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

In the Matter of	)	
	)	
Federal-State Joint Board on Universal Service	)	
	)	
Blackduck Telephone Company	)	
	)	
and	)	CC Docket No. 96-45
	)	
Arvig Telephone Company	)	
	)	
Joint Petition for Waiver of the Definition of "Study Area" Contained in the Part 36, Appendix-Glossary of the Commission's Rules and Related Waiver of Section 54.305 of the Commission's Rules	)))	

ORDER

Adopted: December 5, 2002 **Released: December 6, 2002**

By the Acting Chief, Telecommunications Access Policy Division:

I. INTRODUCTION

1. In this Order, we grant a request from Blackduck Telephone Company (Blackduck) and Arvig Telephone Company (Arvig) for a waiver of the definition of "study area" contained in the Part 36 Appendix-Glossary of the Commission's rules.[1] This waiver will permit Arvig to remove from its Minnesota study area the Ash River exchange, which comprises approximately 116 access lines. This waiver also will permit Blackduck to include the Ash River exchange in its Minnesota study area. We deny Blackduck's request for waiver of section 54.305 of the Commission's rules for the reasons stated herein.

II. BACKGROUND

2. Study Area Boundaries. A study area is a geographic segment of an incumbent local exchange carrier's (LEC's) telephone operations. Generally, a study area corresponds to an incumbent LEC's entire service territory within a state. Thus, incumbent LECs operating in more than one state typically have one study area for each state. The Commission froze all study area boundaries effective November 15, 1984,[2] and an incumbent LEC must apply to the Commission for a waiver of the study area

[1] Blackduck Telephone Company and Arvig Telephone Company, Joint petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary of the Commission's Rules and Related Waiver of Section 54.305 Of the Commission's Rules (filed Feb. 6, 2001) (Petition).

[2] 47 C.F.R.§ 36 app. (defining "study area"). *See MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board,* CC Docket Nos. 78-72, 80-286, Recommended Decision and Order, 49 Fed. Reg. 48325 (1984); Decision and Order, 50 Fed. Reg. 939 (1985); *see also Amendment of*
(continued….)

boundary freeze if it wishes to sell or purchase additional exchanges.[3]

3. *Transfer of Universal Service Support*. Section 54.305 of the Commission's rules provides that a carrier acquiring exchanges from an unaffiliated carrier shall receive the same per-line levels of high-cost universal service support for which the acquired exchanges were eligible prior to their transfer.[4] For example, if a rural carrier purchases an exchange from a non-rural carrier that receives support based on the Commission's high-cost support mechanism for non-rural carriers,[5] the loops of the acquired exchange shall receive the same per-line support as calculated under the non-rural mechanism, regardless of the support the rural carrier purchasing the exchange may receive for any other exchanges.[6] Under the Commission's revised high-cost loop support mechanism for rural carriers, a rural carrier may be eligible to receive additional support for new investments in acquired exchanges under the Commission's "safety valve" mechanism.[7] Section 54.305 is meant to discourage carriers from

(Continued from previous page)
Part 36 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, Notice of Proposed Rulemaking, 5 FCC Rcd 5974 (1990).

[3] Pending Commission review of a study area waiver request and consistent with Part 36 of the Commission's rules, parties involved in the transfer of access lines are reminded to continue filing combined cost data for the subject study area with the National Exchange Carrier Association (NECA). *See* 47 C.F.R. §§ 36.601-36.631. Such cost data is used by NECA to determine carrier eligibility for high-cost universal service support.

[4] 47 C.F.R. § 54.305.

[5] The mechanism for non-rural carriers directs support to carriers based on the forward-looking economic cost of operating a given exchange. *See* 47 C.F.R. § 54.309. In the event that support provided to a non-rural carrier in a given state is less under the forward-looking methodology, the carrier may be eligible for interim hold-harmless support, which is equal to the amount of support for which the non-rural carrier would have been eligible under the Commission's existing high-cost support mechanism, subject to phase-down. *See* 47 C.F.R. § 54.311. Beginning January 1, 2001, the Commission began phasing down interim hold-harmless support, excluding LTS, through annual $1.00 reductions in average monthly, per-line support until there is no more interim hold-harmless support available. *See Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Thirteenth Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 24422 (2000).

