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

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337

ORDER

Adopted: July 29, 2013 **Released: July 29, 2013**

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order, we dismiss a petition filed by South Central Telephone Association, Inc. (South Central), for a waiver of two of the Commission's rules: (i) section 54.302, which caps high-cost support at $250 per line per month; and (ii) section 36.621(a)(5), which limits capital and operating expenses for high-cost loop support (HCLS) ("the benchmarks rule").[1] Because alternative remedies and additional support are available through a state process in Oklahoma, we dismiss South Central's petition without prejudice. South Central may file a petition reasserting the need for a waiver after it has pursued this alternate means of relief.

2. Oklahoma has a process to address any unique concerns of carriers resulting from a change in federal universal service policy. Also, we note that South Central applied for relief before the Oklahoma Corporation Commission (OCC) in August 2012, well before requesting relief with the Commission. We consider a state process such as Oklahoma's a welcome example of federal-state coordination and partnership, and encourage other states to consider similar approaches as states may be best positioned to address any unique circumstances for carriers in their states.

II. BACKGROUND

3. 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 federal universal service fund (USF).[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, finding that support in excess of the $250 cap should not be provided without further justification.[3] Consistent with the Commission's goal to avoid "flash cuts" so

[1] Petition for Waiver of South Central Telephone Association, Inc., WC Docket No. 10-90 et al. (filed Dec. 6, 2012) (South Central Petition). *See* 47 C.F.R. §§ 36.621(a)(5), 54.302.

[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; 47 C.F.R. § 54.302.

that 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 received 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.

4. The Commission also reformed HCLS by adopting a benchmarks rule to moderate the expenses of rate-of-return carriers that experience very high costs as compared to their similarly-situated peers and to further encourage other rate-of-return carriers to invest and advance broadband deployment.[6] The Commission delegated to the Wireline Competition Bureau (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]

5. In the *Sixth Order on Reconsideration*, the Commission reconsidered one aspect of the benchmarks rule to limit capital and operating expenses (capex and opex, respectively) for HCLS.[8] Specifically, the Commission directed the Bureau to develop a regression methodology that will generate a single total loop cost cap for each study area beginning in 2014.[9] As an interim measure toward a single cost cap, the Commission summed capex and opex caps generated by the Bureau's current methodology for purposes of calculating HCLS support in 2013.[10] The Commission also modified the phase-in of the benchmarks for 2013 to provide carriers additional time to adjust to the changes.[11] Recently, the Bureau announced that it would maintain the Commission's approach for HCLS benchmarking in 2013 (utilizing the same regression coefficients as 2012 and 2013), as well as delay the phase-in of support reductions for one year, rather than making them fully effective in 2014.[12]

6. To prevent disruption to consumers as the 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."[13] In the *USF/ICC Transformation Order*, the Commission stated that "[w]e

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[4] *USF/ICC Transformation Order*, 26 FCC Rcd at 17671, para. 11.

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

[6] *See id.* at 17741-47, paras. 210-26; 47 C.F.R. § 36.621(a)(5).

[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*).

[8] *See Connect America Fund et al*., WC Docket No. 10-90 et al., *Sixth Order on Reconsideration and Memorandum Opinion and Order*, 28 FCC Rcd 2572 (2013) (*Sixth Order on Reconsideration*), *petitions for review filed sub nom., Accipiter Comm., Inc. v. FCC*, Case No. 13-71760 (9th Cir. filed May 20, 2013), *Nat'l Telecomm. Coop. Ass'n v. FCC*, Case No. 13-1661 (4th Cir. filed May 21, 2013).

[9] *See Sixth Order on Reconsideration*, 28 FCC Rcd at 2581-83, paras. 24-28.

[10] *See id*. at 2583, para 29.

[11] *See id*. at 2583-84, para 30.

[12] *See Connect America Fund et al.*, WC Docket No. 10-90 et al., Order, DA 13-1656 (Wireline Comp. Bur. rel. July 26, 2013).

