

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

In the Matter of)
Sacred Wind Communications, Inc.)
and)
Qwest Corporation)
Joint Petition for Waiver of the Definition of) CC Docket No. 96-45
"Study Area" Contained in Part 36, Appendix-)
Glossary of the Commission's Rules)
Sacred Wind Communications, Inc.)
Related Waivers of Parts 36, 54, and 69 of the)
Communication's Rules)

ORDER

Adopted: August 15, 2006

Released: August 15, 2006

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order, we grant a joint request from Sacred Wind Communications, Inc. (Sacred Wind) and Qwest Corporation (Qwest) (collectively, Petitioners) for a waiver of the study area boundary freeze codified in the Appendix-Glossary of Part 36 of the Commission's rules. We also grant Sacred Wind waivers of certain Commission rules to enable Sacred Wind to immediately receive high-cost universal service support as provided in this Order. In addition, we grant Sacred Wind's request for waiver of the Commission's rules so that it may participate immediately in the National Exchange Carrier Association (NECA) pools and tariffs. Finally, we waive section 54.400(e) of the Commission's rules, to the extent necessary, to permit Sacred Wind and other eligible telecommunications carriers (ETCs) serving Sacred Wind's service area to offer enhanced Lifeline and Link-Up benefits to qualified residents.

II. BACKGROUND

2. Petition. On March 30, 2006, Sacred Wind and Qwest filed a joint petition for waiver of the definition of "study area" contained in the Part 36 Appendix-Glossary of the Commission's rules so that Sacred Wind may establish a new study area in the state of New Mexico. Sacred Wind was

1 See 47 C.F.R. Part 36 App. See also Sacred Wind Communications, Inc. and Qwest Corporation Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary of the Commission's Rules, Related Waivers of Parts 36, 54 and 69 of the Commission's Rules, CC Docket No. 96-45 (filed March 30, 2006) (Petition).

2 See generally Petition.

established in 2004 to provide advanced and basic telecommunications services to the Navajo people on both reservation lands and nearby lands in the state of New Mexico.³ Qwest is an interstate access price cap incumbent local exchange carrier (LEC) that owns and operates approximately 800,000 access lines in New Mexico.⁴ Sacred Wind is acquiring approximately 2,300 access lines from Qwest that are on or near the Navajo reservation in New Mexico.⁵ A study area waiver will permit Qwest to remove the approximately 2,300 access lines from its New Mexico study area and permit Sacred Wind to establish a new study area in New Mexico.

3. Sacred Wind also seeks waiver of certain Commission rules so that it may receive immediate federal high-cost universal service support and enhanced Lifeline and Link-Up support for serving eligible residents of near-Tribal lands.⁶ Specifically, Sacred Wind requests waivers of sections 36.611, 36.612, 69.2(hh), 69.3(e)(6), and 69.3(e)(11) of the Commission's rules.⁷ Waiver of sections 36.611 and 36.612 of the Commission's rules would enable Sacred Wind to receive immediate high-cost loop support payments based on projected costs until historical costs become available.⁸ Waiver of sections 69.2(hh), 69.3(e)(6), and 69.3(e)(11) would permit Sacred Wind to become a member of NECA and to participate immediately in the NECA pools and tariffs.⁹ In addition, Sacred Wind requests waivers of sections 54.301(b), 54.314(d), and 54.903(a)(3) to allow it to receive immediate local switching support (LSS) and interstate common line support (ICLS).¹⁰ In addition, Sacred Wind posits that section 54.305 of the Commission's rules does not apply to the instant transaction or, in the alternative, that the Commission should waive section 54.305 in order that Sacred Wind may receive high-cost support based on the average cost of all its lines.¹¹ Sacred Wind also requests that the Commission waive its stay of the eligibility requirements for Tier 4 Lifeline and Link-Up support in section 54.400(e) of the Commission's rules as applied to qualifying low-income consumers living within its service area on land that qualifies as "near reservations."¹² Sacred Wind further asks that we grant, on our own motion, any other waivers needed to expedite its receipt of universal service support and participation in NECA pools and tariffs.¹³ The Wireline Competition Bureau (Bureau) released a public notice on April 26, 2006, seeking comment

³ See *id.* at 1-2.

⁴ See Letter from Jeffrey Dupree, NECA, to Marlene Dortch, Federal Communications Commission, CC Docket No. 96-45, at Appendix E (filed September 30, 2005) (NECA annual filing showing 2004 loop cost data).

⁵ See Petition at 3. The sale territory includes the following Qwest exchanges: Farmington West, Farmington Main, Aztec/Bloomfield, Albuquerque West, Grants Main, Fort Wingate, Thoreau (Gallup East) and Gallup Main. See Petition, Exh. 1 (attaching Application of Sacred Wind Communications, Inc. for Certificates of Financial and Technical Competency, Operating Authority, Public Convenience and Necessity and for Designation as an Eligible Telecommunications Carrier and Approval of Initial Tariffs, Case No. 05-00272-UT, Amended Recommended Decision of the Hearing Examiner at 7 (New Mexico Commission March 9, 2006)).

⁶ See generally Petition. Sacred Wind generally uses the terms "Tribal lands" and "near reservation" to refer to Navajo lands on and adjacent to reservations. The Commission specifically defines the term "Tribal lands" for purposes of its enhanced Lifeline and Link-Up rules. See *infra* note 104.

⁷ 47 C.F.R. §§ 36.611, 36.612, 69.2(hh), 69.3(e)(6) and 69.3(e)(11).

⁸ See Petition at 20-23.

⁹ *Id.* at 25-27.

¹⁰ *Id.* at 23-24; 47 C.F.R. §§ 54.301(b), 54.314(d), and 54.903(a)(3).

¹¹ Petition at 13-15.

¹² See 47 C.F.R. § 54.400(e) note; Petition at 27-32.

¹³ See Petition at 32.

on the petition for waivers.¹⁴

4. *Standard for Waiver.* Generally, the Commission may waive its rules for good cause shown.¹⁵ The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.¹⁶ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.¹⁷ 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.

III. DISCUSSION

A. Study Area Waiver

5. A study area is a geographic segment of an incumbent LEC's telephone operations. The Commission froze all study area boundaries effective November 15, 1984, to prevent the establishment of high-cost exchanges within existing service territories as separate study areas merely to maximize high-cost support.¹⁸ A carrier must therefore apply to the Commission for a waiver of the study area boundary freeze if it wishes to sell or purchase additional exchanges.¹⁹

6. Section 54.305(b) 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 loop support and local switching support for which the acquired exchanges were eligible prior to their transfer.²⁰ Section

¹⁴ See *Domestic 214 Application Filed for the Acquisition of Selected Assets of Qwest Corporation by Sacred Wind Communications, Inc., Sacred Wind Communications, Inc. and Qwest Corporation Seek Waiver of the Study Area Boundary Freeze as Codified in Part 36, and Sacred Wind Communications, Inc. Seeks Waiver of Sections 36.611, 36.612, 54.301(b), 54.305, 54.314(d), 54.903(a), 69.2(hh), 69.3(e)(6) and 69.3(e)(11) of the Commission's Rules, Sacred Wind Communications, Inc. Seeks Waiver of the Commission's Stay of the Provision of Enhanced Lifeline and Link-Up Support to Customers on Near-Tribal Lands*, WC Docket No. 06-82, CC Docket No. 96-45, WC Docket No. 03-109, Public Notice, 21 FCC Rcd 4368 (2006). Joe Shirley, Jr., President, Navajo Nation; Charles Damon, Council Delegate, Navajo Nation Council; David Rico, Council Delegate, Navajo Nation Council; Bill Richardson, Governor, State of New Mexico; Tulley Haswood, Chapter President, Rock Springs Chapter; and, Karen Buller, President, National Indian Telecommunications Institute filed comments in support of the Petition. We note that the Bureau has granted transfer of control of the exchanges. See *Notice of Streamlined 214 Applications Granted*, WC Docket Nos. 06-82, 06-86 & 06-91, Public Notice, DA 06-1150 (rel. May 30, 2006).