[6] Rural carriers receive high-cost loop support based on the extent to which their reported average cost per loop exceeds 115 percent of the nationwide average cost per loop. *See* 47 C.F.R. §§ 36.601-36.631. The Commission increased the total amount of high-cost loop support available to rural carriers based on uncapped support amounts for the calendar year 2000, plus a rural growth factor equal to the sum of annual changes in the total number of working loops for rural carriers and the Gross Domestic Product-Chained Price Index (GDP-CPI). *See Federal-State Joint Board on Universal Service,* and *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking in CC Docket No. 96-45, and Report and Order in CC Docket No. 00-256, 16 FCC Rcd 11244 (2001) (*RTF Order*), as corrected by Errata, CC Docket Nos. 96-45, 00-256 (Acc. Pol. Div. rel. Jun. 1, 2001).

[7] *See* 47 C.F.R. § 54.305(b)-(f); *see also RTF Order*, 16 FCC Rcd at 11276-11284. The "safety valve" mechanism enables rural carriers acquiring access lines to receive additional support over a period of five years reflecting post-transaction investments made to enhance the infrastructure of and improve the service in these exchanges. Safety valve support provides up to 50 percent of any positive difference between a rural carrier's index year high-cost loop support expense adjustment for the acquired exchanges and subsequent year expense adjustments. The total safety valve support available to all eligible study areas is limited to no more than five percent of rural incumbent local exchange carrier support available from the annual high-cost loop fund.

transferring exchanges merely to increase their share of high-cost universal service support, especially during the Commission's transition to universal service support mechanisms that provide support to carriers based on the forward-looking economic cost of operating a given exchange.[8] High-cost support mechanisms currently include non-rural carrier forward-looking high-cost support,[9] interim hold-harmless support for non-rural carriers,[10] rural carrier high-cost loop support,[11] local switching support,[12] and Long Term Support (LTS).[13] To the extent that a carrier acquires exchanges receiving any of these forms of support, the acquiring carrier will receive the same per-line levels of support for which the acquired exchanges were eligible prior to their transfer, except as provided for under the Commission's "safety valve" mechanism. Section 54.305 of the Commission's rules does not apply to the transfer of interstate access universal service support for price cap local exchange carriers[14] or interstate common line support (ICLS) for rate-of-return local exchange carriers.[15]

4. <u>*The Petition for Waiver*</u>. On February 6, 2001, Blackduck, an incumbent LEC currently serving approximately 1,604 access lines in Minnesota, and Arvig, an incumbent LEC currently serving approximately 12,300 access lines in Minnesota, filed a joint petition for waiver of the definition of "study area" contained in the Part 36 Appendix-Glossary of the Commission's rules. The requested waiver would permit Arvig to remove the Ash River exchange from its Minnesota study area, and permit Blackduck to include the Ash River exchange in its existing Minnesota study area. Blackduck also seeks a waiver of section 54.305 of the Commission's rules to receive high-cost support based on the average cost of all access lines under its ownership, rather than the per-line level of support for which the acquired lines were eligible prior to their transfer. If granted the requested waiver, Blackduck estimates that it would receive, on average, an additional $61,689 annually in high-cost support.[16] Absent the waiver,

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[8] *See Federal-State Joint Board on Universal Service,* CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 8942-43 (1997) (*First Report and Order)*, as corrected by *Federal-State Joint Board on Universal Service,* Errata, CC Docket No. 96-45, FCC 97-157 (rel. June 4, 1997), *affirmed in part, reversed in part and remanded in part sub nom. Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999).

[9] *See* 47 C.F.R. § 54.309.

[10] *See* 47 C.F.R. § 54.311.

[11] *See* 47 C.F.R. §§ 36.601-36.631.

