

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

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| In the Matter of |) | |
| |) | |
| Federal-State Joint Board on |) | |
| Universal Service |) | CC Docket No. 96-45 |
| |) | |
| RFB Cellular, Inc. |) | |
| Petitions for Waiver of Sections 54.314(d) and |) | |
| 54.307(c) of the Commission's Rules and |) | |
| Regulations |) | |

ORDER

Adopted: December 3, 2002

Released: December 4, 2002

By the Deputy Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order, we grant a request from RFB Cellular, Inc. (RFB Cellular), a competitive eligible telecommunications carrier (ETC), for a waiver of the October 1, 2001 certification filing deadline set forth in section 54.314(d)(1) of the Commission's rules for high-cost universal service support in areas served by rural carriers. We also grant RFB Cellular's request for waiver of certain quarterly filing deadlines for line-count data set forth in section 54.307(c) of the Commission's rules. Granting RFB Cellular's waiver requests will allow it to receive high-cost universal service support as of November 20, 2001, the date the Michigan Public Service Commission (Michigan Commission) designated RFB Cellular as an ETC.

II. BACKGROUND

2. Section 254(e) of the Communications Act of 1934, as amended (the Act), provides that "only an eligible telecommunications carrier designated under section 214(e) shall be eligible to receive specific Federal universal service support."¹ Once a carrier is designated as an ETC, there are other requirements that must be satisfied before a carrier can begin receiving high-cost universal service support. Section 254(e) requires that support shall be used "only for the provision, maintenance, and upgrading of facilities and services for which support is intended."² To implement this statutory requirement, the Commission adopted an annual certification requirement. Section 54.314 of the Commission's rules provides that states desiring rural ETCs to receive universal service high-cost support shall file an annual certification with the Universal Service Administrative Company (USAC) and the Commission stating that all high-cost support received by such carriers within such state will be used "only for the provision, maintenance, and upgrading of facilities and services for which support is

¹ 47 U.S.C. § 254(e). Section 214(e) of the 1996 Act provides that state commissions shall designate carriers as ETCs. 47 U.S.C. § 214(e).

² 47 U.S.C. § 254(e).

intended.”³ In instances where carriers are not subject to the jurisdiction of a state, the Commission allows an ETC to certify directly to the Commission and USAC that federal high-cost support will be used in a manner consistent with section 254(e).⁴ Section 54.314 provides that the certification must be filed by October 1 of the preceeding calendar year to receive support beginning in the first quarter of a subsequent calendar year.⁵ If the October 1 deadline for first quarter support is missed, the certification must be filed by January 1 for support to begin in the second quarter, by April 1 for support to begin in the third quarter, and by July 1 for support to begin in the fourth quarter.⁶ The Commission established this schedule to allow USAC sufficient time to process section 254(e) certifications and calculate estimated high-cost demand amounts for submission to the Commission.⁷

3. In addition to complying with the certification requirement, an ETC must file certain data with USAC before support can begin to flow. A rural competitive ETC receives support to the extent it captures lines from an incumbent LEC or serves new subscriber lines in an incumbent LEC’s service area.⁸ Accordingly, a competitive ETC must file the number of working loops it serves in the incumbent rural carrier’s service area on a quarterly basis.⁹ Specifically, mandatory line-count data are due on July 31 of each year, and quarterly updates are due September 30, December 30, and March 30 of each year.¹⁰ USAC uses line-count data filed on September 30 to calculate support for first quarter, line-count data filed on December 30 to calculate support for second quarter, and line-count data submitted on March 30 to calculate support for third and fourth quarters.¹¹

³ 47 C.F.R. § 54.314. The certification requirement for non-rural ETCs is found in section 54.313 of the Commission’s rules.

⁴ See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Fourteenth Report and Order and Twenty-Second Order on Reconsideration, *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Docket No. 00-256, Report and Order, 16 FCC Rcd 11244, para. 189 (rel. May 23, 2001) (*Rural Task Force Order*); 47 C.F.R. § 54.314(b).

⁵ 47 C.F.R. § 54.314(d)(1).

