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

In the Matter of	)	
	)	
Allband Communications Cooperative	)	WC Docket No. 10-90
Petition for Waiver of Certain High-Cost	)	
Universal Service Rules	)	

ORDER

Adopted: July 25, 2012 **Released: July 25, 2012**

By the Acting Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this order, we grant in part and dismiss as moot in part a petition filed by Allband Communications Cooperative (Allband or Company) for a waiver of section 54.302 of the Commission's rules, which established a $250 per line per month cap on high-cost universal service support ("$250 cap"), and section 36.621(a)(5) of the Commission's rules, which limits reimbursement of capital and operating costs from high-cost loop support (HCLS).[1] For the reasons discussed below, we grant Allband a waiver of section 54.302 for three years to provide it additional time to take cost-cutting and revenue-enhancing actions in order to improve its financial position and lessen its dependence on high-cost universal service support.

II. BACKGROUND

2. In the *USF/ICC Transformation Order*, the Commission comprehensively reformed universal service funding for high-cost, rural areas, adopting fiscally responsible, accountable, incentive-based policies to preserve and advance voice and broadband service while ensuring fairness for consumers who pay into the universal service fund.[2] Among other things, the Commission imposed a presumptive per line cap of $250 per month on total high-cost universal service support for all eligible telecommunications carriers and found that support in excess of the $250 cap should not be provided without further justification.[3] Consistent with the Commission's goal to provide reasonable transitions so companies affected by reform have time to adapt to changing circumstances,[4] the Commission phased in the $250 cap over three years.[5] From July 1, 2012 through June 30, 2013, carriers will receive no more than $250 per line per month plus two-thirds of the difference between their uncapped per-line amount and $250. From July 1, 2013 through June 30, 2014, carriers will receive no more than $250 per line per

[1] Allband Communications Cooperative Petition for Waiver of Part 54.302 and the Framework to Limit Reimbursable Capital and Operating Costs, WC Docket No. 10-90, WT Docket No. 10-208 (filed Feb. 3, 2012) (Petition); *see also Connect America Fund* et al., WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011) (*USF/ICC Transformation Order*); *pets. for review pending sub nom. In re: FCC 11-161*, No. 11-9900 (10th Cir. filed Dec. 8, 2011); 47 C.F.R. §§ 54.302, 36.621(a)(5).

[2] *USF/ICC Transformation Order*, 26 FCC Rcd at 17670, para. 11.

[3] *Id.* at 17765, para. 274.

[4] *Id.* at 17671, para. 11.

[5] *Id.* at 17765, para. 275.

month plus one-third of the difference between their uncapped per-line amount and $250. Beginning July 1, 2014, carriers shall receive no more than $250 per line per month.

3. The Commission also adopted section 36.621(a)(5), the HCLS benchmarking rule, which is intended to moderate the expenses of those rate-of-return carriers with very high costs compared to their similarly situated peers, while further encouraging other rate-of-return carriers to advance broadband deployment.[6] While the Commission set forth a framework for establishing benchmarks, the Commission delegated to the Wireline Competition Bureau (Bureau) the authority to adopt and implement a methodology within the established parameters.[7] On April 25, 2012, the Bureau adopted the specific methodology for establishing the benchmarks within HCLS.[8]

4. The Commission also instituted a waiver process to allow "any carrier negatively affected by the universal service reforms … to file a petition for waiver that clearly demonstrates that good cause exists for exempting the carrier from some or all of those reforms, and that waiver is necessary and in the public interest to ensure that consumers in the area continue to receive voice service."[9] The Commission stated that it did not "expect to grant waiver requests routinely," and cautioned petitioners that any requests would be subject to a "rigorous, thorough, and searching review comparable to a total company earnings review."[10] The Commission also noted that it did not anticipate granting waivers of the $250 cap for an undefined duration, but would expect carriers to periodically re-validate any need for support above the $250 cap.[11] According to the Commission, even if a carrier demonstrates the need for funding above the $250 cap, that carrier is only entitled to the amount above the $250 cap that it can show is necessary, not the amount it was previously receiving.[12] The Commission provided guidance on the types of information that would be relevant for such waiver requests and delegated authority to the Bureau and the Wireless Telecommunications Bureau to rule on all such requests.[13]

