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

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
Accipiter Communications, Inc. Petition for Temporary Waiver of Certain High-Cost Universal Service Rules	)	

ORDER

Adopted: January 30, 2013 **Released: January 30, 2013**

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this order, we find good cause to grant a petition filed by Accipiter Communications, Inc. (Accipiter) for a limited, temporary waiver of certain rules governing the calculation of high-cost universal service support.[1] For the reasons discussed below, we grant Accipiter a waiver of the requested rules through December 31, 2014.

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 that companies affected by reform have time to adapt to changing circumstances,[4] the Commission

[1] Accipiter Communications, Inc. Petition for Temporary Waiver of the Commission's Rules, WC Docket No. 10-90 et al. (filed Apr. 18, 2012) (Accipiter Petition or Petition). The Bureau recently granted Accipiter interim relief, as necessary to ensure the continuation of Accipiter's wireline voice and broadband service during the pendency of the Bureau's review. *See Accipiter Communications, Inc. Petition for Temporary Waiver of Certain High-Cost Universal Service Rules*, WC Docket No 10-90 et al., Order, DA 12-2016 (Wireline Comp. Bur. rel. Dec. 20, 2012) (*Accipiter Interim Support Order*).

[2] *See 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, 17670, para. 11 (2011) (*USF/ICC Transformation Order and/or FNPRM*); *pets. for review pending sub nom. In re: FCC 11-161*, No. 11-9900 (10th Cir. filed Dec. 8, 2011).

[3] *USF/ICC Transformation Order*, 26 FCC Rcd at 17765, para. 274.

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

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 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 reformed high-cost loop support (HCLS) by adopting a benchmark rule to moderate the expenses of rate-of-return carriers with very high costs compared to their similarly situated peers, while further encouraging other rate-of-return carriers to invest and advance broadband deployment.[6] The new rule responded to problematic incentives and inequitable distribution of support created by the prior rules, under which some carriers with high costs could receive reimbursement from the federal universal service fund for up to 100 percent of their marginal expenditures on loop costs. The Commission adopted the benchmarks rule to reverse these incentives and address these problems by, for the first time, placing reasonable overall limits on costs eligible for reimbursement through HCLS and redistributing freed-up HCLS to carriers that stay within these limits to encourage new broadband investment. The Commission delegated to the Bureau the authority to adopt and implement a specific methodology within the parameters set forth by the Commission, which the Bureau did in the *HCLS Benchmarks Implementation Order*.[7]

4. To prevent disruption to consumers as these rules are phased in, the Commission permitted "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."[8] In the *USF/ICC Transformation Order*, the Commission stated that "[w]e envision granting relief 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."[9] In the *Fifth Order on Reconsideration*, the Commission clarified that waiver petitions will be evaluated not just based on the

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

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

[7] *See id.* at 17743-44, paras. 214, 217; *Connect America Fund; High-Cost Universal Service Support*, WC Docket Nos. 10-90, 05-337, Order, 27 FCC Rcd 4235 (Wireline Comp. Bur. 2012) (*HCLS Benchmarks Implementation Order*). The Commission is considering pending petitions for reconsideration and applications for review of the *HCLS Benchmarks Implementation Order*.

[8] *USF/ICC Transformation Order*, 26 FCC Rcd at 17839-40, paras. 539, 540. The Commission did not intend to replace the ordinary standard for granting waivers under section 1.3 of the Commission's rules, but rather to provide guidance in advance to potential applicants of the circumstances that would be persuasive and compelling grounds for grant of a waiver under that waiver standard to assist potential applicants in effectively formulating their waiver petitions. *See Connect America Fund et al.*, WC Docket No 10-90 et al., Fifth Order on Reconsideration, 27 FCC Rcd 14549, 14556-57, para. 19 (2012) (*Fifth Order on Reconsideration*). 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. *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. Waiver of the Commission's rules is appropriate only if both (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest. *Northeast Cellular*, 897 F.2d at 1166.

