

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

In the Matter of
Nemont Telephone Cooperative, Inc.
Missouri Valley Communications, Inc.
Reservation Telephone Cooperative
and
Citizens Telecommunications Company of North Dakota
Joint Petition for Waiver of the Study Area Boundary Freeze Codified in the Part 36, Appendix-Glossary of the Commission's Rules
Petition for Waiver of Sections 61.41(c)(2), 69.3(e)(11) and 69.605(c) of the Commission's Rules
CC Docket No. 96-45

ORDER

Adopted: January 27, 2003

Released: January 28, 2003

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order, we grant a request from Nemont Telephone Cooperative, Inc. (Nemont), Missouri Valley Communications, Inc. (MVC), and Reservation Telephone Cooperative (Reservation) (collectively, Acquiring Companies), and Citizens Telecommunications Company of North Dakota (Citizens) for a waiver of the study area boundary freeze codified in the Appendix-Glossary of Part 36 of the Commission's rules. This waiver will permit Citizens to remove three exchanges comprising approximately 10,698 access lines from its North Dakota study area. This waiver also will permit Nemont and Reservation to add approximately 9,349 access lines and 1,349 access lines, respectively, to their existing North Dakota study areas.

1 See Citizens Telecommunications Company of North Dakota, Nemont Telephone Cooperative, Inc., Missouri Valley Communications, Inc., Reservation Telephone Cooperative Joint Petition for Expedited Waivers (dated September 24, 2002) (Joint Petition); Supplement to Petition for Expedited Waivers (filed October 25, 2002) (Supplement).

2 MVC is acquiring the Williston exchange and Reservation is acquiring the Alexander and Watford City exchanges. MVC, which was created to purchase and operate the Williston exchange is owned 50% by Nemont and 50% by Valley Telecommunications, Inc. (Valley). Valley is owned 100% by Nemont and does not operate in North Dakota. Thus, Nemont is the 100% owner of MVC and the exchange MVC acquires from Citizens will be part of Nemont's study area.

2. We also waive the price cap “all-or-nothing” rule in section 61.41(c)(2) of the Commission’s rules to permit the Acquiring Companies to operate under rate-of-return regulation after acquiring exchanges from Citizens that are subject to price-cap regulation. We grant the Acquiring Companies’ request for a waiver of section 69.3(e)(11) of the Commission’s rules so that the Acquiring Companies can include the exchanges they acquire from Citizens in the National Exchange Carrier Association (NECA) common line tariff upon acquisition of the exchanges. Finally, we find that the public interest would not be served by allowing MVC to have average schedule status and allowing Nemont to continue operating as an average schedule company after the acquisition from Citizens. Therefore, we deny the request of MVC and Nemont for waiver of section 69.605(c) of the Commission’s rules.

II. STUDY AREA WAIVER

A. Background

3. *Study Area Boundaries.* A study area is a geographic segment of an incumbent local exchange carrier’s (LEC’s) telephone operations. Generally, a study area corresponds to an incumbent LEC’s entire service territory within a state. Thus, incumbent LECs operating in more than one state typically have one study area for each state. The Commission froze all study area boundaries effective November 15, 1984, and an incumbent LEC must apply to the Commission for a waiver of the study area boundary freeze if it wishes to sell or purchase additional exchanges.³

4. *Transfer of Universal Service Support.* Section 54.305(a) of the Commission’s rules provides that a carrier acquiring exchanges from an unaffiliated carrier shall receive the same per-line levels of high-cost universal service support for which the acquired exchanges were eligible prior to their transfer.⁴ This limitation applies to high-cost loop support, local switching support and long term support (LTS). Section 54.305(a) is meant to discourage carriers from transferring exchanges merely to increase their share of high-cost universal service support.⁵ For example, if a rural carrier purchases an exchange from a non-rural carrier that receives support based on the Commission’s high-cost support mechanism for non-rural carriers, the loops of the acquired exchange shall receive the same per-line support as calculated under the non-rural mechanism, regardless of the support the rural carrier purchasing the exchange may receive for any of its other exchanges.⁶

5. Notwithstanding the limitations provided in section 54.305(a), there are two circumstances under which rural carriers may receive additional high-cost support for acquired lines.

³ See *MTS and WATS Market Structure, Amendment of Part 67 of the Commission’s Rules and Establishment of a Joint Board*, CC Docket Nos. 78-72, 80-286, Recommended Decision and Order, 49 Fed. Reg. 48325 (1984); Decision and Order, 50 Fed. Reg. 939 (1985). See also 47 C.F.R. § 36 app.

⁴ 47 C.F.R. § 54.305.

⁵ See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 8942-43 (1997) (*First Report and Order*), as corrected by *Federal-State Joint Board on Universal Service*, Errata, CC Docket No. 96-45, FCC 97-157 (rel. June 4, 1997), *affirmed in part, reversed in part and remanded in part sub nom. Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999).

⁶ Rural carriers receive high-cost loop support based on the extent to which their reported average cost per loop exceeds 115 percent of the nationwide average cost per loop. See 47 C.F.R. §§ 36.601-36.631. The mechanism for non-rural carriers directs support to carriers based on the forward-looking economic cost of operating a given exchange. See 47 C.F.R. § 54.309.

First, a rural carrier may be eligible to receive additional high-cost loop support for new investments in acquired exchanges under the Commission's "safety valve" mechanism.⁷ The total safety valve support available to all eligible carriers is limited to no more than five percent of rural incumbent LEC support available from the annual high-cost loop fund. Second, rate-of-return carriers may be eligible for interstate common line support (ICLS) and the Commission determined that the limitations set forth in section 54.305(a) would not apply to such support.⁸ Accordingly, an acquiring carrier is not limited to the amount of ICLS support that the selling carrier received.