¹⁵ 47 C.F.R. § 1.3.

¹⁶ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d, 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

¹⁷ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972); *Northeast Cellular*, 897 F.2d at 1166.

¹⁸ 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, Decision and Order, 50 Fed. Reg. 939 (1985) (*Part 67 Order*). See also 47 C.F.R. Part 36 App.

¹⁹ *Part 67 Order* at para. 1.

²⁰ 47 C.F.R. § 54.305(b). Carriers' acquired exchanges may receive additional support pursuant to the Commission's "safety valve" mechanism, which allows an acquiring carrier to receive support for new investments in acquired lines. 47 C.F.R. § 54.305(d). Moreover, carriers acquiring exchanges may be eligible to receive Interstate Common Line Support (ICLS), which is not subject the limitations set forth in section 54.305(b). See *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-*

(continued....)

54.305(b) is meant to discourage carriers from transferring exchanges merely to increase their share of high-cost universal service support.²¹ Qwest currently receives interstate access support (IAS), but does not receive any other federal high-cost support in New Mexico.²²

7. 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) the state commission having regulatory authority over the transferred exchanges does not object to the transfer; and (3) the transfer must be in the public interest.²³ 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 an amount equal to or greater than one percent of high-cost support in the most recent calendar year.²⁴ 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 high-cost loop support is capped, an increase in the draw of any fund recipient necessarily reduces the amounts that other LECs receive from the fund.²⁵ After the Commission adopted section 54.305, it continued to apply the one-percent guideline to determine the impact on the universal service fund in light of the adoption of safety valve support and ICLS.²⁶

8. 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 Qwest to alter the boundaries of its existing New Mexico study area by removing the approximately 2,300 access lines that it is transferring to Sacred Wind. We also find that good cause exists to permit Sacred Wind to establish a new study area in New Mexico. For the reasons discussed below, we conclude that the Petitioners have satisfied the

(...continued from previous page)

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, and Report and Order, 16 FCC Rcd 19613, 19667-69, paras. 155-57 (2001), *recon. pending*.

²¹ See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 8942-43, para. 308 (1997) (subsequent history omitted). 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. 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-.631. The mechanism for non-rural carriers calculates support to carriers based on the forward-looking economic cost of operating a given exchange. See 47 C.F.R. § 54.309.

²² See Universal Service Administrative Company (USAC) Quarterly Administrative Filing 2006, Third Quarter (3Q) Appendix, HC01, filed May 2, 2006, at <http://www.universalservice.org/overview/filings>.

²³ 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, para. 5 (1995) (*PTI/Eagle Order*).

²⁴ See *id.* at 1774, paras. 14-17. See also *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).

²⁵ See *PTI/Eagle Order*, 10 FCC Rcd at 1773, para. 13.

²⁶ See *supra* note 20.

three-prong standard that the Commission applies to determine whether a study area waiver is warranted.

9. *Public Interest Analysis.* We are persuaded that the public interest is served by a waiver of the study area freeze rule to permit Qwest to remove from its New Mexico study area the 2,300 lines and to permit Sacred Wind to establish a new study area in New Mexico. The area in which Sacred Wind is authorized to provide telecommunications service is located on approximately 2,000,000 acres that is almost exclusively within Navajo Nation Lands.²⁷ The Commission has recognized that Native American communities have the lowest reported level of telephone subscribership in America.²⁸ Such low penetration is particularly severe in Sacred Wind's service territory, which has only a 28 percent penetration rate. This rate is not only substantially below the current nationwide penetration rate but also lags the 38 percent penetration rate for the Navajo Nation as a whole.²⁹ In addition, the Commission has reported Native American households within the state of New Mexico have the second lowest telephone penetration rate in the Nation.³⁰

10. Sacred Wind states that it is committed to increasing significantly the quality of basic and advanced services provided to the Navajo Nation and the penetration rate in its service area, and to ensuring that such services are provided at affordable rates.³¹ In particular, Sacred Wind plans to upgrade existing telecommunications services and expand service by deploying a new fixed wireless backbone that will provide services to remote areas on and near the Navajo reservation.³² As a result, Sacred Wind intends to increase the penetration rate to 90 percent, from about 2,300 lines to over 9,000 lines.³³ In addition, Sacred Wind will deploy telecommunications infrastructure necessary to offer advanced services in communal locales frequented by the Navajo people.³⁴ Further, the New Mexico Commission found that Sacred Wind has the financial and technical qualifications to provide services to its new study area.³⁵ Based on the totality of these facts, we conclude that the transfer of the approximately 2,300 lines and related facilities to Sacred Wind will serve the public interest by, among other things, providing increased access to telecommunications for the residents of Sacred Wind's service territory.

11. *Impact on the Universal Service Fund.* We conclude that the universal service fund will not be adversely affected by granting this study area waiver. Sacred Wind estimates that it will initially be eligible for approximately \$2.1 million in high-cost support in 2006, which will grow to approximately \$6.6 million in 2010.³⁶ Sacred Wind also estimates that as a result of this transaction its ICLS will be

²⁷ See Petition at 2. Most of these lands are historical tribal lands of the Navajo people. *Id.*

²⁸ See *Federal-State Joint Board on Universal Service, Twelfth Report and Order*, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 15 FCC Rcd 12208, para. 5 (2000) (*Twelfth Report and Order*).

²⁹ See Petition at 2. Sacred Wind further notes that the Navajo Nation's subscribership was the lowest amount 25 tribal lands with the most Native American households. *See id.* at 2-3.

³⁰ See *Trends in Telephone Service*, Industry Analysis and Technology Division, Wireline Competition Bureau, FCC at Table 16.3 (rel. June 21, 2005).

³¹ See Petition at i, 9.

³² See *id.* at 3.

³³ *Id.* at 19.

³⁴ *Id.*

³⁵ See New Mexico Order (attaching Amended Recommended Decision of the Hearing Examiner at 51).

³⁶ See Petition at 11.

approximately \$3,300,000 for 2007, its first full calendar year of operation.³⁷ On the other hand, Qwest estimates that its IAS will be reduced by \$25,308 annually as a result of this transaction.³⁸ Although there is a net increase of approximately \$5.4 million initially in universal service support as a result of this transaction, we find that the unique circumstances concerning the extremely low telephone penetration rate in this area justify the level of increase in universal service support.³⁹ We also note that this increase is substantially less than one percent of the fund, and thus will not have an adverse effect on the universal service fund.⁴⁰

12. *Position of State Commission.* On March 21, 2006, the New Mexico Public Regulation Commission (New Mexico Commission) issued an order approving Sacred Wind's Application for Certificate of Operating Authority, Public Convenience and Necessity and Designation as an Eligible Telecommunications Carrier.⁴¹ Moreover, the New Mexico Commission supports the proposed study area waiver.⁴² Thus, we find that the state commission with regulatory authority over the transferred facilities does not object to the transfer.

B. Waiver of Sections 36.611 and 36.612

13. Sacred Wind also requests a waiver of sections of 36.611 and 36.612 of the Commission's rules in order to receive immediate high-cost loop support payments based on its projected costs.⁴³ High-cost loop support is calculated using data provided by incumbent LECs pursuant to the Commission's cost accounting and data collection requirements.⁴⁴ In accordance with section 36.611 of the Commission's rules, on July 31 of each year, incumbent LECs file the preceding year's loop cost data with NECA.⁴⁵ Each rural carrier's high-cost loop support for the following year is based on the relationship between the carrier's study area average cost per loop and the nationwide average cost per loop, as limited by the indexed cap.⁴⁶ Because the cost data are not submitted by carriers until seven

³⁷ See Letter from Martin L. Stern, Preston, Gates, Ellis & Rouvelas, Meeds LLP, to Marlene Dortch, FCC, CC Docket No. 96-45 (filed May 23, 2006).