III. ALLBAND'S PETITION

5. On February 3, 2012, Allband filed a petition for waiver.[14] Allband requests waiver of sections 54.302 and 36.621(a)(5) of the Commission's rules. Allband asserts that absent the requested waivers, it will be unable to: 1) provide voice service to any of its customers; 2) pay the principal and interest on its Rural Utilities Service loan; and 3) continue operations as a telecommunications carrier.[15]

6. Allband was formed in 2003 as a non-profit member cooperative to serve an unserved, remote area in the lower peninsula of Michigan. In 2005, the Commission recognized Allband as an incumbent local exchange carrier (LEC) and allowed it to become a member of the National Exchange Carrier Association (NECA) and to participate in NECA intercarrier compensation tariffs and pools and

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[6] *Id*. at 17741-47, paras. 210-26.

[7] *Id.* at 17744, para. 217.

[8] *See generally Connect America Fund; High-Cost Universal Service Support*; WC Docket Nos. 10-90, 05-337, Order, DA 12-646 (Wireline Comp. Bur. rel. Apr. 25, 2012) (*HCLS Benchmarks Order*).

[9] *USF/ICC Transformation Order*, 26 FCC Rcd at 17839-40, paras. 539, 540.

[10] *Id.* at 17840, para. 540.

[11] *Id*. at 17766, para. 278.

[12] *Id*.

[13] *Id.* at 17840-42, paras. 542, 544.

[14] Allband Communications Cooperative Petition for Waiver of Part 54.302 and the Framework to Limit Reimbursable Capital and Operating Costs, WC Docket No. 10-90, WT Docket No. 10-208 (filed Feb. 3, 2012) (Petition).

[15] Petition at 1.

to receive federal USF support.[16] The Rural Utilities Service (RUS), an agency of the U.S. Department of Agriculture, provided loans to Allband totaling approximately $8 million to construct telecommunications facilities.[17]

7. Allband states that it currently serves 163 lines and has a customer density of 1.09 lines per square mile.[18] Prior to the issuance of the *USF/ICC Transformation Order*, Allband received $714 per line per month.[19] According to Allband, federal universal service fund (USF) revenues from the high-cost program constitute 84 percent of Allband's total regulated and unregulated revenues and that at full transition the $250 cap would reduce Allband's regulated revenues by 55 percent.[20] Allband notes that the RUS loan covenant requires that it at least have sufficient revenues to pay the interest on the RUS loans.[21] Allband contends that it will be unable to make a full annual RUS loan payment, even in the first year of the phase-in of the $250 cap.[22] Allband states that, at best, it will only be able to pay the interest on the loan.[23]

8. Allband contends that this revenue loss cannot be made up through rate increases to local customers. According to Allband, its basic local exchange service rate currently is $19.90 per month,[24] and if local customer rates were to increase to compensate for the lost federal USF revenues resulting from the $250 cap, the total monthly rate would have to increase to $174.90 in the first year of the phase-in, to $329.90 in the second year of the phase-in period, and to $484.90 by the end of the phase-in period.[25] Allband also contends that it cannot recover the lost revenues from either its switched intercarrier compensation rates or the Michigan universal service fund.[26] Allband notes that federal USF revenues provide $1,396,728 annually, while non-regulated revenue sources only provide $76,215 annually.[27] In its petition, Allband also estimated that it would lose $398,435 annually in federal USF support as a result of the HCLS benchmarking rule, based on the methodology set forth in the *Further Notice of Proposed Rulemaking*.

9. The Bureau sought comment on Allband's Petition on February 13, 2012.[28] The National Telecommunications Cooperative Association (NTCA) and the National Cable & Telecommunications Association (NCTA) filed comments. NTCA supports Allband's petition, contending that Allband has demonstrated that absent a waiver, it is not financially viable and rural customers would lose service or

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[16] *Id.* at 2-3 (citing *In the Matter of Allband Communications Cooperative for Waiver of Sections 69.2(hh) and 69.601 of the Commission's Rules,* 20 FCC Rcd 13566 (2005)).