6. *The Joint Petition for Waivers.* Citizens and the Acquiring Companies filed a joint petition for a waiver of the study area boundary freeze and other related waivers on September 24, 2002 and supplemented that petition on October 25, 2002. On October 31, 2002, the Wireline Competition Bureau (Bureau) released a public notice seeking comment on the petition for waivers.⁹ A study area waiver would permit Citizens to alter the boundaries of its existing study area by removing three exchanges that it is transferring to the Acquiring Companies. The waiver would also permit the purchased exchanges to be added to Reservation's study area and Nemont/MVC's consolidated study area.¹⁰ Additionally, the Acquiring Companies provide an estimate for the additional annual ICLS that would be available to Nemont and Reservation as a result of acquiring lines from Citizens.¹¹ As a result of this transaction, Nemont estimates that it will receive additional annual ICLS of \$466,960 and

⁷ See 47 C.F.R. § 54.305(b)-(f). See also *Federal-State Joint Board on Universal Service, Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking in CC Docket No. 96-45, and Report and Order in CC Docket No. 00-256, 16 FCC Rcd 11244, 11276-84 (2001), as corrected by Errata, CC Docket Nos. 96-45, 00-256 (Acc. Pol. Div. rel. Jun. 1, 2001). The "safety valve" mechanism enables rural carriers acquiring access lines to receive additional high-cost loop support over a period of five years reflecting post-transaction investments made to enhance the infrastructure of and improve the service in acquired exchanges. Safety valve support provides up to 50% of any positive difference between a rural carrier's index year high-cost loop support expense adjustment for the acquired exchanges and subsequent year expense adjustments.

⁸ See also *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers in CC Docket No. 00-256, Federal-State Joint Board on Universal Service in CC Docket No. 96-45, Access Charge Reform for Incumbent Local Exchange Carriers Subject to Rate-of-Return Regulation in CC Docket No. 98-77, Prescribing the Authorized Rate of Return From Interstate Services of Local Exchange Carriers in CC Docket No. 98-166*, Second Report and Order and Further Notice of Proposed Rulemaking, Fifteenth Report and Order, Report and Order and, Report and Order, 16 FCC Rcd 19613, 19667-69, paras. 155-157 (2001) (*MAG Order/NPRM*), recon. pending.

⁹ See *Nemont Telephone Cooperative, Inc., Missouri Valley Communications, Inc., Reservation Telephone Cooperative, and Citizens Telecommunications Company of North Dakota Seek a Waiver of the Study Area Boundary Freeze as Codified in Part 36 and Other Waivers of Sections 61.41(c)(2), 69.3(e)(11) and 69.605(c) of the Commission's Rules*, Public Notice, DA 02-2857 (rel. Oct. 31, 2002). Comments in support of the petition were filed by NECA and the National Telecommunications Cooperative Association (NTCA). See Comments of the National Exchange Carrier Association, filed Dec. 2, 2002 (NECA Comments); National Telecommunications Cooperative Association Initial Comments, filed Dec. 2, 2002 (NTCA Comments). No parties opposed the petition.

¹⁰ As noted above, MVC is acquiring approximately 9,349 access lines from Citizens which will be added to Nemont's study area. Reservation is acquiring approximately 1,349 access lines from Citizens which Reservation will add to its study area.

¹¹ Joint Petition at 14.

Reservation estimates that it will receive additional annual ICLS of \$125,991.¹²

7. Standards for Waiver. Generally, the Commission's rules may be waived for good cause shown.¹³ As noted by the Court of Appeals for the D.C. Circuit, however, agency rules are presumed valid.¹⁴ The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.¹⁵ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.¹⁶ Waiver of the Commission's rules is therefore appropriate only if special circumstances warrant a deviation from the general rule, and such deviation will serve the public interest. In evaluating petitions seeking a waiver of the rule freezing study area boundaries, the Commission traditionally has applied a three-prong standard: (1) the change in study area boundaries must not adversely affect the universal service fund; (2) no state commission having regulatory authority over the transferred exchanges opposes the transfer; and (3) the transfer must be in the public interest.¹⁷

8. In evaluating whether a study area boundary change will have an adverse impact on the universal service fund, we analyze whether a study area waiver will result in an annual aggregate shift in high-cost loop support in an amount equal to or greater than one-percent of the total high-cost loop support fund for the year 2003.¹⁸ The Commission began applying the one-percent guideline in 1995 to limit the potential adverse impact of exchange sales on the overall fund, also recognizing that, because of the indexed cap, an increase in the draw of any fund recipient necessarily reduces the amounts that other LECs receive from the fund.¹⁹ After adoption of section 54.305(a) of the Commission's rules, however, the one-percent guideline, was not, in practice, a necessary limitation because section 54.305(a) provides that a carrier purchasing exchanges from an unaffiliated carrier is permitted to receive only the same level of per-line high-cost support that the selling company was receiving for the exchanges prior to the transfer.²⁰ Accordingly, by definition, section 54.305(a) ensures that there will be no adverse impact on the universal service fund. Consistent with past precedent, we apply the one-percent guideline to determine the impact on the universal service fund, in light of the adoption of "safety valve" support, which allows an acquiring carrier to receive support for new investments in acquired lines, and ICLS,

¹² *Id.*

¹³ 47 C.F.R. § 1.3.

¹⁴ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

¹⁵ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

¹⁶ *WAIT Radio*, 418 F.2d at 1159; *Northeast Cellular*, 897 F.2d at 1166.

¹⁷ See, e.g., *US WEST Communications, Inc., and Eagle Telecommunications, Inc., Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary of the Commission's Rules*, AAD 94-27, Memorandum Opinion and Order, 10 FCC Rcd 1771, 1772 (1995) (*PTI/Eagle Order*).

¹⁸ See *PTI/Eagle Order* at 1774, paras. 14-17. See *US WEST Communications, Inc., and Eagle Telecommunications, Inc., Joint Petition for Waiver of "Study Area" Contained in Part 36, Appendix-Glossary of the Commission's Rules, and Petition for Waiver of Section 61.41(c) of the Commission's Rules*, AAD 94-27, Memorandum Opinion and Order on Reconsideration, 12 FCC Rcd 4644 (1997).