³⁸ *Id.* As an interstate price cap LEC, Qwest is eligible for IAS. See 47 C.F.R. §§ 54.800, *et seq.*

³⁹ We also note that the costs of deployment should be minimized by Sacred Wind's use of a fixed wireless local loop solution.

⁴⁰ According to USAC's most recent estimates, total high-cost support for 2006 is projected to be \$4,147,059,854. See USAC Quarterly Administrative Filing 2006, Third Quarter (3Q) Appendix, HC02, filed May 2, 2006, at <http://www.universalservice.org/overview/filings>.

⁴¹ See Petition at Exhibit 1 (attaching Application of Sacred Wind Communications, Inc. for Certificates of Financial and Technical Competency, Operating Authority, Public Convenience and Necessity and for Designation as an Eligible Telecommunications Carrier and Approval of Initial Tariffs, Case No. 05-00272-UT, Final Order (New Mexico Commission rel. March 23, 2006) (New Mexico Order)).

⁴² See Petition at Exhibit 3 (attaching Letter from Ben R. Lujan, Chairman, New Mexico Public Regulation Commission to Thomas Navin, Chief, Wireline Competition Bureau, Federal Communications Commission, CC Docket No. 96-45 (dated March 21, 2006)).

⁴³ See Petition at 20-23 (citing *Border to Border Communications, Inc., Petition for Waiver of Sections 36.611 and 36.612 of the Commission's Rules*, Memorandum Opinion and Order, AAD 94-61, 10 FCC Rcd 5055, 5057, paras. 5-14 (Com. Car. Bur. 1995)).

⁴⁴ See 47 C.F.R. Parts 36, 54, and 69.

⁴⁵ See 47 C.F.R. § 36.611.

⁴⁶ See 47 C.F.R. § 36.622.

months after the end of a calendar year (*i.e.*, July 31), and NECA requires time to analyze the data and make the necessary nationwide calculations, carriers generally do not receive high-cost loop support based on these data until the beginning of the second calendar year after the costs are incurred.⁴⁷ As a result, carriers without historical data, such as newly established incumbent LECs, may wait up to two years before receiving any high-cost loop support payments. Under section 36.612 of the rules, however, carriers can update their data on a quarterly basis and receive support earlier than under section 36.611.⁴⁸

14. We find that special circumstances warrant a deviation from sections 36.611 and 36.612 of the Commission's rules, and that it is in the public interest to grant Sacred Wind's waiver request so that it may receive immediate high-cost loop support.⁴⁹ Sacred Wind plans to use the existing copper wire infrastructure purchased from Qwest to serve and upgrade service to existing customers and plans to expand service to new customers by deploying a new fixed wireless local loop network. Sacred Wind claims that that it will efficiently bring basic and advanced services comparable to those found in urban areas to the Navajo people at affordable rates, and that it will significantly increase penetration throughout its service area.⁵⁰ Sacred Wind argues that the waivers requested are critical to Sacred Wind obtaining the full level of support necessary to enable it to perform its network build-out in a timely manner.⁵¹ Absent immediate universal service support, Sacred Wind may have to look to its subscribers for cost recovery, many of whom are low-income, while waiting for the customary lag in universal service support to pass.⁵² Such a result would frustrate Sacred Wind's efforts to provide service to unserved and underserved areas within the study area. We agree with Sacred Wind that higher local rates would discourage subscription to local telephone service and jeopardize the provision of service in unserved and underserved remote areas.⁵³

15. We find that granting Sacred Wind's request is consistent with the Bureau's treatment of similar requests. In particular, requests for waiver of sections 36.611 and 36.612 of the Commission's rules have been granted only in limited circumstances, primarily to accelerate the provision of support to cover costs incurred by new carriers initiating or extending service in predominantly unserved areas.⁵⁴ In these limited instances, newly established carriers lacking historical cost data have been allowed to

⁴⁷ See 47 C.F.R. § 36.611.

⁴⁸ See 47 C.F.R. § 36.612.

⁴⁹ See *e.g.*, *Mescalero Apache Telecom, Inc., GTE Southwest Incorporated, and Valor Telecommunications of New Mexico, LLC, Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary of the Commission's Rules; Mescalero Apache Telecom, Inc., Waiver of Sections 61.41(c)(2), 69.3(e)(11), 36.611, and 36.612 of the Commission's Rules*, Order, CC Docket No. 96-45, 16 FCC Rcd 3813 (Acc. Pol. Div. 2001) (*Mescalero I*) (granting waiver of sections 36.611 and 36.612 of the Commission's rules to newly-formed, tribally-owned carrier expanding service to unserved residences on American Indian reservation); *Adak Eagle Enterprises, LLC d/b/a Adak Telephone Utility, Petition for Waiver of Sections 36.611, 36.612, 54.301(b), 54.314(d), 54.903(a)(3), 69.2(hh), and 69.3(e)(6) of the Commission Rules*, Order, CC Docket No. 96-45, 20 FCC Rcd 20543 (Wir. Comp. Bur. 2005) (*Adak*).

⁵⁰ Petition at ii, 3.

⁵¹ *Id.* at ii, 4.

⁵² See *id.* More than 50 percent of the households in Sacred Wind's service area are at or below the poverty level. *Id.* at 3.

⁵³ See *id.* at 21.

⁵⁴ See *Border to Border Communications, Inc., Petition for Waiver of Sections 36.611 and 36.612 of the Commission's Rules*, Memorandum Opinion and Order, AAD 94-61, 10 FCC 5055, 5057, paras. 514 (Com. Car. Bur. 1995) (*Border to Border Communications*); *supra* note 51.

receive support based on estimated costs that are subject to true-up.⁵⁵ Where requests for waiver of sections 36.611 and 36.612 have been granted, the Bureau determined that delaying the timing of high-cost loop support under the circumstances presented could have the unintended effect of discouraging new carriers from extending service in unserved remote areas, thereby frustrating the statutory goal of promoting the provision of services at reasonable rates.⁵⁶ We agree with Sacred Wind that denial of immediate high-cost loop support could have a similar effect here.

16. We further find that delaying Sacred Wind's high-cost support would impair its ability to provide telecommunications services at affordable rates and, thus, in these unique circumstances, strict application of our rules may not further the goals of section 254 of the Communications Act of 1934, as amended (the Act).⁵⁷ Accordingly, we grant Sacred Wind a waiver of sections 36.611 and 36.612 of the Commission's rules to the extent necessary to permit it to receive high-cost loop support effective upon release of this Order. Sacred Wind's support initially, *i.e.*, for the remainder of 2006 through December 2007, will be based on projected costs followed by quarterly true-ups using actual costs.⁵⁸ This methodology is consistent with that used in previous waivers of sections 36.611 and 36.612.⁵⁹ We direct Sacred Wind to submit quarterly updates of its actual costs in accordance with the Commission's rules, so that it may be determined whether adjustments for the 2006 and 2007 high-cost loop support amounts are necessary.⁶⁰ Payments for periods subsequent to December 2007 will be based on historic data in accordance with the Commission's rules.⁶¹

C. Waiver of Sections 54.301(b), 54.314(d), 54.903(a)(1) and 54.903(a)(3)

17. Sacred Wind seeks waiver of Commission rules 54.301(b), 54.314(d), and 54.903(a)(3) so that it may receive universal service support payments immediately. Pursuant to section 54.314 of the Commission's rules, a state that desires rural incumbent LECs within its jurisdiction to receive universal service support must file an annual certification with USAC.⁶² The certification must be filed by October 1 of the preceding calendar year for the carrier to receive support beginning in the first quarter of the subsequent calendar year.⁶³ In addition, once a carrier is granted ETC status, it must file certain data with

⁵⁵ See *Mescalero I*, 16 FCC Rcd at 3825-26, paras. 28-30.

⁵⁶ *Id.*, 16 FCC Rcd at 3824, para. 26. See also 47 U.S.C. § 254(b).