[17] *Id.* at 3.

[18] *Id.* at 2, fn. 4.

[19] *Id.* at 6.

[20] *Id.* at 6.

[21] *Id*. at 7.

[22] *Id.*

[23] The full annual loan payment is $638,147, of which $324,576 is interest. *Id.*

[24] *Id.* at 8 (citing *USF/ICC Transformation Order* at ¶ 234 to ¶ 247). Allband's high-speed internet service rate is $34.99 per month. Petition at Appendix 2, p. 7.

[25] *Id.* at 8.

[26] *Id*. at 7.

[27] *Id.* at 10.

[28] *See Wireline Competition Bureau Seeks Comment on Allband Communications Cooperative Petition for Waiver of Certain High-Cost Universal Service Rules*, Public Notice, DA 12-204 (Feb. 13, 2012) (seeking comments by March 14, 2012 and reply comments by March 29, 2012).

incur massive increases in end-user charges.[29] NTCA also argues that there is good cause to waive the Commission's rules, noting that 1) Allband's network is new and largely undepreciated; 2) Allband has minimal staff, which perform multiple functions and are paid reasonable wages; and 3) Allband's board members volunteer their time and receive no compensation.[30] NCTA, in its filing, states that it does not have a position on Allband's request, but wishes to address issues regarding the waiver process itself.[31] On March 29, 2012, Allband filed reply comments.[32] On June 25, 2012, Allband filed supplemental information in support of its petition.[33] Allband's filing provided more detail regarding various transactions which were discussed in its initial filing. On June 27, 2012, Allband filed a request for immediate, permanent stay of section 54.302 in which it reiterated all of its arguments in its petition seeking waiver and set forth its arguments of why a stay would be warranted.[34] On July 24, 2012, Allband filed supplemental information in support of its petition.[35]

IV. DISCUSSION

10. We conclude that Allband has demonstrated that there is good cause to grant a waiver of section 54.302 of the Commission's rules for three years.[36] Based upon a thorough review of the information provided by Allband, including its financial statements, we conclude that a limited waiver is necessary and in the public interest to ensure that consumers in the area continue to receive voice service in areas where there is no terrestrial alternative.[37]

11. We find that special circumstances support Allband's waiver request. Unlike many other incumbent telephone companies, Allband is a relatively new company, and therefore has significant start-

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[29] NTCA Comments, WC Docket No. 10-90, WT Docket No. 10-208, at 2 (filed Mar. 14, 2012).

[30] *Id*. at 3-4.

[31] NCTA Comments, WC Docket No. 10-90, WT Docket No. 10-208, at 3 (filed Mar. 14, 2012). NCTA contends that the Commission should make it clear that the overall $4.5 billion budget, and the automatic steps that are triggered if demand for support exceeds the budget, will continue even if waivers are granted. *Id.* at 3-4. NCTA also argues that the Commission should not assume that increasing high-cost support levels is the only way to address a carrier's concerns regarding the application of the cap.[31] NCTA states that the Commission should consider whether there are any cost savings or efficiency gains that might be possible. *Id.* at 4. NCTA also claims that the Commission and RUS should work together to address troubled loans. *Id.* at 5. Finally, NCTA argues that the waiver process should be completely transparent. *Id.* at 5-7.

[32] Allband Reply Comments, WC Docket No. 10-90, WT Docket No. 10-208 (filed March 29, 2012) (Reply Comments).

[33] Letter from Tom Karalis, Fred Williamson & Associates, Inc., to Marlene Dortch, FCC, WC Docket No. 10-90 et al. (filed June 25, 2012) (Allband Supplemental Filing).

[34] Allband Petition for Stay, WC Docket No. 10-90, WT Docket No. 10-208 (filed June 27, 2012) (Stay Petition).

[35] Letter from Tom Karalis, Fred Williamson & Associates, Inc., to Marlene Dortch, FCC, WC Docket No. 10-90 et al. (filed June 25, 2012) (Allband Second Supplemental Filing).