¹⁹ See *PTI/Eagle Order* at 1773, para. 13.

²⁰ See 47 C.F.R. § 54.305(a).

which does not limit the amount of such support that a carrier can receive for acquired lines.²¹

B. Discussion

9. We find that good cause exists to waive the study area boundary freeze codified in the Appendix-Glossary of Part 36 of the Commission's rules to permit Citizens to alter the boundaries of its existing North Dakota study area to remove three exchanges that it is transferring to the Acquiring Companies. We also find that good cause exists to permit the Acquiring Companies to add these exchanges to their North Dakota study areas. For the reasons discussed below, we conclude that petitioners have satisfied the three-prong standard the Commission has applied to determine whether a waiver is warranted.

10. Because the proposed study area waiver will not result in a shift in high-cost support in an amount equal to or greater than one-percent of the total high-cost support fund, we conclude that the universal service fund will not be adversely affected. High cost loop support, local switching support, and LTS are limited by section 54.305(a) of the Commission's rules.²² Accordingly, the Acquiring Companies are limited to the same per-line levels of support that Citizens was receiving prior to the transfer. In this instance, Citizens has not been eligible for high-cost support, and therefore the Acquiring Companies will not receive such support on the lines they acquire from Citizens.²³ Although the Acquiring Companies may be eligible for safety valve support for investments in the acquired lines, we have no reason to believe that this amount would realistically exceed one-percent of the total high-cost support fund. In reaching this conclusion, we note that the proposed study area waiver involves the transfer of only approximately 10,698 access lines. Moreover, an individual rural carrier's safety valve support is capped at 50% of any positive difference between the amount of high-cost loop support that the rural carrier would qualify for in the index year for the acquired access lines and the support amounts that the carrier would qualify for in subsequent years.²⁴ The total amount of safety valve support available to rural carriers is also capped at five-percent of annual high-cost loop support available to rural carriers in any particular year, thereby providing an additional limitation on the amount of safety valve support available to carriers.²⁵

11. Likewise, we find that providing ICLS support to the Acquiring Companies will not result in more than a one-percent change in the total high-cost fund.²⁶ Nemont and Reservation estimate that they may be eligible to receive annual ICLS in the amounts of \$466,960 and \$125,991, respectively,

²¹ See *supra* para. 5 (discussing "safety valve" support and ICLS).

²² See 47 C.F.R. § 54.305(a).

²³ See Universal Service Administrative Company, Federal Universal Service Support Mechanisms Fund Size Projections for the Fourth Quarter 2002 (rel. August 2, 2002).

²⁴ See 47 C.F.R. § 54.305(d). See *supra* note 7. The term "rural carrier" refers to an incumbent local exchange carrier that meets the definition of "rural telephone company" in section 3(37) of the Communications Act of 1934, as amended. See 47 U.S.C. § 153(37). Because each of the Acquiring Companies provides telephone exchange service to local exchange study areas with fewer than 100,000 access lines, they all meet the definition of "rural telephone company" in the Act.

²⁵ See 47 C.F.R. § 54.305(e).

²⁶ See 47 C.F.R. § 54.902.

totaling \$592,951.²⁷ The total high-cost fund for the year 2003 is projected to be \$3.3 billion dollars, one percent of which would be \$33 million dollars.²⁸ We therefore conclude that the combined total amount of \$592,951 that the Acquiring Companies estimate they will receive in ICLS, in addition to any amounts the Acquiring Companies may be eligible to receive in safety valve support, will not have an adverse impact on the universal service fund.

12. Second, the state commission with regulatory authority over the transferred exchanges does not oppose the transfer. In December, 2002, the North Dakota Public Service Commission issued a letter approving the transfer of the affected exchanges and indicating that it does not object to a grant of the study area waiver.²⁹

13. Third, we conclude that the public interest is served by a waiver of the study area freeze rule to permit Citizens to remove from its North Dakota study area the Williston, Alexander and Watford City exchanges and to permit the Acquiring Companies to include the acquired exchanges in their North Dakota study areas. In the Joint Petition, the Acquiring Companies indicate their desire to expand their operations by acquiring Citizens' exchanges which are contiguous to their current operations. The Acquiring Companies state that, once acquired, the exchanges will be under local ownership and management and as a result, they expect to be able to provide enhanced customer response time and service.³⁰ In contrast, as part of Citizens, the affected exchanges are not under local ownership and management.³¹ Finally, the Acquiring Companies state that they will make extensive upgrades to the facilities being purchased from Citizens.³² Based on these representations, we conclude that the Acquiring Companies have demonstrated that grant of this waiver request will serve the public interest.

14. We note that, as a result of this transaction, access lines in Reservation's and Nemont's pre-acquisition study area boundaries will be eligible for different amounts of high-cost support than the access lines being transferred from Citizens' study area. We therefore direct Reservation and Nemont, as part of their annual universal service data submissions, to file a schedule showing their methodology for excluding the costs associated with the acquired access lines from the costs associated with their pre-acquisition study areas.³³

15. Finally, on May 11, 2001, the Commission adopted a Report and Order requiring

²⁷ See Joint Petition at 15.

²⁸ Federal Universal Support Mechanisms Fund Size Projections for the First Quarter 2003, USAC, November 1, 2002, Appendix HC02 1Q2003 - High Cost Projected Support by State 2003 - Annual.

²⁹ See Letter from Mary J. Sisak, Counsel for Nemont Telephone Cooperative, Inc., Missouri Valley Communications, Inc., and Reservation Telephone Cooperative, to Marlene H. Dortch, FCC (filed December 12, 2002) (attaching Letter from Public Service Commission, State of North Dakota to Marlene H. Dortch, FCC (December 4, 2002)).

³⁰ See Joint Petition at 16.