⁵⁷ 47 U.S.C. § 254(b). The Act was amended by the Telecommunications Act of 1996. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (1996 Act). Section 254(b) of the Act provides, among other things, that consumers in rural, insular, and high-cost areas should have access to telecommunications services at rates that are "reasonably comparable to rates charged for similar services in urban areas." 47 U.S.C. § 254(b)(3).

⁵⁸ Final high-cost loop payments for the interim period will be based on actual costs for that period. We note that, in its Petition, Sacred Wind states it intends to true-up on an annual basis to reconcile any difference between estimated and actual costs incurred. In accordance with the Bureau's previously approved methodology, however, we require Sacred Wind to true-up with actual cost data on a quarterly basis. See *Border to Border Communications*, 10 FCC at 5057; *Mescalero I*, 16 FCC Rcd at 3824-26, paras. 26-30; *Adak*, 20 FCC Rcd at 20547, para. 10.

⁵⁹ See, e.g., *Mescalero I*, 16 FCC Rcd at 3824-26, paras. 26-30.

⁶⁰ See 47 C.F.R. § 36.612.

⁶¹ See 47 C.F.R. §§ 36.611-.612.

⁶² 47 C.F.R. § 54.314.

⁶³ If a state misses the October 1 deadline, it must file the certification by January 1 for support to begin in the second quarter of the year, by April 1 for support to begin in the third quarter, and by July 1 for support to begin in the fourth quarter. See 47 C.F.R. § 54.314(d)(1)-(4).

USAC before universal support payments can begin to flow. Section 54.301(b) of the Commission's rules provides that incumbent LECs file certain data with USAC by October 1 of each year to receive LSS for the following calendar year.⁶⁴ Section 54.903(a)(3) of the Commission's rules provides that rate-of-return LECs must file certain cost and revenue data on March 31 of each year to receive ICLS support from July 1 of the same year through June 30 of the next year.⁶⁵ In addition, section 54.903(a)(1) of the Commission's rules provides that rate-of-return LECs must file line count data by customer class and disaggregation zone, if any, annually by July 31.

18. We find that good cause exists to waive the applicable filing deadlines in sections 54.301(b), 54.314(d), 54.903(a)(1), and 54.903(a)(3) in order that Sacred Wind may be eligible to receive immediate universal service support.⁶⁶ Having concluded earlier that Sacred Wind should be eligible for immediate high-cost loop support in order to provide affordable telecommunications services, the granting of these waivers is necessary in order for Sacred Wind to be eligible to receive all available universal service support as of the effective date of this Order.⁶⁷

19. Specifically, we grant Sacred Wind a waiver of the April 1, 2006 state certification filing deadline, pursuant to section 54.314(d)(3), so that it may be eligible to receive immediate LSS and high-cost loop support, pursuant to sections 54.301 and Part 36, Subpart F.⁶⁸ In addition, we grant Sacred Wind a waiver of the October 1, 2005 data filing deadline, pursuant to section 54.301(b), so that it may be eligible to receive immediate LSS. We also grant Sacred Wind a waiver of the March 31, 2006 filing deadline in 54.903(a)(3) of the Commission's rules in order that Sacred Wind may be eligible for immediate ICLS support.⁶⁹ We also, on our own motion, grant Sacred Wind a waiver of the July 31, 2006 filing deadline in section 54.903(a)(1) to enable Sacred Wind to be eligible to receive immediate ICLS support.

D. Applicability or Waiver of Section 54.305

20. As stated above, section 54.305(b) provides that a carrier acquiring exchanges from an unaffiliated carrier shall receive the same per-line levels of high-cost loop support and local switching support for which the acquired exchanges were eligible prior to their transfer.⁷⁰ Sacred Wind posits that because it is not acquiring exchanges from Qwest, but "merely acquiring 2,300 copper lines from Qwest, it is not acquiring an "exchange" per se . . . hence the limitations on USF support are not applicable to

⁶⁴ 47 C.F.R. § 54.301(b). Incumbent LECs that have been designated as ETCs and serve 50,000 or fewer access lines within a study area are eligible to receive LSS. *See* 47 C.F.R. § 54.301.

⁶⁵ 47 C.F.R. § 54.903(a)(3).

⁶⁶ Sacred Wind did not request a waiver of the filing deadline in section 54.903(a)(1), however, we grant such a waiver on our own motion in order that Sacred Wind may be eligible for immediate ICLS support.

⁶⁷ *See supra* paras. 14-16.

⁶⁸ A waiver of the April 1, 2006 filing deadline, pursuant to section 54.314(d)(3), allows Sacred Wind to receive LSS and high-cost loop support for the third and fourth quarters of 2006. *See* 47 C.F.R. § 54.314(d)(3).

⁶⁹ In order to receive ICLS, Sacred Wind is required to file with the fund Administrator and the Commission, on the date it first files its line count information pursuant to section 54.903, a certification that all ICLS support provided to Sacred Wind will be used only for the provision and maintenance, and upgrading of facilities and services for which the support is intended. 47 C.F.R. §§ 54.903, 54.904.

⁷⁰ *See supra* para. 6.

Sacred Wind.”⁷¹ We disagree with Sacred Wind’s analysis. We find that, for purposes of this transaction, Sacred Wind is acquiring exchange facilities and customers from Qwest. The New Mexico Commission, in its order approving the transfer of lines, states that the proposed acquisition of Qwest’s assets, network facilities . . . [and] customers . . . includes the following Qwest exchanges: Farmington West, Farmington Main, Aztec/Bloomfield, Albuquerque West, Grants Main, Fort Wingate, Thoreau (Gallup East) and Gallup Main.”⁷² Sacred Wind, thus, has acquired exchange assets, facilities, and customers from Qwest.⁷³

21. Only in rare instances has the Commission found that section 54.305 does not apply when a study area waiver has been required. For example, in *Skyline*, the Commission concluded that section 54.305 does not apply because the modifications to the Qwest and Verizon study areas in the state of Washington did not involve transfers of facilities or customers to Skyline Telephone Company.⁷⁴ In *Direct Communications*, the Bureau concluded that section 54.305 does not apply because the acquired lines were owned by a municipal utility deemed to be a non-carrier by the Public Service Commission of Utah, and that Direct Communications acquired exchanges from an entity that was not an eligible communications carrier and, therefore, had not been eligible to receive universal service support.⁷⁵ Sacred Wind’s circumstances are not analogous to those in either *Skyline* or *Direct Communications*. Rather, we find that Sacred Wind’s situation is similar to numerous transactions involving study area waivers where an incumbent LEC has acquired exchange facilities and customers from another incumbent LEC.⁷⁶ Accordingly, Sacred Wind, absent a waiver, is subject to the provisions of section 54.305 of the Commission’s rules.

22. Although we find that section 54.305 does apply in the instant transaction, we find that Sacred Wind’s circumstances are similar to those in the *Mescalero 54.305 Waiver Order (Mescalero II)* in which the Commission granted a waiver of section 54.305 for Mescalero Apache Telecom, Inc. (Mescalero).⁷⁷ Like Mescalero, Sacred Wind has demonstrated that special circumstances warrant a deviation from section 54.305. According to Sacred Wind, the percentage of residences on the

⁷¹ See Petition at 14-15. Sacred Wind explains that the term “exchange” is not defined in the applicable regulations, but references a definition in an industry reference. See *id.* at 14.

⁷² See Petition at Exh. 1, New Mexico Order (attaching Amended Recommended Decision of the Hearing Examiner at 7).

⁷³ In this Order, we do not define the term “exchange” as it is used in the telecommunications industry.

⁷⁴ See *M&L Enterprises, Inc., d/b/a Skyline Telephone Company, Petition for Waiver of Sections 36.611, 36.612, and 69.2 (hh) of the Commission’s Rules*, Order, 19 FCC Rcd 6761, 6767, at para. 16 (2004) (*Skyline*).

