

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

In the Matter of)	
)	
Federal-State Joint Board on)	
Universal Service)	CC Docket No. 96-45
)	
N.E. Colorado Cellular, Inc.)	
Petition for Waiver of Section 54.314(d) of the)	
Commission's Rules and Regulations)	
)	

ORDER

Adopted: July 25, 2003

Released: July 25, 2003

By the Chief, Telecommunications Access Policy Division:

I. INTRODUCTION

1. In this Order, we grant a request from N.E. Colorado Cellular, Inc. (N.E. Colorado Cellular), a competitive eligible telecommunications carrier (ETC), for waiver of the October 1, 2001 certification filing deadline set forth in section 54.314(d)(1) of the Commission's rules for high-cost universal service support in areas served by rural carriers. Granting N.E. Colorado Cellular's waiver request will allow it to receive universal service support beginning on February 6, 2002, the date N.E. Colorado Cellular filed its high-cost certification under section 54.314(d) with the Commission.

II. BACKGROUND

2. Section 254(e) of the Communications Act of 1934, as amended (the Act), provides that "only an eligible telecommunications carrier designated under section 214(e) shall be eligible to receive specific Federal universal service support."¹ Once a carrier is designated as an ETC, there are other requirements that must be satisfied before a carrier can begin receiving high-cost universal service support. Section 254(e) requires that support shall be used "only for the provision, maintenance, and upgrading of facilities and services for which support is intended."² To implement this statutory requirement, the Commission adopted an annual certification requirement. Section 54.314 of the Commission's rules provides that states desiring rural ETCs to receive universal service high-cost support must file an annual certification with the Universal Service Administrative Company (USAC) and the Commission stating that all high-cost support received by such carriers within the state will be used "only for the provision, maintenance, and upgrading of facilities and services for which support is intended."³ In instances where carriers are not subject to the jurisdiction of a state, the Commission allows an ETC to

¹ 47 U.S.C. § 254(e). Section 214(e) of the 1996 Act provides that state commissions shall designate carriers as ETCs. 47 U.S.C. § 214(e).

² 47 U.S.C. § 254(e).

³ 47 C.F.R. § 54.314. The certification requirement for non-rural ETCs is found in section 54.313 of the Commission's rules. 47 C.F.R. § 54.313.

certify directly to the Commission and USAC that federal high-cost support will be used in a manner consistent with section 254(e).⁴ Section 54.314 provides that the certification must be filed by October 1 of the preceding calendar year to receive support beginning in the first quarter of a subsequent calendar year.⁵ If the October 1 deadline for first quarter support is missed, the certification must be filed by January 1 for support to begin in the second quarter, by April 1 for support to begin in the third quarter, and by July 1 for support to begin in the fourth quarter.⁶ The Commission established this schedule to allow USAC sufficient time to process section 254(e) certifications and calculate estimated high-cost demand amounts for submission to the Commission.⁷

3. *N.E. Colorado Cellular's Petition for Waiver.* On January 11, 2002, the Colorado Public Utilities Commission designated N.E. Colorado Cellular as an ETC.⁸ On February 6, 2002, consistent with section 54.314(b) of the Commission's rules, N.E. Colorado Cellular certified to the Commission that federal high-cost support would be used "only for the provision, maintenance, and upgrading of facilities and services for which support is intended, pursuant to [s]ection 254(e)" of the Act.⁹ On February 8, 2002, N.E. Colorado Cellular filed a request for waiver of section 54.314 requesting that the Commission accept N.E. Colorado Cellular's annual certification for high-cost support beginning February 6, 2002, the date N.E. Colorado Cellular filed its high-cost certification under section 54.314(d).¹⁰ Absent a waiver, N.E. Colorado Cellular would not be eligible to receive support until third quarter 2002.¹¹

4. N.E. Colorado Cellular contends that good cause exists for granting its waiver of section 54.314 of the Commission's rules because it did not receive its ETC designation until January 11, 2002, *i.e.*, after the October 1st deadline for filing the certification to begin receiving support in first quarter 2002. Specifically, N.E. Colorado Cellular argues that granting its request is consistent with the

⁴ See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Fourteenth Report and Order and Twenty-Second Order on Reconsideration, *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Docket No. 00-256, Report and Order, 16 FCC Rcd 11244, para. 189 (rel. May 23, 2001) (*Rural Task Force Order*); 47 C.F.R. § 54.314(b).

⁵ 47 C.F.R. § 54.314(d)(1).