[9] *USF/ICC Transformation Order*, 26 FCC Rcd at 17840, para. 540.

impact of reforms on voice service, but also on the continued operation of existing broadband-capable networks and the effect on consumer rates.[10] 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.[11]

5. *Accipiter's Petition.* Accipiter is an incumbent local exchange carrier providing voice telephony and high-speed Internet service to a study area of 1,010 square miles northwest of Phoenix, Arizona.[12] On April 18, 2012, Accipiter filed a petition seeking a temporary waiver of the $250 per line limit on high-cost universal service support and a postponement of the HCLS benchmarks rule, which had not yet been implemented at that time.[13] Following the release of the Bureau's *HCLS Benchmarks Implementation Order*, Accipiter amended its petition, seeking relief from the HCLS benchmarks rule as implemented.[14] Finally, on November 1, 2012, Accipiter filed a second amendment to its waiver petition.[15] In this Second Amendment, Accipiter states that it seeks a waiver of the $250 per line limit and waiver of the HCLS benchmarks rule through December 31, 2014.[16]

6. Accipiter generally argues that the $250 per-line limit and the HCLS benchmarks rule should not apply to it because, unlike most other rural, rate-of-return carriers, it is a growing company with rapidly increasing subscribership. Accipiter argues that it had significantly higher costs while it was expanding its network, especially when calculated on a per-line basis. For example, Accipiter's study area loop count increased by 46 percent from its 2009 cost study to its 2010 cost study.[17] Moreover, Accipiter argues that while in recent years it made significant investments to extend its network into previously unserved areas, it is now positioned to add customers with relatively smaller incremental capital expenditures and operating expenses.[18] For this reason, Accipiter states that with ongoing subscriber growth, it expects that by 2015 it will no longer require a waiver.[19] Nevertheless, as Accipiter explained in its Second Amendment to its Petition, without a waiver the company [**REDACTED**].[20]

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[10] *Fifth Order on Reconsideration*, 27 FCC Rcd at 14557, para. 20.

[11] *USF/ICC Transformation Order*, 26 FCC Rcd at 17840-42, paras. 542, 544.

[12] Petition at 6. Accipiter was incorporated in 1995 and is authorized by the Arizona Corporation Commission to serve portions of Maricopa and Yavapai counties in the state.

[13] *Id*. at 2.

[14] *See* Accipiter Communications, Inc. Petition for Waiver of the Commission's Rules Implementing Reform of Universal Service Support, Amendment to Petition for Temporary Waiver, WC Docket No. 10-90 at 1-2 (filed July 19, 2012) (First Amendment).

[15] Accipiter Communications, Inc. Petition for Waiver of the Commission's Rules Implementing Reform of Universal Service Support, Second Amendment to Petition for Temporary Waiver, WC Docket No. 10-90 (filed Nov. 1, 2012) (Second Amendment).

[16] *Id*. at 1, 3.

[17] Petition at 29.

[18] *Id*. at 3.

[19] Second Amendment at 1.

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

7. The Bureau sought comment on Accipiter's Petition on May 4, 2012.[21] Cox Communications, Inc. (Cox) and the National Telecommunications Cooperative Association (NTCA) filed in response to Accipiter's Petition.[22] Cox filed an opposition to Accipiter's Petition, defending itself against certain allegations of prior anticompetitive behavior made in Accipiter's Petition.[23] Cox also argues that Accipiter is using federal universal service and Rural Utilities Service (RUS) loans to build its network in suburban areas that do not need support and where Cox is competing without a subsidy.[24]

8. NTCA filed comments in support of Accipiter's Petition, asserting that it highlights the significant concerns arising from application of the $250 per line limit in section 54.302 of the Commission's rules and the regression-based caps that will limit recovery of certain operating and capital expenses.[25]