[36] Generally, the Commission's rules may be waived if good cause is shown. 47 C.F.R. § 1.3. The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest. *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*). In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166. In this context, the Commission has made clear that it envisions granting waivers "only in those circumstances in which the petitioner can demonstrate that the reduction in existing high-cost support would put consumers at risk of losing voice services, with no alternative terrestrial providers available to provide voice telephony service using the same or other technologies that provide the functionalities required for supported voice service." *USF/ICC Transformation Order*, 26 FCC Rcd at 17840, para. 540.

[37] *USF/ICC Transformation Order*, 26 FCC Rcd at 17839-40, para. 540.

up costs and undepreciated plant. Allband serves a remote, heavily forested and unserved area in the lower peninsula of Michigan, including portions of four counties that previously had no service.[38] Allband's service territory is difficult to serve and has very few customers.[39] Allband was formed as a nonprofit in 2003 because no other service provider was willing to provide service to the area.[40]

12. We also find that the public interest would be served by granting a waiver for a limited period of time. Specifically, we find that the record supports Allband's claims that consumers in the area will not be able to continue to receive voice service, absent a waiver in the near-term. In reviewing Allband's financial statements, it appears that the management of Allband is mindful of its expenses and limited financial resources given the size of its business. For example, in our view, the salaries and wages of Allband's seven employees are modest.[41] Similarly, while certain other expenses, such as legal, accounting, and insurance are ongoing and an unavoidable cost of doing business, Allband's level of expenses, on a total dollar basis, are reasonable given the size and age of Allband's operation.[42] Accordingly, we find that Allband is not in a position to immediately reduce its expenses in these areas. Similarly, given the low population density in Allband's service territory, Allband also will not be in a position to increase its revenues from consumers in the short-term.

13. Nevertheless, consistent with the Commission's direction,[43] we do not find it to be in the public interest to grant Allband an unlimited waiver of the monthly per-line limits adopted by the Commission, either in terms of the amount of support provided, or the duration of additional support. While a waiver is appropriate for a discrete period of years given the size and age of Allband's operation, it would be appropriate to reassess its financial condition to determine whether a waiver remains necessary in the future. We would be concerned if Allband's support continues to be significantly greater than the Commission's per-line limit as Allband's operation matures.

14. Therefore, we grant Allband a limited waiver of section 54.302 of the Commission's rules for a period of three years to give Allband a sufficient but not undue amount of time to make a good faith effort to come into compliance with the $250 cap. During this time, we expect Allband to actively pursue any and all cost cutting and revenue generating measures in order to reduce its dependency on federal high-cost USF support. Specifically, we anticipate that Allband, during this three-year waiver period, will continue efforts to expand its subscriber base to the extent possible[44] and lower its support needs on a per-line basis, while at the same time taking all necessary steps to reduce its total costs as the company matures. We further note that Allband has expressed its willingness, if necessary, to work with RUS to rework its loan terms.[45] We envision that this is just one of the steps Allband may take to improve its financial position. Moreover, even if Allband cannot meet the cap in the next three years, a possibility we discuss further below,[46] the financial information garnered during that time period will enable both Allband and the Bureau to determine what further steps are necessary to reach that goal. The

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[38] Petition at 2-3.

[39] According to Allband, the Company currently serves 163 lines and has a customer density of 1.09 lines per square mile. *Id.* at 2, n. 4.

[40] *See Id.* at 6.

[41] *See Id.* at Appendix 2, page 5.

[42] *Id*. at 6. We also note that no party disputed the factual evidence presented by Allband or objected to its request for a waiver.

[43] *USF/ICC Transformation Order*, 26 FCC Rcd at 17766, para. 278.

[44] According to Allband, the Company currently has a telephone penetration rate of 69 percent and an internet penetration rate of 36 percent. *See,* Allband Second Supplemental Filing.

[45] Petition at 5-6.

[46] *See infra* para. 16.

three-year waiver also will coincide with the three-year phase-in of the $250 cap for other carriers. Thus, at the end of the waiver period, the Bureau will not only have available for its consideration Allband's financial information, but the financial information from other carriers who are subject to the $250 cap and will be able to use this data for comparison purposes.

