

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

In the Matter of
Federal-State Joint Board on
Universal Service
Western Wireless Corporation
Petition for Waiver of Section 54.314 of the
Commission's Rules and Regulations
CC Docket No. 96-45

ORDER

Adopted: July 17, 2003

Released: July 18, 2003

By the Chief, Telecommunications Access Policy Division, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order, we grant a request from Western Wireless Corporation (Western Wireless), a competitive eligible telecommunications carrier (ETC), for waiver of the October 1, 2002 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 Western Wireless's waiver request will allow it to receive universal service support beginning January 6, 2003, the date the South Dakota Public Utility Commission (South Dakota Commission) designated Western Wireless 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." 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 intended." 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

1 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).

2 47 U.S.C. § 254(e).

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. 47 C.F.R. § 54.313.

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> 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>6</sup>

3. *Western Wireless's Petition for Waiver.* On August 25, 1998, Western Wireless submitted an application with the South Dakota Commission requesting designation as an ETC to receive high-cost support for its operation in a portion of South Dakota outside the Pine Ridge Reservation.<sup>7</sup> On January 6, 2003, the South Dakota Commission designated Western Wireless as an ETC in the rural areas that it serves in South Dakota outside the Pine Ridge Reservation.<sup>8</sup> On March 10, 2003, the South Dakota Commission filed a certification with the Commission and USAC stating that Western Wireless would use high-cost support "only for the provision, maintenance, and upgrading of facilities and services for which support is intended."<sup>9</sup> On March 13, 2003, Western Wireless filed a request for waiver of the October 1, 2002 certification filing deadline so that it can receive support in the first and second quarter of 2003.<sup>10</sup> The Wireline Competition Bureau sought comment on Western Wireless's petition in a public notice released on April 2, 2003.<sup>11</sup>

4. Western Wireless 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 6, 2003. Western Wireless states that it received its ETC designation only after a protracted ETC proceeding, which began with an initial denial by the South Dakota Commission and subsequently was the subject of a lawsuit before the South Dakota appellate court. Western Wireless argues that granting its request is

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<sup>4</sup> See 47 C.F.R. § 54.314(b).

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

<sup>6</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, 11319, para. 191 (2001) (*Rural Task Force Order*). 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>7</sup> See Western Wireless Corporation, Petition for Waiver, filed Mar. 13, 2003, at 2 (Western Wireless Petition).

<sup>8</sup> See Western Wireless Petition at 5 (citing *Filing by GCC License Corp. for Designation as an Eligible Telecommunications Carrier*, TC98-146, Order Designating Western Wireless as an ETC for Areas Served by Certain Rural Telephone Companies (SD PUC Jan. 6, 2003)).

<sup>9</sup> See *In the Matter of the Request of Western Wireless Corporation for Certification Regarding its Use of Federal Universal Service Support*, Order Granting Certification, TC 03-045 (S.D. PUC Mar. 7, 2003) (South Dakota Certification); 47 C.F.R. § 54.314.

<sup>10</sup> See Western Wireless Petition at 1.

<sup>11</sup> See *Wireline Competition Bureau Seeks Comment on Western Wireless Corporation's Petition for Waiver of Section 54.314(d) of the Commission's Rules*, CC Docket No. 96-45, Public Notice, DA 03-1064 (rel. Apr. 2, 2003).

consistent with the Commission's goal of competitive neutrality and will serve the public interest.<sup>12</sup>

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. Consistent with Commission precedent, we find that good cause exists to waive the certification filing deadline contained in section 54.314 of the Commission's rules so that Western Wireless can receive support beginning January 6, 2003.<sup>17</sup> Although section 54.314 requires states to certify that a competitive ETC will use universal service support for its intended purposes, we believe in this case it is appropriate to consider this waiver request filed by Western Wireless, particularly in light of the support of the South Dakota Commission, the state entity with the obligation to make the appropriate section 54.314 certification.<sup>18</sup>

7. Western Wireless has demonstrated that special circumstances warrant a deviation from the filing deadlines provided in section 54.314(d) of the Commission's rules. Because Western Wireless

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<sup>12</sup> See Western Wireless Petition at 7-8.

<sup>13</sup> 47 C.F.R. § 1.3.

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

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

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

<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*); *Federal-State Joint Board on Universal Service, Guam Cellular and Paging, Inc., Petition for Waiver of Section 54.314 of the Commission's Rules and Regulations*, Order, CC Docket No. 96-45, DA 03-1169 (Wireline Compet. Bur. 2002) (granting a waiver of the October 1 certification filing deadline) (*Guamcell Waiver Order*).