9. *Accipiter Interim Support Order*. On December 20, 2012, the Bureau granted limited, interim relief to Accipiter to ensure the continuation of Accipiter's wireline voice and broadband service during the pendency of the Bureau's review of the Petition.[26] In the *Accipiter Interim Support Order*, the Bureau tentatively found that Accipiter's expenses were reasonable, pending further review.[27] On December 27, 2012, the Bureau sent a letter to Accipiter seeking additional financial and other information necessary to complete its review of Accipiter's Petition.[28] On January 4, 2013, Accipiter filed its response.[29]

IV. DISCUSSION

10. We conclude that Accipiter has demonstrated that there is good cause to grant a limited, temporary waiver of the Commission's rules until December 31, 2014.[30] Based upon a thorough review

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[21] *See Wireline Competition Bureau Seeks Comment on Accipiter Communications, Inc. Petition for Temporary Waiver of Certain High-Cost Universal Service Rules*, WC Docket No. 10-90, WT Docket No. 10-208, Public Notice, 27 FCC Rcd 5024 (Wireline Comp. Bur. 2012) (seeking comments by June 5, 2012 and reply comments by June 20, 2012).

[22] *See* Cox Communications, Inc. Opposition to Petition for Waiver, WC Docket No. 10-90, WT Docket No. 10-208 (filed June 5, 2012) (Cox Opposition); NTCA Comments, WC Docket No 10-90, WT Docket No. 10-208 (filed June 5, 2102).

[23] *See* Cox Opposition at 1-3; Petition at 10-11.

[24] Cox Opposition at 4-8. Cox also argues that Accipiter's initial petition did not adequately show that it would be unable to survive losses resulting from reductions in support caused by the $250 per line cap. *See id*. at 5. Accipiter's subsequent filings, however, clearly demonstrate this, *see, e.g.*, Second Amendment at 1, and Cox has not disputed Accipiter's claims.

[25] NTCA Comments at 1.

[26] *See Accipiter Interim Support Order*, DA 12-2016, para. 1.

[27] *Id*. at para. 9.

[28] *See* Letter from Julie A. Veach, Chief, Wireline Competition Bureau, to Kenneth C. Johnson, Counsel to Accipiter Communications, Inc., WC Docket No. 10-90 et al., DA 12-2084 (rel. Dec. 27, 2012) (*Supplemental Letter*).

[29] *See* Letter from Kenneth C. Johnson, Counsel to Accipiter Communications, Inc., Response to Request for Additional Information, WC Docket No. 10-90 et al. (filed Jan. 4, 2013) (Supplemental Response).

[30] *See supra* note 8 (setting forth the waiver standard). In this context, the Commission has made clear that it envisions granting waivers "only in those circumstances in which the petitioner can demonstrate that consumers served by such carriers face a significant risk of losing access to a broadband-capable network that provides both

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of the information provided by Accipiter, including its financial statements, we conclude that a waiver is necessary and in the public interest. First, Accipiter has demonstrated that, within two years, it will be able to operate within the support limits (*e.g*., at or below $250 per line per month) established in the *USF/ICC Transformation Order*.[31] Second, this waiver ensures that those consumers in Accipiter's service area, who have no alternative terrestrial provider of voice and broadband service, will maintain access to a broadband-capable network that provides both voice and broadband service.[32] Third, based on our analysis, Accipiter's expenses appear reasonable, as further discussed below.

11. *Accipiter's Path to Meet Support Limits.* Accipiter is a rapidly growing company whose financial projections demonstrate that a waiver will permit it to operate within the support limits established in the *USF/ICC Transformation Order* within a short timeframe. Specifically, Accipiter's projections show that, by January 1, 2015 at the latest, it will no longer have its support capped by either the Commission's $250 per line overall limit or the HCLS benchmarks rule.[33]

12. *Access to Voice and Broadband.* The record supports Accipiter's claim that without a waiver, some of its customers living in parts of its service area where there is no alternative terrestrial provider of service risk losing access to a broadband-capable network that provides both voice as well as broadband today.[34] In its Petition, Accipiter states that without a waiver, it will be unable to support services to approximately [**REDACTED**] telephone subscribers who have no terrestrial alternative for voice or broadband service.[35] We also note that, as an RUS borrower, Accipiter asserts that relief is necessary to prevent unnecessary risk of default on its existing [**REDACTED**] RUS debt. We conclude that while granting the requested relief will temporarily increase its high-cost support above the amount it would receive under current rules, a waiver likely saves substantial costs related to the restructuring of its RUS debt.[36]