15. We also implement the limited waiver in a manner designed to ensure that Allband does not receive more high-cost support than necessary. Specifically, effective July 1, 2012 and until June 30, 2015, we grant Allband a waiver of section 54.302 so that it may receive the lesser of high-cost universal service support based on its actual costs or the annualized total high-cost support that it received for the period January 1, 2012 through June 30, 2012.[47] That is, as Allband takes steps to reduce its costs and increase penetration, as described above, we expect that it will receive less support.

16. At the end of the waiver period, both Allband and the Bureau will be in a better position to determine if Allband will need further relief. If, after taking all reasonable steps to improve its financial position, Allband determines that it still needs additional support above the $250 cap after June 30, 2015, Allband should file with the Bureau the financial and operational information necessary for the Bureau to determine what further relief is appropriate based on the specific circumstances present at that time. This could include a further waiver or the initiation of a phase-in period (e.g., phasing down to the $250 cap over an additional three years). This filing, if necessary, shall be made no later than six months prior to the expiration of the three-year waiver period. In that event, Allband should provide its 2012 and 2013 financial statements, documentation of steps taken to improve its financial position, and any other information it deems necessary for the Bureau to evaluate the need for renewal of the waiver in whole or in part. We also would expect Allband to provide its 2014 financial statements as soon as they become available, prior to the expiration of the current waiver. As with any company considering filing a petition for waiver of these rules, Allband is encouraged to communicate with the Bureau in advance of any future filing to ensure that only necessary information is provided to the Bureau in order to accelerate review of the petition.

17. Finally, with regard to Allband's request that the Commission waive the benchmarking rule to limit HCLS for capital and operating costs, we conclude that this request is moot. We note that under the specific methodology ultimately adopted by the Bureau, which occurred after Allband filed its petition, Allband is not capped.[48] Therefore, the Bureau dismisses Allband's request for a waiver of the benchmarking rule as moot.

18. With regard to Allband's request for a stay of section 54.302, we find that in light of our decision to grant the limited waiver of section 54.302, Allband cannot demonstrate that it will suffer irreparable harm in the near future.[49] Therefore, the Bureau denies Allband's request for a stay of section 54.302.

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[47] This restriction on Allband's funding level is in keeping with the Commission's directive that a carrier is only entitled to the amount above the cap they can show is necessary, not the amount they were previously receiving. *USF/ICC Transformation Order*, 26 FCC Rcd at 17766, para. 278.

[48] *See Connect America Fund; High-Cost Universal Service Support*; WC Docket Nos. 10-90, 05-337, Order, DA 12-646 (Wireline Comp. Bur. rel. Apr. 25, 2012) at Appendix B, p. 47.

[49] A showing of irreparable injury is a critical element in justifying a request for stay of an agency order. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) ("Our frequently reiterated standard requires plaintiffs seeking an injunction to demonstrate that irreparable injury is *likely* in the absence of an injunction."); *see also Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (denying requests for stay after considering only irreparable harm). Allband also has not persuaded us that the other stay criteria are met here, either.

V. ORDERING CLAUSES

19. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 5(c), 201, and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 155(c), 201, 254, and sections 0.91, 0.291, and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 1.3, that this order IS ADOPTED.

20. IT IS FURTHER ORDERED that the petition for waiver of section 54.302 of the Commission's rules, 47 C.F.R. § 54.302, and the benchmarking rule to limit reimbursements for capital and operating costs, filed by Allband Communications Cooperative, IS GRANTED IN PART, DENIED IN PART, AND DISMISSED AS MOOT IN PART as described herein.

21. IT IS FURTHER ORDERED that the petition for stay, filed by Allband Communications Cooperative, IS DENIED as described herein.

22. IT IS FURTHER ORDERED that, pursuant to section 1.102(b)(1) of the Commission's rules, 47 C.F.R. § 1.102(b)(1), this order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Julie A. Veach
Acting Chief
Wireline Competition Bureau