[12] Incumbent LECs that are designated eligible telecommunications carriers and serve study areas with 50,000 or fewer access lines receive support for local switching costs. 47 C.F.R. § 54.301. Local switching support enables participants to assign a greater proportion of local switching costs to the interstate jurisdiction.

[13] Carriers that participate in the NECA common line pool are eligible to receive LTS. *See* 47 C.F.R. § 54.303. LTS supports interstate access rates for carriers that are members of the NECA pool, by reducing the amount of interstate-allocated loop costs that such carriers must recover through carrier common line charges. *See First Report and Order*, 12 FCC Rcd at 9163-9165.

[14] *See* 47 C.F.R. §§ 54.801-809. Sections 54.801-54.802 of the Commission's rules describes how interstate access support will be calculated for exchanges acquired by price cap LECs. 47 C.F.R. § 54.801.

[15] *See* 47 C.F.R. §§ 54.901-904. Section 54.902 of the Commission's rules describes how interstate common line support will be calculated for exchanges acquired by rate-of-return LECs. *See* 47 C.F.R. § 54.902.

[16] Petition at 3.

Blackduck estimates it would receive the approximately $26,465 in support for which the acquired access lines currently are eligible.[17] On March 8, 2001, the Common Carrier Bureau (Bureau) released a public notice seeking comment on the petition.[18] The United States Telephone Association (USTA) filed comments in support of the petition.[19]

III. DISCUSSION

A. Study Area Waiver

5. We find that good cause exists to waive the definition of study area contained in the Part 36 Appendix-Glossary of the Commission's rules to permit Arvig to remove the Ash River exchange from its Minnesota study area, and permit Blackduck to include the Ash River exchange in its Minnesota study area.

6. Generally, the Commission's rules may be waived for good cause shown.[20] As noted by the Court of Appeals for the D.C. Circuit, however, agency rules are presumed valid.[21] The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.[22] In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.[23] 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. In evaluating petitions seeking a waiver of the rule freezing study area boundaries, the Commission traditionally has applied a three-prong standard: (1) the change in study area boundaries must not adversely affect the universal service fund; (2) no state commission having regulatory authority over the transferred exchanges may oppose the transfer; and (3) the transfer must be in the public interest.[24] For the reasons discussed below, we conclude that petitioners have satisfied these criteria and have demonstrated that good cause exists for waiver of the Commission's study area freeze rule.

7. First, we conclude that Arvig and Blackduck have demonstrated that the proposed change in the study area boundaries will not adversely affect any of the universal service support mechanisms. A

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[17] *Id*.

[18] *Blackduck Telephone Company and Arvig Telephone Company Seek a Waiver of Section 54.305 and the Definition of "Study Area" in Part 36 of the Commission's Rules*, Public Notice, 16 FCC Rcd 5361 (Com. Car. Bur. 2001). The Common Carrier Bureau was subsequently renamed the Wireline Competition Bureau.

[19] *See* USTA Comments at 2.

[20] 47 C.F.R. § 1.3.

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

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

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

[24] *See, e.g., U S WEST Communications, Inc., and Eagle Telecommunications, Inc., Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary of the Commission's Rules,* 94-27, Memorandum Opinion and Order, 10 FCC Rcd 1871, 1872 (1995) (*Eagle*).

study area waiver will not be granted if it results in an annual aggregate shift in high-cost support in an amount equal to or greater than one percent of the total high-cost support, unless the parties demonstrate an extraordinary public interest benefit.[25] For the reasons discussed below, we do not believe that the proposed study area waiver will result in such a shift.