13. *Accipiter's Expenses Appear Reasonable*. Based on the financial information Accipiter has provided, we find that Accipiter's expenses are reasonable. First, as noted above, Accipiter is a rapidly growing company, with financial projections that show that, by January 1, 2015, its support will not be capped by the Commission's $250 per line overall cap or the HCLS benchmarks.[37] Furthermore, the salaries and wages of Accipiter's small number of employees are comparable to other similarly-sized rate-of-return carriers.[38] Similarly, Accipiter's corporate operations expenses are reasonable given the

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voice as well as broadband today, at reasonably comparable rates, in areas where there are no alternative providers of voice or broadband." *Fifth Order on Reconsideration*, 27 FCC Rcd at 14557, para. 21.

[31] *See* Petition at 2; Second Amendment at 1.

[32] *See Fifth Order on Reconsideration*, 27 FCC Rcd at 14557, para. 20.

[33] *See* Petition at 4.

[34] *See Fifth Order on Reconsideration*, 27 FCC Rcd at 14557, para. 20.

[35] Petition at 4. Accipiter acknowledges that some of these current subscribers may have access to mobile voice services. There is no evidence in the record, however, that any provider or combination of providers would be able to provide voice and broadband service throughout Accipiter's service area.

[36] Petition at 5.

[37] *See* Petition at 4.

[38] Accipiter reports that it currently has [**REDACTED**] employees. *See* Appendix to Supplemental Response. The total cash compensation of Accipiter's CEO is below that of the median for companies with a similar number of access lines and operating revenues. Likewise, the compensation of Accipiter's other employees is comparable to the median for similar positions in similarly-situated companies. *See* National Telecommunications Cooperative

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size and growth rate of Accipiter's operation.[39] For example, according to data submitted by the National Exchange Carrier Association (NECA), companies with 500 to 1,500 loops have corporate operations expenses that are on average 40 percent of their total loop revenue requirement.[40] NECA reported that Accipiter had 935 loops as of year-end 2011, and Accipiter's 2011 corporate operations expenses were 19 percent of its total loop revenue requirement, significantly less than similarly sized peers.[41]

14. Moreover, Accipiter has not made affiliate payments, entered into any leases, or made any distributions to owners or shareholders that appear imprudent. For example, Accipiter made no [**REDACTED**].[42] Accipiter has not [**REDACTED**] from 2009 to the present date.[43] Finally, Accipiter states that it expects to [**REDACTED**].[44] Accipiter plans to use those funds in a prudent manner to, for example, [**REDACTED**], as part of its plan to reduce per-line support.[45]

15. Opposing Accipiter's waiver petition, Cox asserts that Accipiter should not receive support for costs associated with its service in suburban areas, including areas where Cox competes with it, and that Accipiter's waiver request includes such costs.[46] Cox argues that high-cost support should not be used to fund investment in areas where competitive alternatives are available.[47] Accipiter counters that providing service in areas with population densities that allow for economies of scale, such as the areas in which it competes with Cox, reduces its overall dependence on high-cost universal service support because revenues from those areas help offset costs incurred in serving higher-cost areas.[48]

16. We agree with Cox that, as the Commission previously found, providing universal service support in areas of the country where another voice and broadband provider is offering high-quality service without government assistance is an inefficient use of limited universal service funds.[49] On the record before us, however, we cannot conclude that Accipiter is using universal service support in that manner. In the *USF/ICC Transformation Order*, the Commission adopted a rule to eliminate universal service support where an unsubsidized competitor offers voice and broadband service

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Association, *2012 Survey of Compensation and Benefits in the Independent Telecommunications Industry,* at 86, Table 36a, 108, Table B (2012).

