PUBLIC NOTICE

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DOMESTIC SECTION 214 APPLICATION GRANTED SUBJECT TO CONDITION

WC Docket No. 19-388

By this Public Notice, the Wireline Competition Bureau (Bureau) grants an application filed by Buggs Island Co-operative d/b/a Buggs Island Telephone Cooperative (BIT), EMPOWER Broadband, Inc. (Broadband), and EMPOWER Telecom, Inc. (Telecom) (collectively, Applicants), pursuant to section 214 of the Communications Act of 1934, as amended, and sections 63.03-04 of the Commission's rules, requesting approval for the transfer of assets of BIT to Telecom.[1] On February 3, 2020, the Bureau released a Public Notice seeking comment on the Application.[2] The Bureau received no comments in opposition to a grant of the Application.

BIT, a Virginia telephone cooperative, provides telecommunications services and other services to approximately 3,000 access lines as an incumbent local exchange carrier (LEC) in Brunswick and Mecklenburg Counties in Virginia.[3] BIT is wholly owned by its approximately 2,830 customer-members.[4] BIT did not elect to receive fixed support and receives cost-based universal service support for its incumbent LEC services.[5]

Telecom, a newly formed Virginia corporation, is organized as a public service corporation in the state and is a wholly owned subsidiary of Mecklenburg Electric Cooperative (MEC).[6] MEC is a not-for-

[1] *See* 47 U.S.C. § 214; 47 CFR §§ 63.03-04. Applicants filed an amended application on January 22, 2020. Amended Application for Consent to Transfer of Control of Domestic Section 214 Authorization, WC Docket No. 19-388 (filed Jan. 22, 2020) (Application). Applicants filed a supplement to the amended application on January 31, 2020. Letter from John C. Lee, Jr., President and CEO, EMPOWER Broadband, Inc. and EMPOWER Telecom, Inc., to Marlene H. Dortch, Secretary, FCC (Jan. 31, 2020) (on file in WC Docket No. 19-388) (EMPOWER Letter).

[2] *Domestic Section 214 Application Filed for the Acquisition of Assets of Buggs Island Telephone Co-Operative by Empower Broadband, Inc. and Empower Telecom, Inc.*, WC Docket No. 19-388, Public Notice, DA 20-125 (WCB Feb. 3, 2020).

[3] Application at 2.

[4] *Id.* at 5.

[5] Universal Service Administrative Co., Tools, https://www.usac.org/high-cost/resources/tools/. The Commission adopted a voluntary path by which rate-of-return carriers could elect to receive a fixed amount of universal service support under the Alternative Connect America Cost Model (A-CAM), a forward-looking broadband cost model, for 10 years, in exchange for deploying broadband-capable networks to eligible locations. *Connect America Fund et al.*, Report and Order, Order and Order on Reconsideration and Further Notice of Proposed Rulemaking, 31 FCC Rcd 3087, 3090, para. 4, 3096-3117, paras. 20-79 (2016).

[6] Application at 2. Applicants state that Telecom has applied for Eligible Telecommunications Carrier status with the Virginia State Corporation Commission. Telecom acknowledges that it will acquire BIT's obligation to use

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profit Virginia utility consumer services cooperative and a public utility supplying retail electric distribution services to member-consumers in Virginia and North Carolina.[7] Broadband, a Virginia corporation and subsidiary of MEC, offers middle mile capacity and broadband services to southern Virginia over its fiber optic cable network.[8] MEC is owned by its approximately 31,000 customer-members with no individual owning a 10% or greater interest.[9] The Applicants state that, after the proposed transaction is consummated, Telecom will provide the same incumbent LEC services currently offered by BIT.[10] Broadband receives fixed support through the Connect America Fund Phase II (Auction 903).[11]