³¹ *Id.*

³² See Letter from Benjamin H. Dickens, Jr., Counsel for Nemont Telephone Cooperative, Inc., Missouri Valley Communications, Inc., and Reservation Telephone Cooperative, to Marlene H. Dortch, FCC (filed November 18, 2002).

³³ See 47 C.F.R. § 36.611.

incumbent LECs to freeze, on an interim basis, the Part 36 jurisdictional rules beginning July 1, 2001.³⁴ In the *Separations Freeze Order*, the Commission addressed how an incumbent LEC acquiring exchanges from another incumbent LEC shall recalculate their frozen separations factors.³⁵ Accordingly, Reservation and Nemont/MVC are required to recalculate their jurisdictional separations factors pursuant to the *Separations Freeze Order* and the Commission's rules.

III. PRICE CAP WAIVER

A. Background

16. Section 61.41(c)(2) of the Commission's rules provides that a non-price cap carrier that acquires access lines from a price cap carrier shall become subject to price cap regulation and must file price cap tariffs within one year.³⁶ Section 61.41(d) of the Commission's rules provides that LECs that become subject to price cap regulation are not permitted to withdraw from such regulation.³⁷

17. In the *LEC Price Cap Reconsideration Order*, the Commission explained that section 61.41(c), the "all-or-nothing" rule, is intended to address two concerns regarding mergers and acquisitions involving price cap companies.³⁸ The first concern was that, in the absence of the rule, a LEC might attempt to shift costs from its price cap affiliate to its non-price cap affiliate, allowing the non-price cap affiliate to charge higher rates to recover its increased revenue requirement, while increasing the earnings of the price cap affiliate. The second concern was that, absent the rule, a LEC might attempt to game the system by switching back and forth between rate-of-return regulation and price cap regulation.³⁹

18. The Commission nonetheless recognized in the *LEC Price Cap Reconsideration Order* that waivers of the price cap "all-or-nothing" rule might be justified if efficiencies created by the purchase and sale of exchanges outweigh the threat that the system might be subject to gaming.⁴⁰ The Commission stated that waivers of section 61.41(c) will be granted conditioned on the selling price cap company's

³⁴ See generally *Jurisdictional Separations and Referral to the Federal-State Joint Board*, Report and Order, CC Docket No. 80-286, 16 FCC Rcd 11382 (2001) (*Separations Freeze Order*). See also 47 C.F.R. § 36.3(c) and (d).

³⁵ See *Separations Freeze Order*, paras. 48-53.

³⁶ 47 C.F.R. § 61.41(c)(2). See *Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786 (*LEC Price Cap Order*), Erratum, 5 FCC Rcd 7664 (Com. Car. Bur. 1990), *modified on recon.*, Order on Reconsideration, 6 FCC Rcd 2637 (1991) (*LEC Price Cap Reconsideration Order*), *aff'd sub nom. National Rural Telecom Ass'n v. FCC*, 988 F.2d 174 (D.C. Cir. 1993), *petitions for further recon. dismissed*, 6 FCC Rcd 7482 (1991), *further modification on recon.*, *Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Supplements for Open Network Architecture, Policy and Rules Concerning Rates for Dominant Carriers*, Report and Order and Order on Further Reconsideration and Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 4524 (1991), *further recon.*, Memorandum Opinion and Order of Second Further Reconsideration, 7 FCC Rcd. 5235 (1992).

³⁷ 47 C.F.R. § 61.41(d).

³⁸ See *LEC Price Cap Reconsideration Order*, 6 FCC Rcd at 2706.

³⁹ *Id.*

⁴⁰ *Id.* at 2706, n. 207.

downward adjustment to its price cap indices to reflect the sale of exchanges.⁴¹ In addition, waivers of the all-or-nothing rule have been granted subject to the condition that the acquiring carrier obtains prior Commission approval if it subsequently seeks to elect price cap regulation.⁴²

19. Reservation requests waiver of section 61.41(c) because it desires to operate under rate-of-return regulation after it acquires price cap exchanges from Citizens.⁴³ The Acquiring Companies operate under rate-of-return regulation, while Citizens is subject to price cap regulation. Absent a waiver of the all-or-nothing price cap rules, the Acquiring Companies would be subject to price cap regulation no later than one year after acquiring Citizens' price cap exchanges.⁴⁴ Petitioners argue that that they are not within the class of carrier deemed by the Commission to be a candidate for price cap regulation and the rule's application in this instance would be contrary to the public interest.⁴⁵ The petitioners further argue that they are neither attempting to shift costs between price cap and non-price cap affiliates nor are they attempting to establish a large rate base by switching back and forth between rate-of-return regulation and price cap regulation.⁴⁶

B. Discussion

20. For the reasons discussed below, we find that good cause exists for us to waive section 61.41(c)(2) of the Commission's rules, and that it would be in the public interest to do so. As discussed previously, the courts have interpreted the Commission's rules to require a petitioner seeking a waiver of a Commission rule to demonstrate that special circumstances warrant a deviation from the general rule, and that such a deviation will serve the public interest.⁴⁷

21. Because the Acquiring Companies are significantly smaller than any of the carriers

⁴¹ See *Price Cap Performance Review for Local Exchange Carriers*, CC Docket No. 94-1, First Report and Order, 10 FCC Rcd 8961, 9104-06 (1995) (*LEC Price Cap Review Order*). The Price Cap Indices, which are the upper bounds for rates that comply with price cap regulation, are calculated pursuant to a formula specified in the Commission's rules for price cap carriers. See 47 C.F.R. § 61.45. The Commission explained that such an adjustment is needed to remove the effects of transferred exchanges from rates that have been based, in whole or in part, upon the inclusion of those exchanges in a carrier's price cap indices. See *LEC Price Cap Review Order*, 10 FCC Rcd at 9105-9106.