[39] Petition at 3.

[40] *See* National Exchange Carrier Association, Inc., Universal Service Fund Data: NECA Study Results, 2012 Report (filed Sept. 28, 2012), http://www.fcc.gov/wcb/iatd/neca.html. 2013 support is based on 2011 cost data filed September 28, 2012.

[41] *See id.*; *see also* Petition at Exhibit 3.

[42] Supplemental Response, App. at A-8.

[43] *Id*.

[44] *Id*.

[45] *Id*.

[46] Cox Opposition at 5.

[47] *Id*.

[48] *See* Letter from Patrick Sherrill, President and Chief Executive Officer, Accipiter Communications, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 10-90 et al., at 2 (filed Aug. 7, 2012).

[49] *USF/ICC Transformation Order*, 26 FCC Rcd at 17767, para. 281.

throughout an incumbent carrier's entire study area.[50] The Commission also sought comment on a process for determining support in study areas with less than 100 percent overlap, such as Accipiter's, including how to allocate costs among the overlapped and non-overlapped areas.[51] Resolving this cost-allocation issue is typically necessary to determine whether universal service funds are being used to subsidize competitive areas, or, to the contrary, and as Accipiter claims here, net revenues from competitive areas are reducing a carrier's universal service needs. We do not wish to prejudge the Commission's resolution of this cost allocation issue. And, we note that Cox has not alleged that Accipiter is using the support in a manner inconsistent with our rules. Accordingly, although we take Cox's concerns seriously, the fact that Accipiter faces competition from an unsubsidized competitor in part of its study area does not at this time justify a denial of its waiver petition.

17. For these reasons, we grant Accipiter a limited, temporary waiver of the $250 per line cap and the HCLS benchmarks rule until December 31, 2014. We implement this limited, temporary waiver in a manner designed to ensure that Accipiter does not receive more high-cost support than necessary or more high-cost support than it received prior to the implementation of the reforms adopted in the *USF/ICC Transformation Order*. Specifically, beginning with support for January 2013 and through support for December 2014, we grant Accipiter's request for a waiver of the above-mentioned rules, but provide that its support for any month shall not exceed the average monthly amount of total high-cost support that it received for January 1, 2012 through June 30, 2012. We direct the Universal Service Administrative Company, beginning with support for January 2013, to provide support to Accipiter pursuant to the terms of this order in place of the monthly support provided in the *Accipiter Interim Support Order*.

18. We expect, as Accipiter states, that by the end of 2014 Accipiter will no longer require a waiver, and we do not anticipate extending this waiver beyond that date.[52] During this time, we expect Accipiter to continue to actively pursue all appropriate measures to reduce its dependency on federal high-cost universal service support.

19. As a condition of receiving support pursuant to this order, Accipiter must maintain its existing services. To the extent that Accipiter must discontinue, reduce or impair service, it must coordinate with the Bureau on a transition plan to minimize customer disruption.

V. ORDERING CLAUSES

20. 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.

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[50] *Id*. There is no evidence in the record to suggest that Cox or any other competitor provides service throughout Accipiter's service area.

[51] *USF/ICC Transformation FNPRM*, 26 FCC Rcd at 18056-59, paras. 1061-78. Specifically, the Commission sought comment on what particular methodology should be used, including whether it should use a cost model to accomplish that allocation. *See id*. at 18058, para. 1074; *see also Further Inquiry Into Certain Issues in the Universal Service-Intercarrier Compensation Transformation Proceeding*, WC Docket No. 10-90 et al., Public Notice, 26 FCC Rcd 11112, 11117 (Wireline Comp. Bur. 2012).

[52] Petition at 4, 17-18; Second Amendment at 1. *See USF/ICC Transformation Order*, 26 FCC Rcd at 17766, para. 278.

21. 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 benchmarks rule to limit reimbursements for capital and operating costs, filed by Accipiter Communications, Inc. IS GRANTED 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
Chief
Wireline Competition Bureau