⁶ See 47 C.F.R. § 54.314(d). When the Commission adopted this certification schedule for rural carriers in the *Rural Task Force Order* on May 23, 2001, the Commission did not require certifications to be filed for the last two quarters of 2001. Rural carriers were required to submit their initial certifications on October 1, 2001, for the first full year of implementation of the modified high-cost mechanism for rural carriers, *i.e.*, January 1, 2002 to December 31, 2002. See *Rural Task Force Order* 16 FCC Rcd 11319, para. 192. Section 54.313 sets out similar certification rules for non-rural carriers.

⁷ See *Rural Task Force Order*, 16 FCC Rcd at 11319, para. 191. Under the Commission’s rules, USAC submits to the Commission estimated demand for the universal service support mechanisms, including high-cost support, two months prior to the beginning of each quarter. See 47 C.F.R. § 54.709(a)(3). Therefore, for the first quarter, USAC submits estimated demand amounts to the FCC on or before November 1. In order to submit an accurate estimate by that date, USAC needs to know which carriers have been certified under the Commission’s rules no later than October 1. See *Rural Task Force Order*, 16 FCC Rcd at 11319, para. 191.

⁸ 47 C.F.R. § 54.307(a).

⁹ 47 C.F.R. § 54.307(c). Prior to the *Rural Task Force Order*, rural incumbents and their competitors were required to file line-count data annually and could provide quarterly updates to USAC on a voluntary basis. To prevent an overpayment of support, the Commission concluded in the *Rural Task Force Order* that, upon competitive entry in rural study areas, quarterly line-count updates would be mandatory. See *Rural Task Force Order*, 16 FCC Rcd at 11298, para. 133. Under the Commission’s forward-looking high-cost support mechanism for non-rural carriers, line count data must be filed each quarter. See 47 U.S.C. § 54.307(b).

¹⁰ *Id.*

¹¹ For non-rural carriers, line-count data filed on September 30 are used for first quarter support, line-count data filed on December 30 are used for second quarter support, line-count data filed on March 30 are used for third

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4. *RFB Cellular's Petitions for Waiver*. On November 20, 2001, the Michigan Commission designated RFB Cellular as an ETC.¹² On December 6, 2001, consistent with section 54.314(b) of the Commission's rules, RFB Cellular certified to the Commission that federal high-cost support would be used "only for the provision, maintenance and upgrading of facilities and services for which the support is intended, pursuant to section 254(e)" of the Act.¹³ On January 10, 2002, RFB Cellular filed a request for waiver of the October 1, 2001 filing deadline set forth in section 54.314(d)(1) requesting that the Commission accept RFB Cellular's annual certification for high-cost support so that it can receive support for the first quarter of 2002.¹⁴

5. In addition, on January 28, 2002, RFB Cellular filed a request for waiver of certain quarterly line-count filing deadlines in section 54.307 so that it can receive support as of November 20, 2001, the date it received ETC designation. Specifically, RFB Cellular requests a waiver of the September 30, 2001 quarterly line-count filing deadline for receiving support for first quarter 2002 and requests that the Commission direct USAC to accept data submitted on November 1, 2001 as timely filed. RFB Cellular also requests a waiver of the March 30, 2001 quarterly line-count filing deadline so that it can receive support for fourth quarter of 2001 and states that it will submit the data due on that date if its petition for waiver is granted.¹⁵

6. RFB Cellular contends that good cause exists for granting its requests for waiver of sections 54.314 and 54.307 of the Commission's rules because it did not receive its ETC designation until November 20, 2001. Specifically, RFB Cellular argues that granting its requests is consistent with the Commission's goal of competitive neutrality and will serve the public interest.

III. DISCUSSION

7. We find that good cause exists to waive sections 54.314(d)(1) and 54.307(c) of the Commission's rules in order to allow RFB Cellular to receive universal service support beginning on November 20, 2001, the date it received its ETC designation. Generally, the Commission's rules may be waived for good cause shown.¹⁶ As noted by the Court of Appeals for the D.C. Circuit, however, agency rules are presumed valid.¹⁷ The Commission may exercise its discretion to waive a rule where the

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quarter support, and line-count data filed on July 31 are used for fourth quarter support. *See Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Twentieth Reconsideration Order, FCC 00-126, para. 17, n. 25 (rel. April 7, 2000).