⁴² See, e.g., *Rye Telephone Company, Inc. and U S WEST Communications, Inc., Joint Petition for Waiver of Definition of "Study Area" Contained in the Part 36 Appendix-Glossary of the Commission's Rules and Petition for Waiver of Section 61.41(c)(2) of the Commission's Rules*, CC Docket No. 96-45, Order, 15 FCC Rcd 18738, 18745, para. 17 (Acc. Pol. Div. 2000); *ALLTEL Corp. Petition for Waiver of Section 61.41 of the Commission's Rules and Application for Transfer of Control*, CCB/CPD No. 99-1, Memorandum Opinion and Order, 14 FCC Rcd. 14191, 14202 (1999) (*ALLTEL/Aliant Merger Order*).

⁴³ See Joint Petition at 4. Reservation requests waiver of section 61.41(c)(2). We note that Nemont and MVC did not seek waivers of section 61.41(c)(2). We consider these waivers on our own motion. 47 C.F.R. § 1.3.

⁴⁴ See 47 C.F.R. § 61.41(c)(2). A Further Notice of Proposed Rulemaking is pending which, in part, seeks comment on a proposal from the Multi-Association Group (MAG) to remove the "all-or-nothing" rule. See *MAG Order/NPRM* at 19717-24.

⁴⁵ See Joint Petition at 4-8.

⁴⁶ See Joint Petition at 7-8.

⁴⁷ See *supra* para. 7.

subject to mandatory price caps, we find that special circumstances warrant waiver of section 61.41(c)(2). In evaluating requests for waiver of section 61.41(c), the Bureau has taken into account the requesting company's preferences and, in particular, the preferences of small carriers.⁴⁸ In fact, the Commission traditionally has been sensitive to the unique administrative burdens imposed on small telephone companies by the application of its rules.⁴⁹ In the *LEC Price Cap Order*, the Commission decided that small telephone companies would not be required to operate under a regulatory regime that was designed largely on the basis of the historical performance of the largest LECs.⁵⁰ The Commission explained that small and mid-size LECs may have fewer opportunities than large companies to achieve cost savings and efficiencies and may be less productive than the Regional Bell Operating Companies (RBOCs) and GTE.⁵¹ The Commission, therefore, limited the mandatory application of price cap regulation to the then-existing eight largest LECs – the seven RBOCs and GTE.

22. The Acquiring Companies run operations that are smaller than other carriers that have been granted waivers of the Commission's price cap rules.⁵² Further, the Acquiring Companies are the type of small carriers that the Commission has previously found to be inappropriate candidates for price cap regulation.⁵³ For these reasons, we find that the Acquiring Companies present special circumstances to support their waiver request.

23. We also find that a waiver of section 61.41(c)(2) serves the public interest. We find that significant risks of cost-shifting between affiliates and gaming the system – the Commission's two primary concerns regarding price cap waivers – are not present with regard to the Acquiring Companies acquisition of Citizens' exchanges. None of the Acquiring Companies has an incentive to shift costs between price cap and rate-of-return affiliates, because none of these companies is seeking to maintain separate affiliates under different systems of regulation. Second, to safeguard against possible gaming that could result from attempts to elect price-cap regulation at a later time, we will require the Acquiring Companies to seek prior Commission approval if they or any of their affiliates seek to elect price cap regulation. At that time, we can make a determination if the transaction raises the concerns that we seek to address in section 61.41(c)(2). We believe that requiring the Acquiring Companies to seek Commission approval before electing price cap regulation is sufficient to deter gaming in the future.

⁴⁸ See, e.g., *ALLTEL/Aliant Merger Order*, 14 FCC Rcd at 14204-05.

⁴⁹ See, e.g., *ALLTEL/Aliant Merger Order*, 14 FCC Rcd at 14204; *In the Matter of Minburn Telecommunications, Inc., Petition for Waiver of Sections 61.41(c) and (d) of the Commission's Rules*, CCB/CPD No. 99-16, Memorandum Opinion and Order, 14 FCC Rcd 14184, 14187 (Com. Car. Bur. 1999).

⁵⁰ See *LEC Price Cap Order*, 5 FCC Rcd at 6799-6801, 6818-19.

⁵¹ *Id.*

⁵² See, e.g., *CenturyTel of Northwest Arkansas, LLC et al., Joint Petition for Waiver of Definition of "Study Area" Contained in the Part 36 Appendix-Glossary of the Commission's Rules, Petition for Waiver of Sections 61.41(c) and 69.3(g)(2) of the Commission's Rules*, CC Docket No. 96-45, Memorandum Opinion and Order, 15 FCC Rcd 25437 (Acc. Pol. Div. 2000) (approving the conversion of 214,270 access lines from price cap to rate-of-return regulation); *ALLTEL/Aliant Merger Order* (approving the conversion of approximately 300,000 access lines from price cap to rate-of-return regulation); *In the Matter of ALLTEL Service Corporation, Petition for Waiver of Section 61.41 of the Commission's Rules*, Order, 8 FCC Rcd 7054 (Com. Car. Bur. 1993) (approving the conversion of approximately 285,000 access lines from price cap to rate-of-return regulation).

⁵³ See *LEC Price Cap Order*, 5 FCC Rcd at 6787, para. 6 (limiting mandatory price cap participation to the eight largest LECs at that time – the seven RBOCs and GTE).

24. Finally, section 61.45 grants us discretion to require price cap carriers to make adjustments to their price cap indices to reflect cost changes resulting from rule waivers.⁵⁴ Accordingly, we will require Citizens to adjust its price cap indices to reflect the removal of the transferred access lines from its North Dakota study area.