⁷⁵ See *Direct Communications Cedar Valley, LLC and Qwest Corporation, Joint Petition for Waiver of the Definition of “Study Area” of the Appendix-Glossary of Part 36 of the Commission’s Rules, Petition for Waiver of Sections 69.2(hh) and 69.605(c) of the Commission’s Rules*, Order, 20 FCC Rcd 19180, 19183, at para. 9 (Wir. Comp. Bur. 2005) (*Direct Communications*).

⁷⁶ See, e.g., *Madison River Telephone Company, LLC, MebTel, Inc. d/b/a MebTel Communications, and BellSouth Telecommunications, Inc., Joint Petition for Waiver of the Definition of “Study Area” Contained in Part 36 of the Commission’s Rules, Petition for Waiver of Section 69.3(e)(11) of the Commission’s Rules*, 20 FCC Rcd 19173 (Wir. Comp. Bur. 2005); *Blue Valley Telecommunications, Inc. and United Telephone Company of Kansas, Joint Petition for Waiver of the Definition of “Study Area” in Part 36 of the Commission’s Rules; Petition for Waiver of Section 69.3(e)(11) of the Commission’s Rules*, 20 FCC Rcd 19166 (Wir. Comp. Bur. 2005). Qwest has agreed to sell to Sacred Wind the copper and any fiber distribution, extensions, drops and network interface devices for approximately 2,300 lines. See Petition at 3 & n.13.

⁷⁷ *Mescalero Apache Telecom, Inc., Waiver of Section 54.305 of the Commission’s Rules*, CC Docket No. 96-45, Order, 16 FCC Rcd 1312 (2001) (*Mescalero II*).

reservation with telephone service is among the lowest in the country at 28 percent, below the 38 percent penetration for the Navajo Nation as a whole and significantly below the current nationwide penetration rate.⁷⁸ Sacred Wind further argues that some areas it intends to serve have no telephone service at all and that more than 50 percent of the population in the proposed service area has income levels at or below the poverty level.⁷⁹ We therefore conclude that limiting Sacred Wind's support by applying section 54.305 in this instance could have the unintended effect of inhibiting the expansion of service in unserved and remote areas on or adjacent to reservation lands.

23. Allowing a waiver of section 54.305 will also serve the public interest. In *Mescalero II*, the Commission found that a waiver of section 54.305 served the public interest because it would enable Mescalero to address the severe shortage of telecommunications services on the Mescalero Apache Reservation in New Mexico; improve existing services on the reservation without a significant increase in basic service rates; and fulfill Mescalero's commitment to provide service to all unserved customers in its first two years of operation.⁸⁰ The Commission therefore found that a waiver of section 54.305 was consistent with the Commission's goal of preserving and advancing universal service and the Commission's mandate to ensure that consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high-cost areas, have access to telecommunications and information services.⁸¹ Like Mescalero, Sacred Wind plans to remedy the low penetration rates and poor telecommunications services on reservation and in adjacent lands.⁸² Specifically, Sacred Wind plans to upgrade the existing wireline infrastructure through deployment of a fixed-wireless local loop network suited to bring service to among the most remote regions of the Navajo Nation and to overcome the right-of-way obstacles that have previously hindered deployment of network facilities in the area.⁸³ Sacred Wind further states that, like Mescalero, the projected costs of providing such services and upgrading the facilities in Sacred Wind's service territory are higher than the cost of providing service in other parts of New Mexico and higher than the cost of serving most subscribers in any other state.⁸⁴ Without a waiver of section 54.305, therefore, Sacred Wind's plan to buildout to underserved and unserved areas would be hindered. In addition, absent a waiver, Sacred Wind's customer penetration rates would also be affected.⁸⁵ Accordingly, based on Sacred Wind's representations and commitments, we conclude that Sacred Wind has demonstrated that the grant of this waiver request serves the public interest.⁸⁶

⁷⁸ See Petition at 2. We note that a recent Commission report states that the nationwide telephone penetration rate is 92.9 percent. See *Telephone Subscribership in the United States*, Industry Analysis and Technology Division, Wireline Competition Bureau, FCC at 2 (rel. May 12, 2006).

⁷⁹ See Petition at 3.

⁸⁰ See *Mescalero II*, 16 FCC Rcd at 1316-19.

⁸¹ *Id.* at 1318.

⁸¹ See *id.* at 1316-19.

⁸² See Petition at 17.

⁸³ *Id.* See also, *Mescalero II*, 16 FCC Rcd at 1316-19; Mescalero Apache Telecom Inc., GTE Southwest Inc. and Valor Telecommunications of New Mexico, LLC, Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary of the Commission's Rules, Related Waivers of Parts 36, 54, 61, and 69 of the Commission's Rules, at 6 (filed June 30, 2000).

⁸⁴ See Petition at 17.

⁸⁵ See *id.* at 19.

⁸⁶ The Commission has emphasized on two occasions that carriers seeking a waiver of section 54.305 must bear a heavy burden and that routine waivers of the rule will not be granted. See *Federal-State Joint Board on Universal*

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E. Waiver of Sections 69.2(hh), 69.3(e)(6), and 69.3(e)(11)

24. Sacred Wind states that, should the Commission find that Sacred Wind has not acquired an exchange from Qwest, it may conclude that Sacred Wind is not a successor or assign of Qwest for purposes of section 251(h)(1) of the Act.⁸⁷ Sacred Wind, therefore, requests a waiver of section 69.2(hh) in order that it may become a member of NECA, participate in NECA pools and receive federal universal service support.⁸⁸ Section 69.2(hh) of the Commission's rules defines a "telephone company" as an incumbent LEC as defined in section 251(h)(1) of the Act.⁸⁹ Section 251(h)(1) of the Act defines an "incumbent local exchange carrier" as a provider of telephone exchange service and a member of NECA on the date of enactment of the 1996 Act, or a successor or assign of an incumbent LEC.⁹⁰ Section 69.3(e)(6) specifies that a new carrier filing a tariff under section 69.3(e) must notify NECA not later than March 1 of the year the tariff becomes effective that it intends to file such a tariff.⁹¹ Section 69.3(e)(11) requires that any changes in NECA common line tariff participation resulting from a merger or acquisition of telephone properties are to be made effective on the next annual access tariff filing effective date following the merger or acquisition.⁹² Sacred Wind requests a waiver of sections 69.3(e)(6) and 69.3(e)(11) of the Commission's rules to allow it to expeditiously participate in NECA's tariff.⁹³

25. Because we find that Sacred Wind is acquiring facilities from Qwest, a waiver of section 69.2(hh) is not required.⁹⁴ Sacred Wind, as a successor to Qwest, meets the definition of an incumbent LEC pursuant to section 251(h)(1) of the Act. We do grant, however, Sacred Wind's request for waiver

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Service, Valor Telecommunications of Texas, L.P. Request for Waiver of Section 54.305 of the Commission's Rules, Order, CC Docket No. 96-45, 20 FCC Rcd 782, 786 para. 12 (2005) (denying Valor's request for a waiver of section 54.305). *See also Mescalero II*, 16 FCC Rcd at 1320, para. 13. The action we take in this instance recognizes a unique opportunity to promote subscribership and infrastructure development in the unserved and underserved areas of Indian tribal land.

⁸⁷ *See* Petition at 25.

⁸⁸ *See id.* The Commission's rules regarding participation in NECA tariffs and pools, and its rules regarding universal service support for incumbent LECs, do not specifically address companies, such as Sacred Wind, that come into existence after the enactment of the Telecommunications Act of 1996. In order to be a member of NECA and to participate in the NECA tariffs and pools, a carrier must be a "telephone company," as defined in Part 69 of the Commission's rules. *See* 47 C.F.R. § 69.601.

⁸⁹ 47 C.F.R. § 69.2(hh).

