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

In the Matter of	)	
Federal-State Joint Board on	)	CC De dest No. 00 45
Universal Service	)	CC Docket No. 96-45
Guam Cellular and Paging, Inc.	j j	
Petition for Waiver of Section 54.314 of the	)	
Commission's Rules and Regulations	)	
	)	

**ORDER** 

Adopted: April 16, 2003 Released: April 17, 2003

By the Chief, Telecommunications Access Policy Division:

#### I. INTRODUCTION

1. In this Order, we grant a request from Guam Cellular and Paging, Inc. (Guamcell), a competitive eligible telecommunications carrier (ETC), for 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. Granting Guamcell's waiver request will allow it to receive universal service support beginning on February 1, 2002, the date Guamcell filed its high-cost certification under section 54.314(d) with the Commission.

# 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." 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." 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

<sup>&</sup>lt;sup>1</sup> 47 U.S.C. § 254(e). Section 214(e) of the 1996 Act provides that state commissions, or this Commission when states lack jurisdiction, shall designate carriers as ETCs. 47 U.S.C. § 214(e).

<sup>&</sup>lt;sup>2</sup> 47 U.S.C. § 254(e).

intended."<sup>3</sup> 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).<sup>4</sup> Section 54.314 provides that the certification must be filed by October 1 of the preceding calendar year to receive support beginning in the first quarter of a subsequent calendar year.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup>

- 3. <u>Guamcell's Petition for Waiver</u>. On July 26, 2001, Guamcell submitted an application with the Commission requesting designation as an ETC to receive high-cost support for operation in the Territory of Guam.<sup>8</sup> On January 25, 2002, the Wireline Competition Bureau<sup>9</sup> (Bureau) of the Commission designated Guamcell as an ETC.<sup>10</sup> On February 1, 2002, consistent with section 54.314(b) of the Commission's rules, Guamcell 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.<sup>11</sup> On February 6, 2002, Guamcell filed a request for waiver of section 54.314 requesting the Commission accept Guamcell's annual certification for high-cost support so that it can receive support beginning on February 1, 2002, the date Guamcell filed its high-cost certification under section 54.314(d).
- 4. Guamcell contends that good cause exists for granting its waiver of section 54.314 of the Commission's rules because it did not receive its ETC designation until January 25, 2002. Specifically, Guamcell argues that granting its request is consistent with the Commission's goal of competitive neutrality and will serve the public interest.<sup>12</sup>

<sup>&</sup>lt;sup>3</sup> 47 C.F.R. § 54.314. The certification requirement for non-rural ETCs is found in section 54.313 of the Commission's rules.

<sup>&</sup>lt;sup>4</sup> 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).

<sup>&</sup>lt;sup>5</sup> 47 C.F.R. § 54.314(d)(1).

<sup>&</sup>lt;sup>6</sup> See 47 C.F.R. § 54.314(d).

<sup>&</sup>lt;sup>7</sup> 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 generally 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.

<sup>&</sup>lt;sup>8</sup> See Guam Cellular and Paging, Inc., Petition for Waiver, filed Feb. 6, 2002, at 1 (Guamcell Petition).

<sup>&</sup>lt;sup>9</sup> Formerly the Common Carrier Bureau.

<sup>&</sup>lt;sup>10</sup> See Guam Cellular and Paging, Inc. d/b/a Guamcell Communications Petition for Designation as and Eligible Telecommunications Carrier in the Territory of Guam, Memorandum Opinion and Order, DA 02-174, CC Docket 96-45 (Com. Car. Bur. rel. Jan. 25, 2002) (Guamcell ETC Designation Order).

<sup>&</sup>lt;sup>11</sup> See Letter from Phillip N. Lyons, Chairman and CEO, Guamcell, to Magalie R. Salas, Secretary, FCC (Jan. 31, 2002).

<sup>&</sup>lt;sup>12</sup> See Guamcell Petition at 6-7.

5. Generally, the Commission's rules may be waived for good cause shown. <sup>13</sup> As noted by the Court of Appeals for the D.C. Circuit, however, agency rules are presumed valid. <sup>14</sup> The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest. <sup>15</sup> In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. <sup>16</sup> 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.