[13] *USF/ICC Transformation Order*, 26 FCC Rcd at 17839-40, paras. 539, 540. The Commission provided guidance on the types of information that would be relevant for such waiver requests. *See USF/ICC Transformation Order*, 26 FCC Rcd at 17840-42, paras. 541-43. The Commission did not intend to replace the ordinary standard for

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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."[14] In delegating to the Bureau the authority to approve or deny all or part of requests for waiver,[15] the Commission indicated that it did not anticipate granting waiver requests routinely or for "undefined duration[s]."[16] In the *Fifth Order on Reconsideration*, the Commission clarified that waiver petitions will be evaluated not just based on the impact of reforms on voice service, "but also on [the] continued operation of a broadband-capable network and the effect on consumer rates."[17]

7. States have always been free to implement intrastate support measures to supplement federal high-cost support. Oklahoma law provides that Oklahoma Universal Service Fund (OUSF) support may be available to eligible incumbent local exchange carriers serving less than seventy-five thousand access lines "in the event of a Federal Communication order, rule or policy, the effect of which is to decrease the federal universal service fund revenues" or "as a result of changes required by existing or future federal or state regulatory rules, order, or policies or by federal or state law."[18] Oklahoma's Administrative Code outlines the process for carriers seeking recovery from the OUSF to seek relief pursuant to this mechanism.[19]

8. South Central is a rate-of-return carrier serving a 222 square mile study area in Oklahoma along the state's border with Kansas.[20] In August 2012, South Central applied to the OCC for recovery of

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granting waivers under section 1.3 of the Commission's rules, but rather sought 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. *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. 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.

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

[15] *Id.* at 17840, 17842, paras. 540, 544.

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

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

[18] *See* 17 OK.ST.ANN. § 139.106(K)(1) and (2).

[19] *See* OK Admin Code 165:59-3-62. First, within 90 days of the filing of the request, the Administrator of the OUSF, Solix, must recommend to the OCC whether it should grant or deny the request. *See* OK Admin Code 165:59-3-62(f). Once this recommendation is made, any adversely affected party wishing to file a request for reconsideration of the Administrator's recommendation must do so within 15 days. *See* OK Admin Code 165:59-3-62(g). If no request for reconsideration is received, the OCC issues an order approving the request without further hearing. *See* OK Admin Code 165:59-3-62(i). However, if a request for reconsideration is received, the OCC must hold a hearing and issue an order on the request for funding within 30 days. *See* OK Admin Code 165:59-3-62(h). Failure to do so results in the request for funding being deemed granted on an interim basis, subject to refund. *See* OK Admin Code 165:59-3-62(j); *see also* OK Admin. Code 165:59-3-10(1) (noting that funds from the OUSF may be sought to "[t]o reimburse eligible local exchange telecommunications service providers for the reasonable investments and expenses not recovered from the federal universal service fund or any other state or federal government fund incurred in providing universal services").

[20] South Central Petition at 3-4.

revenues lost as a result of the reforms contained in the *USF/ICC Transformation Order*.[21] In its application to the OCC, South Central requested a lump payment of $118,924 covering July 2012 through October 2012, and $29,731 in continued recurring monthly support beginning in November 2012.[22] The application remains pending before the OCC.

9. Subsequently, on December 6, 2012, South Central filed with the Commission a petition for waiver of the $250 per line per month cap and the benchmarks rule.[23] South Central argues that, without a waiver, consumers in its Oklahoma study area "would be at risk of losing access to wireline voice and broadband services" and that the company would be "out of cash immediately following the second year of the total cap phase-in."[24] Further, South Central explains that it provides the area's only terrestrial network capable of backhaul, the viability of which would be threatened absent a waiver.[25]

III. DISCUSSION

10. We conclude that, in light of the state mechanism for recovery available to South Central, we should dismiss without prejudice its petition for waiver. Given the limits on federal universal service funding and the overall burden to consumers who contribute to it, we find that South Central has not demonstrated good cause for relief at this time because an alternative avenue for relief, which it began pursuing prior to filing its waiver with the Commission, is available.[26]

11. As the Commission explained in its *USF/ICC Transformation Order*, all revenues along with the individualized circumstances of a company would be taken into account in considering each waiver petition.[27] Further, the *Fifth Order on Reconsideration* explained that "a full understanding of a carrier's financial circumstances is necessary when considering a waiver seeking additional support."[28]

[21] *See, e.g.*, Application of South Central Telephone Association, Inc. for Funding from the Oklahoma Universal Service Fund, Cause No. PUD 201200184 (filed Aug. 6, 2012), *available at* http://imaging.occeweb.com/AP/CaseFiles/OCC4311334.PDF (last visited July 29, 2013). In addition to South Central, Terral Telephone Company has filed with Oklahoma seeking relief using the same recovery mechanism. *See* Application of Terral Telephone Company for Funding from the Oklahoma Universal Service Fund, Cause No. PUD 201200183 (filed Aug. 6, 2012), *available at* http://imaging.occeweb.com/AP/CaseFiles/OCC4311335.PDF (last visited July 29, 2013). On April 26, 2013, the OCC issued a "Notice of Approval Date for Interim OUSF Funding" to Terral Telephone Company (filed in Docket No. PUD 201200183).