⁹⁰ *See* 47 U.S.C. § 251(h)(1). For purposes of calculating universal service support, Part 36 of the Commission's rules applies to incumbent LECs, and Part 54 of the Commission's rules distinguishes between incumbent LECs and competitive ETCs. For example, section 36.611 of the Commission's rules governs the submission of data to NECA for purposes of calculating high-cost support and only applies to incumbent LECs. Competitive ETCs file line count data and their support is calculated pursuant to section 54.307 of the Commission's rules. *See* 47 C.F.R. §§ 36.611, 54.307. Incumbent LEC for purposes of Part 54 of the Commission's rules has the same meaning as that term is defined in section 251(h)(1) of the Act. *See* 47 C.F.R. §§ 51.5, 54.5. Unlike Parts 54 and 69 of the Commission's rules, Part 36 does not include an explicit definition of incumbent LEC. The term "incumbent local exchange carrier" is used throughout Part 36, however, and in some cases references the Commission's definition of rural incumbent LEC in section 54.5 of the Commission's rules. *See, e.g.*, 47 C.F.R. § 36.622(a).

⁹¹ *See* 47 C.F.R. § 69.3(e)(6).

⁹² *See* 47 C.F.R. § 69.3(e)(11).

⁹³ *See* Petition at 26.

⁹⁴ *See supra* para. 20.

of sections 69.3(e)(6) and 69.3(e)(11) of the Commission's rules in order to allow the carrier to participate immediately in NECA tariffs and pools.

26. We conclude that Sacred Wind has demonstrated that special circumstances warrant a waiver of sections 69.3(e)(6) and 69.3(e)(11) of the Commission's rules. Immediate participation in NECA will allow Sacred Wind to avoid the costs of filing and maintaining its own company-specific interstate tariffs for only 2,300 subscribers.⁹⁵ Because Sacred Wind has relatively few customers, the costs of preparing company-specific tariffs could be disproportionately excessive. Further, without such participation in NECA's pools it is likely that Sacred Wind's company-specific interstate access rates would be prohibitively high.⁹⁶ Therefore, we find that it is in the public interest to permit Sacred Wind and its customers to benefit from the cost savings and lower rates available through immediate NECA participation.

F. Waiver of Section 54.400(e) as Applied to Qualifying Low-Income Consumers on Near-Reservation Lands

27. Sacred Wind requests that the Commission waive its stay of the provision of enhanced Lifeline (Tier 4) and Link-Up support to eligible residents of near-Tribal Lands.⁹⁷ The Commission's Lifeline and Link-Up programs are designed to ensure that telephone service is affordable to low-income consumers by providing universal service funds to reduce the price consumers pay for basic telephone service and initial telephone installation.⁹⁸ In the *Twelfth Report and Order*, the Commission identified a number of factors that are primary impediments to subscribership on Tribal lands, including: the lack of access to, or affordability of telecommunications services; the cost of basic service; the cost of intrastate toll service; inadequate telecommunications infrastructure and the cost of line extensions; and the lack of competitive service providers offering alternative technologies.⁹⁹ To address these impediments, the

⁹⁵ See Petition at 25.

⁹⁶ We note that NECA does not object to Sacred Wind participating in its pools. See Letter from Tracey E.J. Saltenberger, NECA, to Marlene H. Dortch, Federal Communications Commission, CC Docket No. 96-45 (filed June 12, 2006).

⁹⁷ Petition at 27. See *infra* note 119.

⁹⁸ See 47 U.S.C. § 254(b)(1) ("Quality services should be available at just, reasonable, and affordable rates."). Under the Commission's rules, there are four tiers of federal Lifeline support. All eligible telephone subscribers receive Tier 1 support, which provides a discount of up to \$6.50 off of the monthly cost of telephone service for a single telephone line in their principal residence. See 47 C.F.R. § 54.401(a)(2). Tier 2 support provides an additional \$1.75 per month in federal support as long as all relevant state regulatory authorities approve such a reduction. 47 C.F.R. § 54.403(a)(2). Tier 3 support provides an amount equal to one-half of the subscriber's state or carrier-provided Lifeline support, up to a maximum of \$1.75. 47 C.F.R. § 54.403(a)(3). Finally, Tier 4 support provides eligible residents of Tribal lands, as defined in section 54.400(e) of the Commission's rules, enhanced Lifeline support. 47 C.F.R. § 54.403(a)(4). The Link-Up program assists qualifying low-income consumers in initiating telephone service by paying a portion of the service connection charge. See 47 C.F.R. § 54.411.

⁹⁹ See *Twelfth Report and Order*, 15 FCC Rcd at 12220, para. 20. In the *Twelfth Report and Order*, the Commission noted that only 76.7 percent of rural households earning less than \$5,000 have a telephone, and only 47 percent of Indian tribal households on reservations and other tribal lands have a telephone, in comparison to 94 percent of all households in the United States. *Id.* at 12224, paras. 26-27. On the basis of these observations, the Commission concluded that the extent to which telephone penetration levels fall below the national average underscored the need for immediate action to promote the deployment of telecommunications facilities in tribal areas and to provide the support necessary to increase subscribership in these areas. Toward that end, the Commission adopted measures to promote telecommunications deployment and subscribership for the benefit of those living on federally-recognized American Indian and Alaska native tribal lands. The Commission found the enhancement of tribal communities'

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Commission adopted the enhanced Lifeline and Link-Up programs that are specifically targeted to increase subscribership and infrastructure development on Tribal lands, where unaffordable service and low subscribership are most prevalent.¹⁰⁰

28. Specifically, enhanced Lifeline and Link-Up support provides qualifying low-income consumers living on Tribal lands additional discounts off the monthly cost of telephone service and telephone installation.¹⁰¹ Under Tier 4 Lifeline support, eligible residents of Tribal lands receive up to \$25.00 in additional discounts off the monthly cost of telephone service, provided that this amount does not bring the basic local residential rate below \$1 per month per qualifying low-income subscriber.¹⁰² Under enhanced Link-Up support, eligible residents of Tribal lands receive up to an additional \$70.00 off the initial costs of installing telephone service.¹⁰³

29. Section 54.400(e) defines an eligible resident of Tribal lands as “a qualifying low-income consumer living on or near a reservation.”¹⁰⁴ The term “reservation” means “any federally recognized Indian tribe’s reservation, pueblo, or colony, including former reservations in Oklahoma, Alaska Native regions established pursuant to the Alaska Native Claims Settlement Act, and Indian allotments.”¹⁰⁵ The term “near reservation” is described as lands adjacent or contiguous to reservations and that generally have been considered Tribal lands for purposes of other federal programs targeted to federally-recognized Indian tribes.¹⁰⁶ On August 31, 2000, the Commission stayed implementation of enhanced Lifeline and Link-Up benefits to the extent that they apply to qualifying low-income consumers living near a reservation.¹⁰⁷

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access to telecommunications services consistent with its obligations under the Act to preserve and advance universal service, and its obligations under the historic federal trust relationship between the federal government and federally-recognized Indian tribes to encourage tribal sovereignty and self-governance. *Id.* at 12222, para. 23, 12222-24, para. 26.

¹⁰⁰ *Id.* at 12228-12251.

¹⁰¹ See 47 C.F.R. §§ 54.405(a)(4), 54.411(a)(3).

¹⁰² 47 C.F.R. § 54.405(a)(4).

¹⁰³ 47 C.F.R. § 54.411(a)(3). The Link-Up program provides other eligible telephone subscribers a discount of up to \$30.00 off the initial cost of installing telephone service. 47 C.F.R. § 54.411(a)(1).

¹⁰⁴ 47 C.F.R. § 54.400(e). For purposes of identifying the geographic areas within which enhanced Lifeline and Link-Up should apply, the Commission determined that the term “Tribal lands” should include the United States Department of Interior Bureau of Indian Affairs (BIA) definitions of “reservation” and “near reservation” contained in sections 20.1(v) and 20.1(r) of the BIA regulations, respectively. See *Twelfth Report and Order*, 15 FCC Rcd at 12218, para. 17, citing 25 C.F.R. §§ 20.1(r) and 20.1(v). See also, *Federal-State Joint Board on Universal Service, Twenty-Fifth Order on Reconsideration, Report and Order, and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 10958, 10965-67, paras. 15-17 (2003) (*Twenty-Fifth Reconsideration Order*) (confirming that the Commission would continue to use the BIA definition adopted in the *Twelfth Report and Order*).