Pursuant to the terms of the proposed Asset Purchase Agreement (the Agreement), Broadband will purchase substantially all of the assets and business operations of BIT.[12] Prior to the consummation of the proposed transaction, Broadband will exercise its right under the Agreement to transfer the acquired facilities to Telecom.[13] Upon consummation of the Agreement, Broadband will redeem BIT's membership interests, and BIT will cease to exist thereafter.[14] Control of the facilities will transfer directly from BIT to Telecom.[15] This would allow for the continued availability of all of the existing services in BIT's service area without interruption.[16]

<u>Discussion</u>. The Applicants request approval to consummate a transaction involving companies that receive high-cost universal service support under the different mechanisms of fixed support and cost-based support. The Commission has found that this type of mixed support transaction could result in potential harm to its goal of ensuring that limited universal service funding is distributed efficiently and effectively.[17] When a company receiving a fixed level of support acquires or is acquired by a company receiving support based on its costs, the combined companies could, and in some instances might have an economic incentive to, shift certain shared or common costs from the fixed support company to the cost-based support company.[18] If cost shifting were to occur, the combined company, post-transaction, could obtain more high cost universal service support than the two companies did as separate entities, not

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universal service support to build out to 386 locations in its services area and that it will fulfill such obligation. EMPOWER Letter at 1.

[7] Application at 2.

[8] *Id*.

[9] *Id.* at 5.

[10] *Id.* at 2-3.

[11] *Connect America Fund Phase II Auction Support Authorized for 856 Winning Bids*, AU Docket No. 17-182, WC Docket No. 10-90, Public Notice, DA 19-539, at 1 and Attach. A at 10 (WCB 2019) (listing the total fixed support amount over 10 years and total number of locations for which EMPOWER Broadband, Inc. is authorized in Virginia). *See* https://www.fcc.gov/auction/903 (listing state level summaries under the "Data" tab).

[12] Application at 6.

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.* at 7.

[17] *Joint Application of W. Mansfield Jennings Limited Partnership and Hargray Communications Group, Inc. for Consent to the Transfer of Control of ComSouth Corporation Pursuant to Section 214 of the Communications Act of 1934*, WC Docket 18-52, Memorandum Opinion and Order, 33 FCC Rcd 4780, 4784, para. 19 (2018). (*Hargray/ComSouth Order*).

[18] *Id*. at 4785-86, para. 20.

because of any new investment, expense, or buildout, but rather solely because of the application of accounting procedures.[19] Such an outcome is inconsistent with the Commission's general expectation that transactions generate efficiencies that reduce the combined company's costs.[20] Moreover, providing additional universal service support to a company as a result of cost shifting solely because it acquired or merged with another company is not an efficient use of limited universal service resources.[21]

In the *Hargray/ComSouth Order*, in which the Commission approved a mixed support transaction, it sought to prevent cost shifting and to protect the finite resources of the high-cost universal service fund by imposing a limited condition that capped high-cost universal service support based on the operating expenses of the entity receiving cost-based support.[22] The Commission also directed the Bureau to impose the same limited condition on future transactions between parties receiving different types of high-cost universal service support.[23]

Telecom, which is affiliated with Broadband, a fixed support company, seeks to acquire the operations of BIT, a cost-based support company. Therefore, the potential for harm caused by cost-shifting is a transaction-specific harm. Accordingly, to mitigate the potential for cost shifting, we grant the Application subject to the condition adopted in the *Hargray/ComSouth Order*.[24] The combined operating expenses of the post-consummation company's rate-of-return affiliates[25] shall be capped at the averaged combined operating expenses of the three calendar years preceding the transaction's closing date for which the operating expense data are available.[26]

The cap will apply to cost recovery under both HCLS and CAF-BLS and will be applied proportionately to each affiliate's accounts used to determine the affiliate's eligible operating expense for HCLS and CAF-BLS.[27] For example, if the cap requires that a post-consummation company's eligible operating expense be reduced by 10%, then each account used to determine each rate-of-return affiliate's

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[19] *Id*.