⁶ See 47 C.F.R. § 54.314(d). When the Commission adopted this certification schedule for rural carriers in the *Rural Task Force Order* on May 23, 2001, the Commission did not require certifications to be filed for the last two quarters of 2001. Rural carriers were required to submit their initial certifications on October 1, 2001, for the first full year of implementation of the modified high-cost mechanism for rural carriers, *i.e.*, January 1, 2002 to December 31, 2002. See *Rural Task Force Order* 16 FCC Rcd 11319, para. 192. Section 54.313 sets out similar certification rules for non-rural carriers.

⁷ See *Rural Task Force Order*, 16 FCC Rcd at 11319, para. 191. Under the Commission's rules, USAC submits to the Commission estimated demand for the universal service support mechanisms, including high-cost support, two months prior to the beginning of each quarter. See 47 C.F.R. § 54.709(a)(3). Therefore, for the first quarter, USAC submits estimated demand amounts to the FCC on or before November 1. In order to submit an accurate estimate by that date, USAC needs to know which carriers have been certified under the Commission's rules no later than October 1. See *Rural Task Force Order*, 16 FCC Rcd at 11319, para. 191.

⁸ See *Recommended Decision of Administrative Law Judge William J. Fritzel Approving Stipulation and Settlement Agreement*, Docket No. 00A-315T, Decision No. R01-1298 (Dec. 21, 2001) (*Recommended Decision*). Although the *Recommended Decision* was adopted on December 21, 2001, it became final after the 20 day period for filing exceptions expired, or January 11, 2002.

⁹ See *Letter from David A. LaFuria to William F. Caton, Secretary, FCC* (dated Feb. 6, 2002).

¹⁰ See *N.E. Colorado Cellular, Inc., Petition for Waiver*, filed Feb. 8, 2002, at 1 (N.E. Colorado Cellular Petition).

¹¹ 47 C.F.R. § 54.314(d)(3).

Commission's goal of competitive neutrality and will serve the public interest.¹²

5. 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 a deviation will serve the public interest.

III. DISCUSSION

6. We find that good cause exists to waive the certification deadlines contained in section 54.314 of the Commission's rules so that N.E. Colorado Cellular can receive support for the first quarter of 2002.¹⁷ N.E. Colorado Cellular has demonstrated that special circumstances warrant a deviation from the filing deadlines provided in section 54.314(d) of the Commission's rules. Because N.E. Colorado Cellular did not receive its ETC designation until January 11, 2002, it could not have met, under any circumstances, the October 1, 2001 filing deadline for receiving support beginning in the first quarter of 2002, or the January 1, 2002 deadline for receiving support in the second quarter of 2002. N.E. Colorado Cellular, however, made the necessary certification on February 6, 2002.¹⁸ The certification filing schedule set out in the Commission's rules was adopted to ensure that USAC has sufficient time to process the certifications prior to its submission of estimated support requirements to the Commission. It would be onerous, however, to deny an ETC receipt of universal service support for more than two quarters, as a result of a particular ETC designation having occurred after the certification filing deadline.¹⁹ We therefore find that N.E. Colorado Cellular has demonstrated special circumstances that justify a waiver of section 54.314. In this instance, these special circumstances outweigh any

¹² See N.E. Colorado Cellular Petition at 7. In its Petition, N.E. Colorado Cellular also requested a waiver of section 54.313 of the Commission's rules for its certification filing in a study area served by a non-rural incumbent LEC. See *id.* at 1-2. On March 22, 2002, N.E. Colorado Cellular submitted a partial request to withdraw the portion of its petition seeking waiver of section 54.313 of the Commission's rules. See N.E. Colorado Cellular, Inc., Partial Request to Withdraw Petition for Waiver (filed Mar. 22, 2002) (N.E. Colorado Cellular Partial Withdrawal Petition). N.E. Colorado Cellular's request for partial withdraw is granted *supra* para. 9.

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 When the Commission adopted the certification schedule for rural carriers in the *Rural Task Force Order* on May 23, 2001, the Commission did not require certifications to be filed for the last two quarters of 2001. See *supra* note 6. See, e.g., *Federal-State Joint Board on Universal Service, West Virginia Public Service Commission, Request for Waiver of State Certification Requirements for High-Cost Universal Service Support for Non-Rural Carriers*, Order, CC Docket No. 96-45, 16 FCC Rcd 5784 (2001) (granting a waiver of the October 1 certification filing deadline); *Federal-State Joint Board on Universal Service, RFB Cellular, Inc., Petitions for Waiver of Sections 54.314(d) and 54.307(c) of the Commission's Rules and Regulations*, Order, CC Docket No. 96-45, 17 FCC Rcd 24387 (Wireline Compet. Bur. 2002) (granting a waiver of the October 1 certification filing deadline) (*RFB Cellular Waiver Order*).

