

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

In the matter of
Waiver of Sections 69.3(a) and 69.4(d) of the
Commission's Rules
CCB/CPD 01-15

ORDER

Adopted: June 14, 2001

Released: June 14, 2001

By the Chief, Common Carrier Bureau:

1. By this Order, we, on our own motion, waive certain elements of sections 69.3(a) and 69.4(d)(2) of the Commission's rules. We take this action in order to allow non-price cap local exchange carriers (LECs) to comply with the recent decision of the United States Court of Appeals for the Fifth Circuit in Comsat v. FCC. This waiver will permit non-price cap LECs to include in their tariff filings an end-user charge to recover their universal service contributions. We also decline to rule on a petition for waiver filed by the National Exchange Carrier Association (NECA) in response to Comsat v. FCC, in which it seeks a waiver of section 69.4(d)(1) to permit its members to recover universal service contributions through a separately stated charge on IXCs.

2. Under section 254 of the Communications Act of 1934, as amended, incumbent LECs are required to contribute to the Commission's universal service support mechanisms. Initially, the Commission required incumbent LECs to recover their contributions through access charges on IXCs. In 1999, however, the Fifth Circuit held this requirement unlawful, ruling that it violated section 254(e)'s mandate that all support be explicit. The Commission then amended section 69.4(d) to permit incumbent LECs to recover their universal service contributions

1 47 C.F.R. §§ 69.3(a) and 69.4(d)(2).

2 Comsat Corp. v. FCC, No. 00-60044 (5th Cir. May 3, 2001) (Comsat v. FCC).

3 Application for Special Permission (filed June 7, 2001).

4 47 U.S.C. § 254.

5 Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report and Order, 12 FCC Rcd. 8776 (1997), aff'd in part, rev'd in part, and remanded in part, Texas Office of Public Utility Counsel v. FCC, 183 F.3d 393 (5th Cir. 1999).

6 Texas Office of Public Utility Counsel v. FCC, 183 F.3d 393 (5th Cir. 1999).

through either an increase in the access charges assessed on IXC's (specifically, the carrier common line or "CCL" charge) or the imposition of a separate end-user charge.⁷ On review, the court again reversed and remanded the Commission's determination, holding that even this permissive rule violated section 254(e).⁸

3. The Commission may, for good cause, waive its rules on its own motion.⁹ We find that good cause exists in the present case. NECA carriers and other non-price cap LECs currently recover their universal service contributions through CCL charges imposed on IXC's, which the Fifth Circuit has held is unlawful. However, the Commission's rules appear to prevent non-price cap LECs from collecting their universal service contributions through end-user charges. Specifically, section 69.4(d)(2) permits only price-cap LECs to assess such end-user charges. While this section originally applied to all LECs, it appears to have been inadvertently limited to price cap LECs when the CALLS Order changed price cap LECs' pricing rules.¹⁰ Nevertheless, there is insufficient time for the Commission to amend its rules to correct this apparent error and to comply with the Fifth Circuit's decision before the Fifth Circuit issues its mandate and LECs make their annual interstate access tariff filings.¹¹ Accordingly, to facilitate carriers' compliance with the Fifth Circuit's decision, we waive section 69.4(d)(2)'s limitation to price-cap LECs and thereby allow both price cap and non-price cap LECs to recover universal service contributions through end-user charges. As with price cap LECs, non-price cap LECs shall not assess a universal service end-user charge on Lifeline customers.¹² Furthermore, non-price cap LECs assessing end-user charges must make corresponding reductions in their access charges to avoid any double recovery.¹³ We also find good cause to waive section 69.3(a)'s requirement that the annual interstate access tariff filing must be limited to rate level changes. We do so only to the extent that non-price cap LECs may add a new end-user charge to recover universal service contributions in their annual interstate access tariff filings this year. This will simplify the overall efforts required to comply with the Court's decision.

⁷ *Federal-State Joint Board On Universal Service, Access Charge Reform*, CC Docket Nos. 96-45 and 96-262, Sixteenth Order on Reconsideration in CC Docket No. 96-45, Eighth Report and Order in CC Docket No. 96-45, and Sixth Report and Order in CC Docket No. 96-262, 15 FCC Rcd. 1679 (1999).

⁸ *Comsat v. FCC*, slip op. at 7-9.

⁹ 47 C.F.R. § 1.3.

¹⁰ *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers*, CC Docket Nos. 96-262 and 94-1, Sixth Report and Order, *Low-Volume Long-Distance Users*, CC Docket No. 99-249, Report and Order, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Eleventh Report and Order, 15 FCC Rcd 12962 (*CALLS Order*), *pets. for review pending, Texas Office of Public Util. Counsel et al. v. FCC*, 5th Cir. Nos. 00-60434 (and consolidated cases) (2000). After the Fifth Circuit's initial remand decision, the Commission amended its rules to allow both price cap and non-price cap LECs to recover their universal service contributions through end-user charges. See note 7. Nothing in the text of the CALLS Order suggests an intention to depart from that decision. The current limitation to price cap LECs in section 69.4(d)(2) thus appears to be the result of a drafting error.

¹¹ The term "annual interstate access tariff filings" refers to the filings described in 47 C.F.R. § 69.3. Although non-price cap LECs are only required to make such filings every two years, *id.* § 69.3(a), non-price cap LECs that are not required to make such filings until next year may nevertheless choose to make filings this year in order to come into compliance with *Comsat v. FCC*.

¹² See 47 C.F.R. § 69.158.

¹³ See *id.* § 69.4(d)(2)(ii).

4. We decline, at present, to rule on NECA's request for a waiver of section 69.4(d)(1) to permit NECA carriers to recover universal service contributions through a separately stated access charge on IXCs. The petition raises a question of first impression regarding the Fifth Circuit's decision that we are not prepared to resolve at this time on the basis of a single petition for waiver, without time to solicit comment from affected parties. Therefore, we take a cautious approach that will allow the affected carriers to recover their universal service contributions only through the same type of end-user charges that are already paid by the vast majority of telephone consumers.¹⁴

5. ACCORDINGLY, IT IS ORDERED, pursuant to authority contained in sections 1.3, 0.91, and 0.291 of the Commission's rules, 47 C.F.R. §§ 1.3, 0.91, and 0.291, that sections 69.3(a) and 69.4(d)(2) ARE WAIVED TO THE EXTENT INDICATED HEREIN.

6. IT IS FURTHER ORDERED that non-price cap local exchange carriers electing to take advantage of the waivers granted herein shall cite the "DA" number of this Order as the authority for the filing.

FEDERAL COMMUNICATIONS COMMISSION

Dorothy T. Attwood
Chief, Common Carrier Bureau

¹⁴ See *id.* § 69.158.