8. Under section 54.305 of the Commission's rules, rural carriers purchasing exchanges initially may only receive the same level of per-line universal service support that the selling company was receiving for those exchanges prior to the transfer.[26] Accordingly, Blackduck initially will receive the same per-line levels of support, including high-cost loop support, local switching support, and LTS, for which the Ash River exchange was eligible prior to its transfer. Although Blackduck, a rural LEC, may become eligible for additional high-cost loop support for new investments in the acquired exchanges under the Commission's safety valve mechanism, we believe that this amount would be well below one percent of the total high-cost loop support fund.[27] In reaching this conclusion, we note that the proposed study area waiver only involves the transfer of approximately 116 access lines. Moreover, as discussed above, an individual rural carrier's safety valve support is capped at 50 percent of any positive difference between the amount of high-cost loop support that the rural carrier would qualify for in the index year for the acquired access lines and amounts of support that the carrier would qualify for in subsequent years.[28] Because the total amount of safety valve support available to rural carriers is capped at 5 percent of annual high-cost loop support available to rural carriers, actual amounts of safety valve support available to individual rural carriers may be further reduced.[29]

9. Likewise, we find that providing ICLS support to Blackduck will not result in more than a one-percent change in the total amount of high-cost support.[30] Blackduck estimates that it may be eligible to receive annual ICLS in the amount of $8,500 per year, approximately the same amount that Arvig currently is eligible for in the Ash River exchange.[31] The total amount of funding for the high-cost

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[25] Because of the operation of the indexed cap, any study area reconfiguration that increases the high-cost loop support of one recipient often reduces that of other recipients. In evaluating whether a study area change would have an adverse impact on the distribution or level of the high-cost loop support fund, the Commission determined that a "one-percent" guideline should be applied to study area waivers filed after January 5, 1995. *See Eagle,* 10 FCC Rcd at 1774; *see also Dickey Rural Telephone Cooperative et al., Joint Petition for Waiver of the Definition of "Study Area" Contained in the Part 36, Appendix-Glossary of the Commission's Rules, Petition for Waiver of Sections 61.41(c) and (d), 69.3(e)(11) and 69.605(c)*, CC Docket No. 96-45, Order, 16 FCC Rcd 16881 (Wir. Comp. Bur. 2002).

[26] Below, we deny a request for waiver of section 54.305. *See infra* discussion at para. 13. The term "rural carrier" refers to an incumbent local exchange carrier that meets the definition of "rural telephone company" in section 3(37) of the Communications Act of 1934, as amended. *See* 47 U.S.C. § 153(37).

[27] *See* 47 U.S.C. § 153(37). Because Blackduck provides telephone exchange service to a local exchange study area with fewer than 100,000 access lines, it satisfies the definition of "rural telephone company" in the Act.

[28] *See* 47 C.F.R. § 54.305(d).

[29] *See* 47 C.F.R. § 54.305(e).

[30] *See* 47 C.F.R. § 54.902.

[31] Letter from Rebecca Duke, counsel for Arvig Telephone Company and Blackduck Telephone Company, to Sharon Webber, Federal Communications Commission, filed Nov. 5, 2002.

mechanisms in 2003 is projected to be approximately $3.3 billion.[32] We therefore conclude that the combined total amount of ICLS support, in addition to any amounts Blackduck may be eligible to receive in safety valve support, will not have an adverse impact on the universal service mechanisms.[33]

10. Second, no state commission with regulatory authority over the transferred exchanges opposes the transfer. The Minnesota Public Utilities Commission has indicated that it does not object to grant of the study area waiver.[34]

11. Finally, we conclude that the public interest is served by a waiver of the study area freeze rule to permit Arvig to remove the Ash River exchange from its study area and to permit Blackduck to include the acquired exchange in its Minnesota study area. In its petition, Blackduck states its intent to make significant improvements to the Ash River exchange, including switch upgrades, upgrades of microwave connections, building refurbishment or replacement, and line expansions.[35] Blackduck asserts that these upgrades will improve service to customers and add to the array of switching services to which customers are able to subscribe.[36] Based on these representations, we conclude that Blackduck has demonstrated that grant of this waiver request serves the public interest.

12. On May 11, 2001, the Commission adopted a Report and Order requiring incumbent LECs to freeze, on an interim basis, the Part 36 jurisdictional rules beginning July 1, 2001.[37] In the *Separations Freeze Order*, the Commission addressed how an incumbent LEC acquiring exchanges from another incumbent LEC shall recalculate their frozen separations factors.[38] Accordingly, Blackduck is required to recalculate its jurisdictional separations factors pursuant to the *Separations Freeze Order* and Commission rules.

