. 14.

effect for the companies at issue herein.<sup>16</sup> Indeed, the Commission has in the past waived a similar rule applicable to price cap carriers to account for the fact that strict application of that rule only increased small carriers' transaction costs.<sup>17</sup>

Finally, as an additional alternative, a waiver of Section 61.50(a) to permit the companies at issue here to “maintain the status quo” should be granted. The Hilliary companies have a long history of operating under such a “mixed” regulatory status and make clear in the Petition that this alternative would be less disruptive than the conversion of OWT and MPT to incentive regulation.<sup>18</sup>



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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*, p. 16, citing Multi-Association Group Plan for Regulation of Interstate Services of Non-Price Cap ILECs and Interexchange Carriers, CC Docket No. 00-256, Report and Order and Second Further Notice of Proposed Rulemaking, FCC 04-31, (2004).

<sup>18</sup> Petition, pp. 17-18.