## III. DISCUSSION

6. We find that good cause exists to waive the certification deadlines contained in section 54.314 of the Commission's rules so that Guamcell can receive support beginning in the first quarter of 2002. 17 Guamcell has demonstrated that special circumstances warrant a deviation from the filing deadlines provided in section 54.314(d) of the Commission's rules. Because Guamcell did not receive its ETC designation until January 25, 2002, it could not have met, under any circumstances, the October 1, 2001 filing deadline for receiving support beginning in the first quarter of 2002, or the January 1, 2002 deadline for receiving support in the second quarter of 2002. 18 Guamcell, however, made the necessary certification on February 1, 2002, a week after having been designated as an ETC by the Commission. 19 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 almost two quarters as a result of a particular ETC designation having occurred after the certification filing deadline. We therefore find that Guamcell 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. 20

<sup>&</sup>lt;sup>13</sup> 47 C.F.R. § 1.3.

<sup>&</sup>lt;sup>14</sup> WAIT Radio v. FCC, 418 F.2d 1153, 1159 (D.C. Cir. 1969), cert. denied, 409 U.S. 1027 (1972).

<sup>&</sup>lt;sup>15</sup> Northeast Cellular Telephone Co. v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

<sup>&</sup>lt;sup>16</sup> WAIT Radio, 418 F.2d at 1159; Northeast Cellular, 897 F.2d at 1166.

<sup>&</sup>lt;sup>17</sup> 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 certification filing deadline); Federal-State Joint Board on Universal Service, RFB Cellular, Inc., Petitions for Waiver of Sections 54.314(d) and 54.307(c) of the Commission's Rules and Regulations, Order, CC Docket No. 96-45, 17 FCC Rcd 24387 (Wireline Compet. Bur. 2002) (granting a waiver of the October 1 certification filing deadline) (RFB Cellular Waiver Order).

<sup>&</sup>lt;sup>18</sup> Because we grant Guamcell a waiver of the October 1 deadline which will allow Guamcell to receive support beginning in first quarter 2002, it is unnecessary to also grant Guamcell a waiver of the January 1, 2002 filing deadline. *See* Guamcell Petition at 3; 47 C.F.R. 54.314(d)(2).

<sup>&</sup>lt;sup>19</sup> See Guamcell Petition at 3.

<sup>&</sup>lt;sup>20</sup> To facilitate timely payments and to minimize the administrative burden associated with processing those payments, we direct USAC to distribute Guamcell's retroactive support payments on a phased-in basis. Specifically, we instruct USAC to pair retroactive support payments with regular monthly support payments as follows until all retroactive support has been paid: Guamcell's April 2003 support payment (disbursed in May 2003) shall include its February 2002 support payment; Guamcell's May 2003 support payment (disbursed in June 2003) shall include its March 2002 support payment; Guamcell's June 2003 support payment (disbursed in July 2003) shall include its April 2002 support payment; Guamcell's July 2003 support payment (disbursed in August (continued....)

- 7. 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. Denying first quarter and second quarter 2002 support to Guamcell, a competitive ETC, merely because the timing of its ETC designation precluded it from timely filing its October 1 certifications would undermine the Commission's goals of competitive neutrality. Because the Commission has found that "competitively neutral access to support is critical to ensuring that all Americans have access to affordable telecommunications," Guamcell should not be penalized as a result of the timing of its ETC designation. We therefore conclude waiver of this rule is in the public interest.
- 8. In conclusion, because Guamcell became eligible to receive high-cost support after the October 1, 2001 certification filing deadlines, we find that good cause exists to warrant a waiver of section 54.314(d) of the Commission's rules. As Guamcell requested, this waiver shall allow Guamcell to begin receiving high-cost support as of February 1, 2002, the date it filed its high-cost certification under section 54.314 of the Commission's rules.

## IV. ORDERING CLAUSE

9. 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) of the Commission's rules, filed by Guam Cellular and Paging, Inc. on February 6, 2002, IS GRANTED, as described herein.

FEDERAL COMMUNICATIONS COMMISSION

Eric N. Einhorn Chief, Telecommunications Access Policy Division Wireline Competition Bureau

2003) shall include its May 2002 support payment; and Guamcell's August 2003 support payment (disbursed in September 2003) shall include its June 2002 support payment.

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<sup>(...</sup>continued from previous page)

<sup>&</sup>lt;sup>21</sup> 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.").

<sup>&</sup>lt;sup>22</sup> See id.