<sup>18</sup> See South Dakota Commission Comments at 15. See also E-mail from Bob Sahr, Chairman, South Dakota Public Utilities Commission, to William Maher, Chief, Wireline Competition Bureau, Federal Communications Commission and Eric Einhorn, Chief, Telecommunications Access Policy Division, Wireline Competition Bureau, Federal Communications Commission, dated July 9, 2003 and submitted into the record on July 16, 2003. Although we grant this waiver, we note that Western Wireless's reliance on *Michael I. Sovern* for purposes of asserting standing to bring the waiver request is inapposite. In that case, Mr. Sovern served on the Board of Directors of both a broadcast television station and cable television system with overlapping service areas which brought into play the Commission's then existing section 76.501(a) broadcast/cable television station cross-ownership rule. See *Michael I. Sovern, Petition for Special Relief Requesting Waiver of 47 C.F.R. § 76.501(a)*, Memorandum Opinion and Order, DA 00-2471, 2000 WL 1639002 (Cable Serv. Bur., rel. Nov. 2, 2000). Although the rule applied to the cable television system, Mr. Sovern brought the waiver request. However, section 76.7(a)(1) of the Commission's rules specifically allows "[o]n petition by *any interested party*, [or other specifically enumerated entities] . . . the Commission may waive any provision of this part 76 . . ." 47 C.F.R. § 76.7(a)(1) (emphasis added).

did not receive its ETC designation until January 6, 2003, the South Dakota Commission could not have met, under any circumstances, the October 1, 2002 filing deadline for receiving support beginning in the first quarter of 2003, or the January 1, 2003 deadline for receiving support in the second quarter of 2003.<sup>19</sup> The South Dakota Commission, however, filed the necessary certification with the Commission on March 10, 2003.<sup>20</sup> 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 Western Wireless 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.<sup>21</sup>

8. 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.<sup>22</sup> Denying first quarter and second quarter 2003 support to Western Wireless, 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 "competitively neutral access to support is critical to ensuring that all Americans have access to affordable telecommunications," Western Wireless should not be penalized as a result of the timing of its ETC designation.<sup>23</sup> We therefore conclude waiver of this rule is in the public interest.

9. We disagree with those commenters who contend that the Bureau should deny Western Wireless's petition because Western Wireless caused the delay in its ETC designation and misrepresents

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<sup>19</sup> Because we grant Western Wireless a waiver of the October 1 deadline which will allow it to receive support beginning in first quarter 2003, it is not necessary to also grant Western Wireless a waiver of the January 1, 2003 filing deadline. *See* 47 C.F.R. § 54.314(d)(2).

<sup>20</sup> *See* Letter from Robert K. Sahr, Chairman, Gary Hanson, Commissioner, and James A. Burg, Commissioner, South Dakota Public Utilities Commission, to Marlene H. Dortch, Secretary, FCC (Mar. 10, 2003).

<sup>21</sup> To facilitate timely payments and to minimize the administrative burden associated with processing those payments, we direct USAC to distribute Western Wireless'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: Western Wireless's July 2003 support payment (disbursed in August 2003) shall include its January 2003 support payment; Western Wireless's August 2003 support payment (disbursed in September 2003) shall include its February 2003 support payment; Western Wireless's September 2003 support payment (disbursed in October 2003) shall include its March 2003 support payment; Western Wireless's October 2003 support payment (disbursed in November 2003) shall include its April 2003 support payment; Western Wireless's November 2003 support payment (disbursed in December 2003) shall include its May 2003 support payment; and Western Wireless's December 2003 support payment (disbursed in January 2004) shall include its June 2003 support payment.

<sup>22</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>23</sup> *See id.* *See also* Dobson Communications Comments at 3-4.

certain facts concerning its ETC designation.<sup>24</sup> We do not believe that any issues surrounding the ETC proceeding conducted by the South Dakota Commission are relevant to our consideration of the instant waiver request. In reaching our decision here, we considered the date of the ETC designation relative to the filing deadline set forth in the Commission's rules and whether a grant would serve the public interest. As discussed above, we conclude that good cause exists for a waiver in this instance because Western Wireless's ETC designation occurred after the October 1 certification filing deadline.<sup>25</sup> The Division takes no position with regard to Western Wireless's statements concerning the delays associated with the ETC proceeding before the South Dakota Commission.<sup>26</sup>

10. In sum, because Western Wireless became eligible to receive high-cost support after the October 1, 2001 certification filing deadline, we find that good cause exists to warrant a waiver of section 54.314(d) of the Commission's rules. This waiver will allow Western Wireless to begin receiving high-cost support as of January 6, 2003, the date Western Wireless received its ETC designation.

#### IV. ORDERING CLAUSE

11. 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 Western Wireless Corporation on March 13, 2003, IS GRANTED, as described herein.

FEDERAL COMMUNICATIONS COMMISSION

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

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<sup>24</sup> See South Dakota Telecommunications Association Comments at 7; Fred Williamson & Associates Comments at 2. The Rural Iowa Independent Telephone Association contends that Western Wireless's petition for waiver should be denied because Western Wireless attempted to "self-certify" compliance with the conditions placed on it by the South Dakota Commission for ETC designation and therefore, violated the authority of the South Dakota Commission over Western Wireless's ETC designation. Rural Iowa Independent Telephone Association Comments at 2-3. We find that such issues are beyond the scope of this proceeding.

<sup>25</sup> See *supra* paras 6-8.

<sup>26</sup> Although the South Dakota Commission does not oppose Western Wireless's petition for waiver, it does object to the factual record submitted by Western Wireless concerning its ETC designation. See South Dakota Public Utility Commission Comments at 2.