IV. WAIVER OF SECTION 69.3(E)(11)

A. Background

25. Under section 69.3 of the Commission's rules, annual access tariffs, including the tariffs filed by NECA on behalf of companies that participate in NECA's access tariffs, go into effect on July 1 of each year.⁵⁵ To minimize the complexity of administering NECA's common line pool and LTS program, any change in NECA common line tariff participation and LTS resulting from a merger or acquisition of telephone properties is effective on the next annual access tariff filing effective date following the merger or acquisition.⁵⁶ Because the next annual access tariff filing effective date is not until July 1, 2003,⁵⁷ the Acquiring Companies would have to wait until that date to participate in NECA's access tariffs and would be required to file their own interstate tariffs for the interim period. In order to avoid the burdens associated with filing their own tariffs during this interim period, the Acquiring Companies have requested a waiver of section 69.3(e)(11) of the Commission's rules.⁵⁸ The waiver would enable the Acquiring Companies to include the acquired access lines in the NECA carrier common line tariff upon the date of the closing of their transaction with Citizens. The Acquiring Companies indicate that the inclusion of the small number of access lines they are acquiring from Citizens in the NECA carrier common line tariffs would represent a minimal increase in NECA common line pool participation and would not unduly increase the complexity of administering the LTS program.⁵⁹ NECA, in its comments, "affirms that the proposed addition of lines to the common line pool will not significantly impact common line pool revenue requirements and will not impose any undue administrative burdens on NECA."⁶⁰

B. Discussion

26. We find that the Acquiring Companies have demonstrated that special circumstances warrant a deviation from section 69.3(e)(11) of our rules and that it would be in the public interest to grant the Acquiring Companies' waiver request. According to NECA, "the proposed addition of lines to the common line pool will not significantly impact common line pool revenue requirements and will not

⁵⁴ See 47 C.F.R. § 61.45(d).

⁵⁵ See 47 C.F.R. § 69.3(a).

⁵⁶ 47 C.F.R. § 69.3(e)(11). See *Amendment of Part 69 of the Commission's Rules Relating to the Common Line Pool Status of Local Exchange Carriers Involved in Mergers or Acquisitions*, CC Docket No. 89-2, Report and Order, 5 FCC Rcd 231, 248 (1989).

⁵⁷ See 47 C.F.R. § 69.3(a).

⁵⁸ See Joint Petition at 11.

⁵⁹ *Id.*

⁶⁰ See NECA Comments at 5.

impose any undue administrative burdens on NECA.”⁶¹ Based on NECA’s representation in its comments, we conclude that the inclusion of the acquired access lines in the NECA carrier common line tariff represent a minimal increase in NECA common line pool participation. Also, we believe that it would be administratively burdensome for the Acquiring Companies to develop and file their own interstate tariffs until July 1, 2003 for a relatively small number of access lines. Consequently, we find that the Acquiring Companies present special circumstances to justify a waiver of section 69.3(e)(11). Moreover, we believe that a waiver of section 69.3(e)(11) will be in the public interest because the Acquiring Companies will be able to devote additional resources to providing improved telecommunications services to the affected rural areas that, absent the waiver, may otherwise be utilized on tariff filings. We, therefore, conclude that good cause exists to grant a waiver of section 69.3(e)(11) to the Acquiring Companies.

V. AVERAGE SCHEDULE WAIVER

A. Background

27. Incumbent LECs that participate in NECA pools collect access charges from interexchange carriers at the rates contained in the tariffs filed by NECA.⁶² Each pool participant receives settlements from the pools to recover the cost of providing service plus a pro-rata share of the pool’s earnings.⁶³ NECA pool participants’ interstate access charge settlements are determined either on the basis of cost studies or average schedule formulas. Cost companies are incumbent LECs that receive compensation for interstate telecommunications services based on their actual interstate investment and expenses, calculated from detailed cost studies. Average schedule companies are those incumbent LECs that receive compensation for use of their interstate common carrier services on the basis of formulas that are designed to simulate the disbursements that would be received by a cost company that is representative of average schedule companies.⁶⁴ In electing average schedule status, companies are able to avoid the administrative and financial burdens of performing interstate cost studies.

28. Section 69.605(c) of the Commission’s rules provides, in pertinent part, that “a telephone company that was participating in average schedule settlements on December 1, 1982, shall be deemed to be an average schedule company.”⁶⁵ The definition of “average schedule company” includes existing average schedule incumbent LECs, but does not allow the creation of new average schedule companies or the conversion of cost-based carriers to average schedule status without a waiver of the Commission’s rules.⁶⁶ The definition was designed to limit the use of average schedule formulas to companies that operated as average schedule companies prior to adoption of the rule or that are able to demonstrate

⁶¹ *Id.*

⁶² *See* 47 C.F.R. § 69.601.

⁶³ *See* 47 C.F.R. §§ 69.601-69.612.

⁶⁴ *See* 47 C.F.R. § 69.606(a).

⁶⁵ 47 C.F.R. § 69.605(c).

⁶⁶ An incumbent LEC may convert from an average schedule company to a cost company, but a carrier must obtain a waiver of the definition of “average schedule company” in section 69.605(c) to change from a cost company to an average schedule company. *See* 47 C.F.R. § 69.605(c).

compelling circumstances sufficient to warrant a special exception.⁶⁷ Accordingly, absent a waiver of section 69.605(c), an average schedule company acquiring additional lines would be required to convert to operation as a cost-based company.⁶⁸ Our actions on waivers of the definition of “average schedule company,” therefore, are guided by the principle that incumbent LECs should settle on a cost basis whenever possible without undue hardship.

29. In the Joint Petition, Nemont and MVC seek waiver of the definition of “average schedule company” in section 69.605(c) so that they may operate as average schedule companies after adding the Citizens exchange to Nemont’s existing average schedule study area in North Dakota.⁶⁹ The petitioners argue that several special circumstances justify this waiver. They note that the Commission has previously granted a waiver when a new company will share the study area with an average schedule affiliate.⁷⁰ Here, they assert, MVC is seeking to acquire a small, rural exchange and to join the existing Nemont average schedule study area in North Dakota.⁷¹ The petitioners argue that, absent waiver, they would have to convert their existing exchanges to cost-based settlements, at an unduly burdensome expense to both themselves and their customers.⁷² They note that the Commission has previously granted similar waivers subject to certain requirements to guard against unintended effects on interstate revenue requirements or additional administrative burdens on NECA or the Commission.⁷³

30. NECA and NTCA support the requested average schedule waiver. NECA argues that waiver would enhance customer response time and service quality.⁷⁴ NTCA argues that waiver would be consistent with previous Commission decisions applying to similarly-sized average schedule companies that acquire comparable numbers of access lines from price cap carriers.⁷⁵

⁶⁷ See *Petition for Waiver Filed by Heartland Telecommunications Company of Iowa and Hickory Tech Corporation*, AAD File No. 96-94, Memorandum Opinion and Order, 14 FCC Rcd 13661, 13662, para. 3 (1999) (*Heartland*).