¹² *See In the Matter of the Application of RFB Cellular, Inc., for Designation as and Eligible Telecommunications Carrier Pursuant to Section 214(e)(6) of the Communications Act of 1934*, Opinion and Order, Case No. U-13145 (Nov. 20, 2001) (*Michigan Commission ETC Designation Order*).

¹³ *See Letter from James F. Ireland to Magalie R. Salas, Secretary, FCC* (dated Dec. 6, 2001). RFB self-certified to the Commission under section 54.314 of the Commission's rules because it is not regulated by the Michigan Commission. *See id.* at 3-4.

¹⁴ We note that, pursuant to the annual certification filing schedule, a carrier that files its certification by January 1 may begin receiving support in second quarter. RFB Cellular's December 6 filing of its certification permits it to begin receiving support in second quarter 2002 and therefore RFB Cellular only requires a waiver of the October 1 deadline to receive first quarter support.

¹⁵ RFB Cellular does not require a waiver of the July 1 certification filing deadline to receive fourth quarter support because the Commission did not require ETCs to file certifications for the last two quarters of 2001 in order to receive support for those quarters. *See supra* note 6.

¹⁶ 47 C.F.R. § 1.3.

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

particular facts make strict compliance inconsistent with the public interest.¹⁸ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.¹⁹ Waiver of the Commission's rules is therefore appropriate only if special circumstances warrant a deviation from the general rule, and such a deviation will serve the public interest.

8. *Waiver of Section 54.314(d)*. We find that good cause exists to waive the certification filing deadline contained in section 54.314 of the Commission's rules so that RFB Cellular can receive support for the first quarter of 2002.²⁰ RFB Cellular has demonstrated that special circumstances warrant a deviation from the filing deadline provided in section 54.314(d) of the Commission's rules. Because RFB Cellular did not receive its ETC designation until November 20, 2001, it could not have met, under any circumstances, the October 1, 2001 filing deadline for receiving support beginning in the first quarter of 2002. RFB Cellular, however, made the necessary certification on December 6, 2001, only weeks after having been designated as an ETC by the Michigan Commission. The certification filing schedule set out in the Commission's rules was adopted to ensure that USAC has sufficient time to process the certifications prior to its submission of estimated support requirements to the Commission. It would be onerous, however, to deny an ETC receipt of universal service support for an entire quarter, as a result of a particular ETC designation having occurred after the certification filing deadline. We therefore find that RFB Cellular has demonstrated special circumstances that justify a waiver of section 54.314. In this instance, these special circumstances outweigh any processing difficulties that USAC may face as a result of the late-filed certification.²¹

9. We also conclude that waiver of section 54.314 would be consistent with the public interest. Competitive neutrality is a fundamental principal of the Commission's universal service policies.²² Denying first quarter 2002 support to RFB Cellular, a competitive ETC, merely because the timing of its ETC designation precluded it from timely filing its October 1 certification would undermine the Commission's goals of competitive neutrality. Because the Commission has found that

¹⁸ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

¹⁹ *WAIT Radio*, 418 F.2d at 1159; *Northeast Cellular*, 897 F.2d at 1166.

²⁰ See, e.g., *Federal-State Joint Board on Universal Service, West Virginia Public Service Commission, Request for Waiver of State Certification Requirements for High-Cost Universal Service Support for Non-Rural Carriers*, Order, CC Docket No. 96-45, 16 FCC Rcd 5784 (2001) (granting a waiver of the October 1 state certification filing deadline).

²¹ To facilitate timely payments and to minimize the administrative burden associated with processing those payments, we direct USAC to distribute RFB Cellular's retroactive support on a phased-in basis. Specifically, we instruct USAC to pair retroactive payments with regular monthly support payments as follows until all retroactive support has been paid: RFB Cellular's January 2003 payment shall include its prorated November 2001 support and December 2001 support; RFB Cellular's February 2003 payment shall include its January 2002 support; RFB Cellular's March 2003 payment shall include its February 2002 support; and RFB Cellular's April 2003 payment shall include its March 2002 support.