¹⁸ See N.E. Colorado Cellular Petition at 2.

¹⁹ The deadline for support to begin second quarter is January 1, so, absent a waiver, N.E. Colorado would not be eligible for support until third quarter.

administrative difficulties that USAC may face as a result of the late-filed certification.²⁰

7. We also conclude that waiver of section 54.314 would be consistent with the public interest. Competitive neutrality is a fundamental principal of the Commission's universal service policies.²¹ Denying first quarter and second quarter 2002 support to N.E. Colorado Cellular, a competitive ETC, merely because the timing of its ETC designation precluded it from timely filing its October 1 certification, would undermine the Commission's goals of competitive neutrality. Because the Commission has found that "competitively neutral access to support is critical to ensuring that all Americans have access to affordable telecommunications," N.E. Colorado Cellular should not be penalized as a result of the timing of its ETC designation.²² We therefore conclude that waiver of this rule is in the public interest.

8. In conclusion, because N.E. Colorado Cellular became eligible to receive high-cost support after the October 1, 2001 certification filing deadlines, we find that good cause exists to warrant a waiver of section 54.314(d) of the Commission's rules. As N.E. Colorado Cellular requested, this waiver will allow N.E. Colorado Cellular to begin receiving high-cost support as of February 6, 2002, the date it filed its high-cost certification under section 54.314 of the Commission's rules.

9. *N.E. Colorado Cellular's Petition for Withdrawal.* In its petition, N.E. Colorado Cellular also requested a waiver of section 54.313 of the Commission's rules for its certification filing in a study area served by a non-rural incumbent LEC.²³ On March 22, 2002, N.E. Colorado Cellular submitted a partial request to withdraw the portion of its petition seeking waiver of section 54.313 of the Commission's rules.²⁴ We grant N.E. Colorado Cellular's request for partial withdrawal.

IV. ORDERING CLAUSE

10. Accordingly, IT IS 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

²⁰ To facilitate timely payments and to minimize the administrative burden associated with processing those payments, we direct USAC to distribute N.E. Colorado Cellular's retroactive support payments on a phased-in basis. Specifically, we instruct USAC to pair retroactive support payments with regular monthly support payments as follows until all retroactive support has been paid: N.E. Colorado Cellular's July 2003 support payment (disbursed in August 2003) shall include its prorated February 2002 support payment; N.E. Colorado Cellular's August 2003 support payment (disbursed in September 2003) shall include its March 2002 support payment; N.E. Colorado Cellular's September 2003 support payment (disbursed in October 2003) shall include its April 2002 support payment; N.E. Colorado Cellular's October 2003 support payment (disbursed in November 2003) shall include its May 2002 support payment; and N.E. Colorado Cellular's November 2003 support payment (disbursed in December 2003) shall include its June 2002 support payment.

²¹ See *Federal-State Joint Board on Universal Service*, CC Docket 96-45, Ninth Report and Order and Eighteenth Order on Reconsideration, 14 FCC Rcd 20432, 20479-78, paras. 89-90 (1999) (*Ninth Report and Order*), reversed in part and remanded in part, *Qwest Corp. v. FCC*, 258 F.3d 1191 (10th Cir. 2001). See also *Federal-State Joint Board on Universal Service; Promoting Deployment of Subscriberhip in Unserved and Underserved Areas, Including Tribal and Insular Areas*, CC Docket No. 96-45, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 15 FCC Rcd 12208, 12264-65, para. 114 (2000) ("competitively neutral access to ... support is critical to ensuring all Americans, including those that live in high-cost areas, have access to affordable telecommunications.").

²² See *id.*

²³ N.E. Colorado Cellular Petition at 1-2.

²⁴ N.E. Colorado Cellular Partial Withdrawal Petition.

waiver of section 54.314(d) of the Commission's rules, filed by N.E. Colorado Cellular, Inc., on February 8, 2002, IS GRANTED, as described herein.

11. IT IS FURTHER ORDERED, pursuant to the authority delegated under sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, that the partial request to withdraw the petition for waiver of section 54.313 of the Commission's rules, filed by N.E. Colorado Cellular, Inc., on March 22, 2002, IS GRANTED, as described herein.

12. IT IS FURTHER ORDERED, pursuant to sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, that the petition for waiver of section 54.313 of the Commission's rules, filed by N.E. Colorado Cellular, Inc., on March 22, 2002 IS DISMISSED WITHOUT PREJUDICE, to the extent provided herein.

FEDERAL COMMUNICATIONS COMMISSION

Eric N. Einhorn
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Wireline Competition Bureau