¹⁰⁵ 25 C.F.R. § 20.1(v).

¹⁰⁶ 25 C.F.R. § 20.1(r). See also, *Twelfth Report and Order*, 15 FCC Rcd at 12218-19, para. 18.

¹⁰⁷ *Order and Further Notice of Proposed Rulemaking*, 15 FCC Rcd 17112 (2000) (*Tribal Stay Order*). The Commission concluded that the term “near reservation” as defined by BIA may include wide geographic areas that do not possess the characteristics that warrant the targeting of enhanced Lifeline and Link-Up support to reservations, such as geographic isolation, high rates of poverty, and low telephone subscribership. *Id.* at 17113-14, para. 3. The Commission determined that giving low income support to such broad areas may not further the goal of increasing telecommunications deployment and subscribership in the most historically isolated and underserved

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30. On March 30, 2005, the Commission granted the petition of Smith Bagley, Inc. (SBI) seeking a waiver of section 54.400(e) of the Commission's Lifeline and Link-Up eligibility rules to enable eligible residents of the Eastern Navajo Agency in the state of New Mexico to receive enhanced Lifeline and Link-Up support.¹⁰⁸ The Commission found that SBI demonstrated good cause to justify the waiver by demonstrating that special circumstances exist in the Eastern Navajo Agency.¹⁰⁹ For example, depressed economic conditions, which the Commission had previously determined is one of the primary causes of low subscribership levels, exist in the Eastern Navajo Agency.¹¹⁰ Sparse population and distances between requesting customers in this area make extending wireline telephone facilities challenging, if not infeasible, and there are many areas within the Eastern Navajo Agency where no telephone service is available.¹¹¹ The Commission found that the Eastern Navajo Agency has the same impediments to subscribership and infrastructure development as those existing on Tribal lands,¹¹² and concluded that it is appropriate to waive section 54.400(e) of the Commission's rules and permit ETCs serving the Eastern Navajo Agency to offer Tier 4 Lifeline and Link-Up benefits to qualified residents.¹¹³

31. In its Petition, Sacred Wind states that the waiver granted in the *Smith Bagley Order* covers substantially the same lands as those to be served by Sacred Wind and requests a similar waiver.¹¹⁴ Sacred Wind subsequently clarified that its service area will include portions of the Fort Defiance, Shiprock and Eastern Navajo Agencies that are on the Navajo reservation, for which no waiver is required,¹¹⁵ and lands within the Eastern Navajo Agency and immediately adjacent non-Agency lands.¹¹⁶ Sacred Wind further clarified that its service territory also will include a portion of the Jicarilla Apache reservation.¹¹⁷ Sacred Wind asks that the Commission confirm that the waiver granted in the *Smith Bagley Order* also applies to Sacred Wind's customers in the Eastern Agency.¹¹⁸ In addition, Sacred Wind asks that the Commission waive section 54.400(e) with respect to Sacred Wind customers on those areas of Sacred Wind's service territory that are immediately adjacent to the Eastern Agency so that these

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regions of the Nation. *Id.* The Commission currently has a pending rulemaking on how to identify geographic areas that are adjacent to reservations, consistent with the goal of targeting enhanced Lifeline and Link-Up to the most underserved areas of the nation. *See Twenty-Fifth Reconsideration Order*, 18 FCC Rcd at 10974-77, paras. 32-38.

¹⁰⁸ *Federal-State Joint Board on Universal Service, Smith Bagley, Inc., Petition for Waiver of Section 54.400(e) of the Commission's Rules*, Memorandum Opinion and Order, WC Docket No. 03-109, 20 FCC Rcd 7701 (2005) (*Smith Bagley Order*).

¹⁰⁹ *See id.* at 7704, para. 10.

¹¹⁰ *See id.* at 7705-06, para. 11.

¹¹¹ *See id.* at 7706, para. 12.

¹¹² *See id.* at 7704, para. 10.

¹¹³ *See id.* at 7706, para. 13.

¹¹⁴ *See* Petition at 30. *See infra* note 119.

¹¹⁵ Letter from Martin L. Stern, Preston, Gates, Ellis & Rouvelas, Meeds LLP, to Marlene Dortch, FCC, WC Docket No. 06-82, CC Docket No. 96-45, WC Docket No. 03-109 at 1 (filed June 20, 2006) (June 20 Letter).

¹¹⁶ *See id.*

¹¹⁷ *See* Letter from Martin L. Stern, Preston, Gates, Ellis & Rouvelas, Meeds LLP, to Marlene Dortch, FCC, WC Docket No. 06-82, CC Docket No. 96-45, WC Docket No. 03-109 (filed July 24, 2006) (attaching Letter from Larry J. Bonney and Wilson Ray, Huerfano Chapter # 91) at 1 (dated July 17, 2006) (Huerfano Letter). No waiver would be required to provide enhanced Lifeline and Link-Up to eligible residents of the Jicarilla Apache reservation.

¹¹⁸ *See id.*

customers will be eligible for enhanced Lifeline and Link-Up support.¹¹⁹

32. We clarify that the waiver of section 54.400(e) of the Commission's Lifeline and Link-Up eligibility rules to enable eligible residents of the Eastern Navajo Agency to receive enhanced Lifeline and Link-Up support applies to Sacred Wind, as well as to SBI.¹²⁰ In addition, as explained below, we find that Sacred Wind has demonstrated good cause to justify the waiver of section 54.400(e) of the Commission's rules to enable eligible residents in the specified areas, which are immediately adjacent to the Eastern Agency, to receive enhanced Lifeline and Link-Up support. Sacred Wind has demonstrated that special circumstances exist in the areas immediately adjacent to the Eastern Agency.

33. The majority of the residents of the lands located adjacent to the Eastern Navajo Agency are members of the Navajo Nation, except for those on the Jicarilla Apache reservation.¹²¹ Much of this land is extremely remote, with many residents living great distances from the larger Navajo housing clusters and communities, and many miles from highways and roads.¹²² The 2000 Census data place 41.8 percent of all Navajo families residing on tribal lands in New Mexico below the poverty level,¹²³ and estimate that 54.4 percent of the residents of the New Mexico portions of the Navajo Nation are not in the labor force.¹²⁴ An economic development study prepared by the Navajo Nation's Division of Economic Development estimates that the unemployment rate for the New Mexico portions of the Navajo Nation is 52.76 percent, and specifically in the Eastern Navajo Agency is 70.53 percent.¹²⁵ Sacred Wind asserts that the poverty and unemployment levels in the non-Agency lands immediately adjacent to Eastern Agency are likely even below that for the rest of Sacred Wind's service territory and for the Navajo Nation as a whole, because there is a direct correlation between the poverty level and unemployment rate within a Navajo Chapter and its proximity to a highway and/or urban center.¹²⁶ Sacred Wind estimates that the telephone penetration rate overall for its service territory is approximately 28 percent.¹²⁷ To

¹¹⁹ Sacred Wind asks that the Commission "waive the stay" and understands that this was the relief granted in the *Smith Bagley Order*. *See id.* In the *Smith Bagley Order*, however, the Commission did not waive the stay of the implementation of enhanced Lifeline and Link-Up benefits to the extent that they apply to qualifying low-income consumers living near a reservation. Rather, the Commission waived section 54.400(e) of the Commission's rules. *See Smith Bagley*, 20 FCC Rcd at 7704 & n. 24. We treat Sacred Wind's request for a waiver of the stay of the rules, as a request for waiver of the rule.

¹²⁰ *Smith Bagley Order*, 20 FCC Rcd at 7706, para. 13.