[22] South Central filed an amended application with the OCC in November 2012 reflecting "final lost federal USF revenue from FCC and USAC sources" and "the primary OUSF being requested." *See* Application of South Central Telephone Association, Inc. for Funding from the Oklahoma Universal Service Fund, Cause No. PUD 201200184 (filed Nov. 5, 2012), *available at* http://imaging.occeweb.com/AP/CaseFiles/OCC4330844.PDF (last visited July 29, 2013).

[23] *See* South Central Petition at 2. The Bureau sought comment on South Central's petition. *See Wireline Competition Bureau Seeks Comment on the South Central Telephone Association, Inc. Petition for Waiver of Certain High-Cost Universal Service Rules*, WC Docket Nos. 10-90, 05-337, Public Notice, 27 FCC 16040 (Wireline Comp. Bur. 2012).

[24] South Central Petition at 9-10.

[25] *Id.* at 9.

[26] 47 C.F.R. § 1.3.

[27] *See USF/ICC Transformation Order*, 26 FCC Rcd at 17839, para. 539 ("We cannot . . . evaluate . . . claims [that reductions in current support levels would threaten a company's financial viability] absent detailed information about individualized circumstances . . . .").

[28] *Fifth Order on Reconsideration*, 27 FCC Rcd at 14560, para. 30.

12. We find that the availability of an alternative means of support under Oklahoma law, which South Central requested well in advance of filing the instant petition, precludes a finding that additional support from this Commission is warranted at this time.[29] Because it appears that South Central is eligible to receive OUSF support to offset reductions in federal high-cost universal service support as a result of the Commission's reforms, we cannot conclude that consumers in South Central's Oklahoma study area are at risk of losing voice or broadband services in these circumstances.[30] Moreover, requiring South Central to exercise available remedies at the state level first advances the Commission's goal of fiscal responsibility and accountability with respect to the USF. South Central has identified no reason why this Oklahoma recovery mechanism would be insufficient.[31] Finally, it is critical that we ensure that there is no possibility for gamesmanship. As the Commission recently reiterated, it is committed to providing support that is sufficient but not excessive.[32]

13. For the reasons discussed above, we therefore dismiss South Central's petition without prejudice. We believe the most prudent approach is to allow the OCC to complete its process of evaluating and ruling on South Central's request for funding from the OUSF before we consider South Central's waiver request. Subject to the final outcome of any proceeding for relief described above,[33] the petitioner may resubmit its waiver petition to the Commission.

IV. ORDERING CLAUSES

14. 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.

15. IT IS FURTHER ORDERED that the petition for waiver of section 54.302 of the Commission's rules, 47 C.F.R. § 54.302, capping per-line support at $250 per month, and section 36.621(a)(5) of the Commission's rules, 47 C.F.R. § 36.621(a)(5), the benchmarks rule, filed by South Central Telephone Association, Inc., IS DISMISSED as described herein.

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[29] We note that the Bureau recently dismissed similar requests from three carriers who sought waivers from the Commission's rules while simultaneously pursuing relief under a comparable Texas statute. *See Connect America Fund; High-Cost Universal Service Support*, WC Docket Nos. 10-90, 05-337, Order, 28 FCC Rcd 5733 (Wireline Comp. Bur. 2013).

[30] *See USF/ICC Transformation Order*, 26 FCC Rcd at 17840, para. 540 (discussing the circumstances under which a waiver would be appropriate); *Fifth Order on Reconsideration*, 27 FCC Rcd at 14557, para. 20 (clarifying that the Commission will consider the impact of reforms on the continued operation of both voice and broadband service).

[31] South Central has emphasized the importance of receiving a decision from either state or federal regulators. *See* Letter from Gerard J. Duffy, Counsel to South Central, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 05-337 (filed June 5, 2013) ("South Central is very concerned that it will get stuck in the middle between this Commission and the Oklahoma Corporation Commission . . . while its two regulators decide upon their respective responsibilities").

[32] *Fifth Order on Reconsideration*, 27 FCC Rcd at 14557-58, para. 22.

[33] In addition, where lack of timely action in a proceeding before a state authority jeopardizes a carrier's ability to provide voice or continue to operate a broadband-capable network, that carrier may file for interim waiver relief, subject to a true-up, while the state commission considers the request. *See id.* at 14557, para. 20. In the event of a subsequent waiver petition, South Central may request that the record established in this proceeding be incorporated.

16. 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