²² See *Federal-State Joint Board on Universal Service*, CC Docket 96-45, Ninth Report and Order and Eighteenth Order on Reconsideration, 14 FCC Rcd 20432, 20479-78, paras. 89-90 (1999) (*Ninth Report and Order*), reversed in part and remanded in part, *Qwest Corp. v. FCC*, 258 F.3d 1191 (10th Cir. 2001). See also *Federal-State Joint Board on Universal Service; Promoting Deployment of Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas*, CC Docket No. 96-45, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 15 FCC Rcd 12208, 12264-65, para. 114 (2000) ("competitively neutral access to ... support is critical to ensuring all Americans, including those that live in high-cost areas, have access to affordable telecommunications.").

“competitively neutral access to support is critical to ensuring that all Americans have access to affordable telecommunications,” RFB Cellular should not be penalized as a result of the timing of its ETC designation.²³ We therefore conclude waiver of this rule is in the public interest.

10. *Waiver of Section 54.307(c)*. For similar reasons, we find that good cause warrants a waiver of the deadlines for filing line-count data established in section 54.307 of the Commission’s rules so that RFB Cellular can receive support for first quarter 2002 and fourth quarter 2001.²⁴ Absent a waiver of the March 30 deadline for support in fourth quarter 2001, and the September 30 deadline for support in first quarter 2002, RFB Cellular would not begin receiving support until second quarter 2002. As noted above, it would be inconsistent with the Commission’s goal of competitive neutrality and section 254(e) to delay RFB Cellular’s receipt of high-cost support merely because it received its ETC designation on November 20, 2001, after the March 30, 2001 and September 30, 2001 line-count filing deadlines. Accordingly, we find that a waiver of section 54.307(c) is warranted. We therefore grant RFB Cellular’s request for waiver of the filing deadlines in section 54.307 of the Commission’s rules. We direct USAC to accept RFB Cellular’s November 1, 2001 data submission as timely for purposes of receiving support for first quarter 2002.²⁵ Also, upon release of this Order, RFB Cellular shall submit to USAC the data that would have been due for the March 30, 2001 filing deadline so that it can receive support for the fourth quarter 2001, prorated to begin on November 20, 2001.

11. In sum, because RFB Cellular became eligible to receive high-cost support after the October 1, 2001 certification deadline, we find that good cause exists to warrant a waiver of section 54.314 of the Commission’s rules. Similarly, because RFB Cellular became eligible to receive high-cost support after the September 30 and March 30 line-count data quarterly filing deadlines, we also find that good cause exists to waive section 54.307 of the Commission rules and direct USAC to accept RFB Cellular’s line-count data as set forth above. These waivers will allow RFB Cellular to begin receiving support as of November 20, 2001, the date RFB Cellular received its ETC designation.

IV. ORDERING CLAUSES

12. Accordingly, IT IS 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, 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 54.314(d)(1) of the Commission's rules, filed by RFB Cellular, Inc. on January 10, 2002, IS GRANTED, as described herein.

²³ See *id.*

²⁴ See, e.g., *Federal-State Joint Board on Universal Service, Centennial Cellular Corporation’s Request for Waiver of Section 54.307(b) of the Commission’s Rules*, Order, CC Docket No. 96-45, DA 99-453 (rel. Mar. 4, 1999 Acc. Pol. Div.) (granting a waiver of the July 31 loop count data filing deadline).

²⁵ RFB Cellular submitted its first quarter line count data on November 1, 2001 in expectation that its ETC designation would occur on November 20, 2001.

13. 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, 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 54.307(c) of the Commission's rules, 47 C.F.R. § 54.307(c) filed by RFB Cellular, Inc. on January 28, 2002, IS GRANTED, as described herein.

FEDERAL COMMUNICATIONS COMMISSION

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Deputy Chief, Wireline Competition Bureau