⁶⁸ *Id.* at 13664-65, para. 7.

⁶⁹ Joint Petition at 8; Supplement at 1-2.

⁷⁰ Joint Petition at 9 (citing *Jordan-Soldier Valley Telephone Company and Alpine Communications, L.C.*, CC Docket No. 96-45, 15 FCC Rcd 21917, 21921-22, para. 13 (Acc. Pol. Div. 2000) (*Jordan-Soldier*)).

⁷¹ Joint Petition at 9-10.

⁷² *Id.* at 10. According to Nemont, it would cost approximately \$62,000 in annual recurring cost and \$25,000 in non-recurring cost to perform the cost studies. *Id.*

⁷³ *Id.* The requirements that the Commission has previously imposed, to which the petitioners would assent upon grant of waiver, are as follows: (1) the requesting companies and their affiliates must make a combined report to NECA, including average schedule and USF-related concerns; (2) all affiliates must convert to cost-based settlements if any one affiliate converts from average schedule status to cost-based settlements, or elects section 61.39 treatment; and (3) the companies’ average schedule status may remain in effect only as long as the respective affiliates remain under common control. *Id.*

⁷⁴ NECA Comments at 3.

⁷⁵ NTCA Comments at 3-4.

B. Discussion

31. We reject the petition for waiver of the definition of “average schedule company” in section 69.605(c). As we have previously stated, section 69.605(c) was premised on a policy determination “that exchange carriers which have the financial resources and expertise to conduct cost studies without undue hardship should be required to measure the actual costs they incur in providing interstate service.”⁷⁶ We have also noted that section 69.605(c) serves to prevent an increase in the number of lines subject to average schedule treatment.⁷⁷ We have granted waivers to ensure a smooth settlement process when, among certain other limited exceptions, we have allowed an average schedule company and its acquired cost company to merge into one average schedule study area.⁷⁸ We have declined to permit a waiver on this ground, however, when a disproportionate number of the requesting company’s lines were previously operated on a cost basis or were subject to price caps, or when a waiver would add too greatly to the number of lines that settle on an average schedule basis.

32. The Commission’s precedents support denial of this waiver request. In *Heartland*, the Commission affirmed the Bureau’s decision to deny a request for waiver of the “average schedule company” definition when only 9.6% of the total access lines of the merged company were operated on an average schedule basis before the transfer.⁷⁹ In that case, the average schedule company, which served 1,330 access lines, acquired an exchange serving 12,527 access lines subject to price cap regulation.⁸⁰ In *NebCom*, the Accounting and Audits Division of the Common Carrier Bureau denied a similar waiver request for the conversion of approximately 3,000 access lines, or 40 percent of the resulting company’s lines, from cost-based to average schedule settlements.⁸¹ The waiver requested here is at least as problematic as those denied in *Heartland* and *NebCom*. MVC, which was created to purchase and operate the Williston exchange from Citizens, will add approximately 9,349 access lines that previously were subject to price cap regulation to the existing, 236-line Nemont North Dakota average schedule study area.⁸² Nemont’s 236 average schedule access lines amount to only 2.5% of the total 9,585 access lines to be operated by the combined carrier. We conclude that the requested waiver would convert an unacceptably large number of access lines to average schedule settlement. We further conclude that this conversion is not justified by the small number, and the small proportion, of the resulting company’s lines that have previously settled on an average schedule basis. We reject the petitioners’ reliance on our decision in *Jordan-Soldier*; there, we permitted the conversion to average schedule status of only 300 lines that had previously been settled on a cost basis.⁸³

⁷⁶ See *NebCom, Inc. Petition for Waiver of Sections 61.41(c)(2) and 69.605(c) of the Commission’s Rules*, AAD File No. 97-50, Order, 13 FCC Rcd 4487, 4492 para. 13 (Acc. Aud. Div. 1998) (*NebCom*) (citing *MTS and WATS Market Structure: Average Schedule Companies*, Memorandum Opinion and Order, 2 FCC Rcd 6642 (1987)).

⁷⁷ *Id.*

⁷⁸ See *Heartland*, 14 FCC Rcd at 13663, para. 4. We have also granted waivers to small exchange carriers that clearly lacked the resources to operate on a cost-study basis. *Id.*

⁷⁹ *Id.* at 13664-66, paras. 7-8.

⁸⁰ *Id.* at 13664, para. 5.

⁸¹ *NebCom*, 13 FCC Rcd at 4492, para. 14.

⁸² Joint Petition at 3.

⁸³ *Jordan-Soldier*, 15 FCC Rcd at 21919, para. 4.