¹²¹ Huerfano Letter at 1. Sacred Wind previously stated that the lands located adjacent to the Eastern Navajo Agency are "inhabited almost exclusively by Navajo Nation tribal members." June 20 Letter at 3.

¹²² June 20 Letter at 3; Huerfano Letter at 1.

¹²³ Letter from Martin L. Stern, Preston, Gates, Ellis & Rouvelas, Meeds LLP, to Marlene Dortch, FCC, WC Docket No. 06-82, CC Docket No. 96-45, WC Docket No. 03-109 (filed July 18, 2006) (July 18 Letter) at 2, Exhibit 1 at 3 (Table DP-3. Profile of Selected Economic Characteristics: 2000). Sacred Wind previously indicated that the 2000 Census placed 53.8 percent of all Navajo families residing on tribal lands in New Mexico below the national poverty level. *See* June 20 Letter at 3. The July 18 Letter corrects the previous figure.

¹²⁴ July 18 Letter at 2, Exhibit 1 at 3 (Table DP-3. Profile of Selected Economic Characteristics: 2000).

¹²⁵ July 18 Letter at 2, Exhibit 2 at 2-3 (2002-2003 Comprehensive Economic Development Strategy of the Navajo Nation, Tables 15-A, 15-B). Sacred Wind previously estimated that the unemployment rate for Navajo families in New Mexico is between 55.5 and 58 percent. *See* June 20 Letter at 3. The July 18 Letter updates the previous estimate and provides specific information about the Eastern Navajo Agency.

¹²⁶ June 20 Letter at 3.

¹²⁷ Letter from Martin L. Stern, Preston, Gates, Ellis & Rouvelas, Meeds LLP, to Marlene Dortch, FCC, WC Docket No. 06-82, CC Docket No. 96-45, WC Docket No. 03-109, at Exh. 1 (filed July 26, 2006) (July 26 Letter).

Sacred Wind's knowledge, these lands are largely unserved by existing providers, including mobile wireless providers.¹²⁸ The remoteness of the lands adjacent to the Eastern Navajo Agency makes the provision of basic telephone service cost-prohibitive, and in many areas, telecommunications facilities are non-existent.¹²⁹

34. Consistent with the Commission's findings in the *Smith Bagley Order*, we find that the area of Sacred Wind's service territory immediately adjacent to the Eastern Navajo Agency has the same impediments to subscribership and infrastructure development as those existing on Tribal lands. We therefore conclude that it is appropriate to waive section 54.400(e) of the Commission's rules and permit Sacred Wind and other ETCs serving the area immediately adjacent to the Eastern Navajo Agency to offer Tier 4 Lifeline and Link-Up benefits to qualified residents.

35. We find that granting Sacred Wind's request for waiver will serve the public interest by allowing Sacred Wind to provide much-needed telecommunications services at affordable rates to many Navajo peoples who have never had telephone service, or have been unable to afford to maintain it.¹³⁰ We expect that the availability of enhanced Lifeline and Link-Up likely will increase penetration rates in these depressed regions and, for the first time, enable these low-income residents to have access to necessary emergency, medical, government and other public services.¹³¹ Granting this waiver serves the public interest because doing so furthers the Commission's goal of increasing the deployment of telecommunications facilities in unserved and underserved regions of the Nation, especially among Native American populations. We emphasize that the action we take here does not affect state sovereignty or impinge upon a state's ability to establish universal service programs aimed at increasing telephone subscribership within its borders.¹³²

G. Other Matters

36. Section 61.45(d) of the Commission's rules grants us discretion to require price cap carriers to make adjustments to their price cap indices to reflect cost changes resulting from rule waivers.¹³³ Accordingly, we require Qwest to adjust its price cap indices to reflect the removal of the transferred access lines from its New Mexico study area.

37. On May 11, 2001, the Commission adopted an order requiring incumbent LECs to freeze, on an interim basis, the Part 36 jurisdictional separations factors beginning July 1, 2001.¹³⁴ In that order, the Commission addressed the recalculation of frozen allocation factors when a carrier converts from average schedule-based interstate settlements to cost-based interstate settlements.¹³⁵ In those

¹²⁸ June 20 Letter at 3; *see also* Huerfano Letter at 1.

¹²⁹ June 20 Letter at 3; *see also* Huerfano Letter at 1.

¹³⁰ June 20 Letter at 3; *see also* Huerfano Letter at 1.

¹³¹ *See* June 20 Letter at 3; *see also* Huerfano Letter at 1.

¹³² *See Smith Bagley Order*, 20 FCC Rcd at 7707, para. 15.

¹³³ *See* 47 C.F.R. § 61.45(d).

¹³⁴ *See 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*); *Jurisdictional Separations and Referral to the Federal-State Joint Board*, Order and Further Notice of Proposed Rulemaking, CC Docket No. 80-286, 21 FCC Rcd 5516 (2006).

¹³⁵ *See Separations Freeze Order*, 16 FCC Rcd at 11406 n.123.

circumstances, the carrier has not previously performed cost studies to separate certain types of costs. To address this issue, the Commission provided that rate-of-return carriers that convert from average schedule to cost company status during the freeze “shall calculate new factors based on the twelve-month period immediately following the conversion and then freeze the new factors for the remainder of the freeze.”¹³⁶ Because Sacred Wind has not previously performed such cost studies, it is appropriate to apply the same requirement, thus “eliminating the need for waiver requests to calculate new factors . . .”¹³⁷ Specifically, we require Sacred Wind for the first twelve months of operation to categorize the telecommunications plant and expenses and develop separations factors in accordance with the separations procedures in effect as of December 31, 2000.¹³⁸

IV. ORDERING CLAUSES

38. 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, filed by Sacred Wind Communications, Inc. and Qwest Corporation on March 30, 2006, IS GRANTED, as described herein.

39. IT IS FURTHER 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 petition for waiver of sections 36.611 and 36.612 of the Commission's rules, 47 C.F.R. §§ 36.611 and 36.612, filed by Sacred Wind Communications, Inc., on March 30, 2006, IS GRANTED, as described herein.

40. IT IS FURTHER 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 petition for waiver of sections 54.301(b), 54.314(d)(3), 54.903(a)(1), and 54.903(a)(3) of the Commission's rules, 47 C.F.R. §§ 54.301(b), 54.314(d)(3), 54.903(a)(1), and 54.903(a)(3), filed by Sacred Wind Communications, Inc., on March 30, 2006, IS GRANTED, as described herein.

41. IT IS FURTHER 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 petition for waiver of sections 69.3(e)(6) and 69.3(e)(11) of the Commission's rules, 47 C.F.R. §§ 69.3(e)(6) and 69.3(e)(11), filed by Sacred Wind Communications, Inc., on March 30, 2006, IS GRANTED, as described herein.

42. IT IS FURTHER 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 petition for waiver of section 54.305 of the Commission's rules, 47 C.F.R. § 54.305, filed by Sacred Wind Communications, Inc., on March 30, 2006, IS GRANTED, as described herein.

¹³⁶ *Id.*, 16 FCC Rcd at 11407, para. 53.

¹³⁷ *See id.*

¹³⁸ *See* 47 C.F.R. § 36.3(e).

43. IT IS FURTHER 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 petition for waiver of section 54.400(e) of the Commission's rules, 47 C.F.R. § 54.400(e), filed by Sacred Wind Communications, Inc., on March 30, 2006, IS GRANTED, as described herein.

44. 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 Qwest Corporation SHALL ADJUST its price cap indices in its annual price cap filing to reflect cost changes resulting from this transaction, consistent with this Order.

45. IT IS FURTHER 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 Sacred Wind Communications, Inc. IS REQUIRED for the first twelve months of operation to categorize its telecommunications plant and expenses and develop separations factors pursuant to section 36.3(e) of the Commission's rules, 47 C.F.R. § 36.3(e).

FEDERAL COMMUNICATIONS COMMISSION

Thomas J. Navin
Chief, Wireline Competition Bureau