B. Waiver of Section 54.305

13. We are not persuaded that good cause exists for us to grant Blackduck's request for waiver of section 54.305 of the Commission's rules. At the time Blackduck filed its petition, section 54.305 provided that a carrier acquiring exchanges from an unaffiliated carrier would indefinitely be limited to the same per-line levels of high-cost universal service support for which the acquired

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[32] *See* Universal Service Administrative Company, Federal Universal Service Support Mechanisms Fund Size Projections for the First Quarter of 2003, at 9-19, filed Nov. 1, 2002, available at http://www.universalservice.org/overview/filings/2003q1/1Q2003%20FCC%20110102.doc.

[33] *See* 47 C.F.R. § 54.305.

[34] *See* Petition at Attachment 3.

[35] Investments by Blackduck to accomplish these upgrades are estimated to be: switch upgrade, $100,000; microwave upgrade, $50,000; building refurbishment, $20,000; and line expansion, $15,000.

[36] *See* Petition at 6.

[37] *See generally, Jurisdictional Separations and Referral to the Federal-State Joint Board*, Report and Order, CC Docket No. 80-286, FCC 01-162 (rel. May 22, 2001)(*Separations Freeze Order*). *See also* 47 C.F.R. § 36.3(c) and (d).

[38] *See Separations Freeze Order* at paras. 48-53.

exchanges were eligible prior to their transfer.[39] Shortly after Blackduck filed its petition, the Commission amended section 54.305 to enable rural carriers to receive additional high-cost loop support for new investments in acquired exchanges.[40] Section 54.305 was modified to address concerns that the limits on high-cost support for acquired exchanges in section 54.305 may discourage rural carriers from acquiring high-cost exchanges from carriers with low average costs and may prevent rural carriers from receiving support for new investments in recently-acquired high-cost exchanges.[41] These are the very concerns raised by Blackduck in its waiver petition.[42] The Commission concluded that safety valve support would provide appropriate incentives for rural carriers, such as Blackduck, that will be operating recently-acquired exchanges, to invest in rural infrastructure.[43] If, as predicted, Blackduck makes significant new investments in the acquired access lines, it may become eligible for additional safety valve support.[44] We therefore reject Blackduck's claims that operation of section 54.305 of the Commission's rules will limit it to $26,465 in high-cost loop support annually, the amount of support for which the acquired access lines currently are eligible, and will prevent it from making needed upgrades to the acquired access lines.[45]

IV. ORDERING CLAUSES

14. 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 Part 36, Appendix-Glossary, of the Commission's rules, filed by Blackduck Telephone Company and Arvig Telephone Company on February 6, 2001, IS GRANTED, as described herein.

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[39] 47 C.F.R. § 54.305.

[40] Blackduck filed its petition on February 6, 2002, and the Commission released a Report and Order amending section 54.305 its rules on May 23, 2001. *See RTF Order,* 16 FCC Rcd at 11284.

[41] *See id.*; *see also In the Matter of Mescalero Apache Telecom, Inc., Waiver of Section 54.305 of the Commission's Rules,* CC Docket No. 96-45, Order, 16 FCC Rcd 1312 (2001) (granting a request for waiver of section 54.305 of the Commission's rules prior to the establishment of the safety valve mechanism to enable a new-formed tribally-owned carrier serving a geographically remote area with low levels of subscribership and antiquated infrastructure to receive high-cost loop support in an acquired exchange based on its own costs).

[42] *See* Petition at 6-11.

[43] *See RTF Order,* 16 FCC Rcd at 11276-77.

[44] *See supra* discussion at para. 11.

[45] *See* Petition at 7.

15. 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 54.305, filed by Blackduck Telephone Company on February 6, 2001, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Mark G. Seifert
Acting Chief, Telecommunications Access Policy Division