[20] *Id*.

[21] *Id*. at 4786, para. 21.

[22] *Id*. at 4788-90, paras. 26-31.

[23] *Id*. at 4789, para. 27, n.72.

[24] *Id.* at 4788-90, paras. 26-31.

[25] *See* 47 U.S.C. § 153(1).

[26] *Hargray/ComSouth Order* at 4788-89, para. 27. The cap will apply to the combined operating expenses of the post-consummation company and any other existing rate-of-return affiliates acquired during the time in which the condition is in effect (together, covered entities). To monitor compliance with the condition adopted herein, to the extent it does not already do so, we direct the covered entities to submit their relevant cost data to the National Exchange Carrier Association (NECA). We direct NECA to provide the dollar amount of the operating expense costs that will be capped pursuant to this Public Notice to the Universal Service Administrative Company (USAC) within 30 days following submission of any covered entity's cost data. We further direct NECA to provide USAC with the reductions in High-Cost Loop Support (HCLS) and Connect America Fund-Broadband Loop Support (CAF-BLS) for any covered entity pursuant to this Public Notice for each year following the effective date of this Public Notice. USAC shall validate all calculations received from NECA before making disbursements subject to any such support reductions. We also direct all covered entities to provide USAC with an annual certification of compliance on or before December 31 of each year for the duration of the condition. With the certification, each covered entity must also submit its latest audited financial statements to USAC, including all notes and consolidating statements, on an annual basis, by December 31 of each year. *Id*. at 4790, para. 31.

eligible operating expenses shall be reduced by 10%.[28] For purposes of this cap, operating expenses shall include maintenance, network support/network operations/general, benefits, rent expenses, and corporate operations, while depreciation, return on investment, and taxes shall be excluded.[29]

For all covered entities, the new cap shall also include an annual adjustment for inflation based on the Gross Domestic Product-Channel Price Index (GDP-CPI) for the years in which the new cap remains in effect.[30] This cap shall remain in effect for seven years from the consummation of the transaction.[31] The condition will also sunset if all of a post-consummation company's rate-of-return affiliates become fixed support companies at any point during the seven-year period.[32]

We find, upon consideration of the record, that grant of the Application listed above, subject to compliance with the condition, will serve the public interest, convenience, and necessity.[33] Therefore, pursuant to section 214 of the Act, 47 U.S.C. § 214, and sections 0.91, 0.291, 63.03, and 63.04 of the Commission's rules, 47 CFR §§ 0.91, 0.291, 63.03, and 63.04, the Bureau hereby grants the Application discussed in this Public Notice subject to compliance with the condition described above.[34]

Pursuant to section 1.103 of the Commission's rules, 47 CFR § 1.103, the grant is effective upon release of this Public Notice. Petitions for reconsideration under section 1.106 or applications for review under section 1.115 of the Commission's rules, 47 CFR §§ 1.106, 1.115, may be filed within 30 days of the date of this Public Notice. For further information, please contact Dennis Johnson, Wireline Competition Bureau, Competition Policy Division, (202) 418-0809.

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[27] *Id*. at 4789, para. 28.

[28] *Id.*

[29] *Id.*

[30] *Id.* at 4790, para. 30.

[31] The Commission has found seven years to be an appropriate period over which to monitor enforcement of the condition and to ensure that the combined entity, which will continue to receive support, does not shift costs from year-to-year. *Id*. at 4789-90, para. 29, fn.78. The cap will not apply if the parties do not consummate the proposed transaction.

[32] *Id*. at 4789-90, para. 29.

[33] *See* 47 U.S.C. § 214(a); 47 CFR § 63.03.

[34] The Applicants provide incumbent LEC services in their respective study areas. Within 30 days of closing the proposed transaction, they must notify USAC so that it can make any appropriate changes to the High Cost Universal Broadband (HUBB) on-line location reporting portal for universal service recipients.