33. We also reject the petitioners' claim that it will be unduly burdensome to convert the subject exchange to cost-based settlements. They assert that they would incur approximately \$62,000 in annual recurring costs plus a one-time cost of \$25,000 to develop cost studies for MVC.⁸⁴ In addition, the petitioners assert that, if MVC is required to convert to cost settlements, it will experience a net income loss of \$26,176 in the first year and \$12,824 in the second year after the acquisition.⁸⁵ In *Heartland*, the petitioners asserted that the combined carrier would spend approximately \$80,000 per year to conduct cost studies.⁸⁶ In denying waiver, the Commission reasoned that much of the cost study information already existed before the transfer, since approximately 90% of the combined carrier's access lines were previously operated on a cost study basis.⁸⁷ In addition, the selling carrier was required under the Commission's rules to keep its property and accounting records in a manner that would facilitate development of the information needed for annual cost studies.⁸⁸ Here, 97.5% of the combined carrier's access lines will have previously been subject to price cap regulation before the transfer of Citizens' access lines to Nemont's North Dakota study area.⁸⁹

34. Examination of the size of other cost and average schedule companies weighs heavily against the petitioners' claim that it is unduly burdensome for a company with nearly 10,000 access lines to settle with NECA on a cost basis. We note that today the mean number of lines for an average schedule company is 5,225, far smaller than the petitioners' resulting study area.⁹⁰ Furthermore, 592 of the 944 existing cost companies (63 percent) have fewer than 10,000 lines.⁹¹ We granted the waiver in *Jordan-Soldier* because, consistent with prior decisions, the resulting small carrier, which served only 640 access lines, would experience undue hardship if it were required to conduct cost studies.⁹² The petitioners' resulting study area, with more than 9,500 lines, has significantly more lines than the carrier in *Jordan-Soldier*, and therefore the petitioners' reliance on *Jordan-Soldier* is misplaced.

⁸⁴ Joint Petition at 10. See also Letter from Benjamin H. Dickens, Jr., Counsel for Missouri Valley Communications, Inc., to Marlene H. Dortch, FCC (filed November 18, 2002). (Average Schedule *ex parte*).

⁸⁵ Average Schedule *ex parte* at 1.

⁸⁶ *Heartland*, 14 FCC Rcd at 13666, para. 10.

⁸⁷ *Id.* at 13667, para. 11.

⁸⁸ *Id.*

⁸⁹ Additionally, we note that the petitioners offer no support for either their figures for claimed income loss or for the one-time cost of \$25,000, which, they assert, they will incur in developing cost studies. Cf. *NebCom*, 13 FCC Rcd at 4493, para. 16 (those seeking waiver assume "the burden of presenting credible evidence of special circumstances, and mere allegations, absent convincing documentation and support, do not suffice").

⁹⁰ Universal Service Administrative Company Federal Universal Service Support Mechanisms, Fund Size Projections for the First Quarter 2003 (filed Nov. 1, 2002).

⁹¹ See Universal Service Fund 2002 Submission of 2001 Study Results by the National Exchange Carrier Association, Inc. (filed Oct. 1, 2002).

⁹² *Jordan-Soldier*, 15 FCC Rcd at 21922, para. 15. Specifically, we compared the high cost of completing cost studies relative to the small size of the acquiring average schedule company. *Id.*

35. Finally, we reject the petitioners' implication that the burden of conducting the initial cost studies will negatively affect their subscribers.⁹³ As the Commission noted in *Heartland*, carriers may assign the entire cost of their initial cost study to the interstate jurisdiction, with recovery from the NECA pooling process, which in turn recovers its costs through access charges paid by interexchange carriers nationwide.⁹⁴ Accordingly, there should be no discernible negative impact on the petitioners' subscribers from our denial of the requested waiver.

VI. ORDERING CLAUSES

36. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 5(c), 201, 202 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 155(c), 201, 202, and 254 and sections 0.91, 0.291, and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 1.3, that the joint petition for waiver of the study area boundary freeze as codified in Part 36, Appendix-Glossary, of the Commission's rules, by Nemont Telephone Cooperative, Inc., Missouri Valley Communications, Inc., Reservation Telephone Cooperative, and Citizens Telecommunications Company of North Dakota dated September 24, 2002, IS GRANTED, as described herein.

37. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 5(c), 201, and 202 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 155(c), 201, and 202, and sections 0.91, 0.291, and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 1.3, that waiver of section 61.41(c)(2) of the Commission's rules, 47 C.F.R. § 61.41(c)(2), IS GRANTED to Nemont Telephone Cooperative, Inc., Missouri Valley Communications, Inc., and Reservation Telephone Cooperative, as described herein.

38. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 5(c), 201, and 202 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 155(c), 201, and 202, and sections 0.91, 0.291, and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 1.3, that the petition for waiver of section 69.605(c) of the Commission's rules, 47 C.F.R. § 69.605(c), filed by Nemont Telephone Cooperative, Inc. and Missouri Valley Communications, Inc. IS DENIED, as discussed in paragraphs 31 to 35 of this Order.

39. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 5(c), 201, and 202 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 155(c), 201, and 202, and sections 0.91, 0.291, and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 1.3, that Nemont Telephone Cooperative, Inc. is required to convert from an average schedule company to a cost company and Missouri Valley Communications, Inc. is required to operate as a cost company.

40. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 5(c), 201, and 202 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 155(c), 201, and 202, and sections 0.91, 0.291, and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 1.3, that the petition for waiver of section 69.3(e)(11) of the Commission's rules, 47 C.F.R. § 69.3(e)(11), filed by Nemont Telephone Cooperative, Inc., Missouri Valley Communications, Inc., and Reservation Telephone Cooperative, IS GRANTED, as described herein.

41. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 5(c), 201, and 202 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 155(c), 201, and 202, and sections

⁹³ See Joint Petition at 10.

⁹⁴ *Heartland*, 14 FCC Rcd at 13667, para. 12.

0.91, 0.291, 1.3 and 36.611 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 1.3, and 36.611 that Nemont Telephone Cooperative, Inc. and Reservation Telephone Cooperative, SHALL SUBMIT, as part of their annual universal service data submissions to the fund administrator, a schedule showing the methodology for excluding costs associated with the acquired access lines from costs associated with their pre-acquisition study areas.

42. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 5(c), 201, and 202 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 155(c), 201, and 202, and sections 0.91, 0.291, 1.3, and 61.43 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 1.3, and 61.43, that Citizens Telecommunications Company of North Dakota SHALL ADJUST its price cap indices in its annual price cap filing to reflect cost changes resulting from this transaction, consistent with this Order.

FEDERAL COMMUNICATIONS COMMISSION

William F. Maher, Jr.
Chief, Wireline Competition Bureau