

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

In the Matter of
Federal-State Joint Board on
Universal Service
FiberNet, LLC
Petition for Waiver of
54.307(c) of the Commission's Rules and
Regulations
CC Docket No. 96-45

ORDER

Adopted: May 6, 2004

Released: May 6, 2004

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

I. INTRODUCTION

1. In this Order, we deny a request from FiberNet, LLC (FiberNet), a competitive eligible telecommunications carrier (ETC), for waiver of the December 30, 2001 line-count data filing deadline set forth in section 54.307(c)(3) of the Commission's rules for high-cost universal service support. FiberNet has failed to demonstrate that special circumstances warrant a waiver and that the grant of such waiver would serve the public interest.

II. BACKGROUND

2. Competitive ETCs receive support to the extent they capture lines from an incumbent local exchange carrier (LEC) or serve new subscriber lines in an incumbent LEC's service area. Before a competitive ETC can begin receiving support, certain information must be filed with the Universal Service Administrative Company (USAC). First, the relevant state commission must file a certification stating that all high-cost support received by the competitive ETC will be used "only for the provision, maintenance, and upgrading of facilities and services for which support is intended." Second, a competitive ETC must file the number of working loops it serves in the incumbent carrier's service area on a quarterly basis. Specifically, line-count data are due on July 31 of each year, and quarterly updates

1 FiberNet, LLC, Petition for Waiver of FCC Rule Section 54.307(c)(3), filed Feb. 11, 2002 (FiberNet Petition).

2 47 C.F.R. § 54.307(a).

3 47 C.F.R. § 54.313; 47 C.F.R. S 54.314. The certification requirements for non-rural carriers are found in section 54.313 of the Commission's rules and the certification requirements for rural carriers are found in section 54.314 of the Commission's rules. See id. In instances where carriers are not subject to state jurisdiction, an ETC may self-certify to the Commission and USAC. 47 C.F.R. § 54.313(b); 47 C.F.R. § 54.314(b).

4 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 Federal-State Joint Board on Universal

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are due September 30, December 30, and March 30 of each year.⁵ USAC uses line-count data filed on September 30 to calculate first-quarter support, line-count data filed on December 30 to calculate second-quarter support, and line-count data submitted on March 30 to calculate third- and fourth quarter support.⁶

3. On February 11, 2002, FiberNet filed a request for waiver of the December 30, 2001 quarterly line-count filing deadline in section 54.307(c)(3) of the Commission's rules so that it can receive support for second quarter 2002.⁷ Absent a waiver of the December 30 filing deadline, FiberNet will begin receiving support in third quarter 2002. FiberNet contends that good cause exists for granting its request for waiver of section 54.307(c)(3) of the Commission's rules because it did not receive its ETC designation until November 20, 2001. Subsequent to its ETC designation, FiberNet claims that it was unable to satisfy the December 30 line-count filing deadline "due to the sheer volume of new information associated with universal service fund eligibility, and in order to upgrade its operations systems necessary to accurately capture wire center and loop information."⁸ FiberNet also states that granting its request will provide competitive choice and quality telecommunications offerings to customers in West Virginia and therefore will serve the public interest.⁹

4. Generally, the Commission's rules may be waived for good cause shown.¹⁰ As noted by the Court of Appeals for the D.C. Circuit, however, agency rules are presumed valid.¹¹ The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.¹² In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.¹³ 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

5. We find that FiberNet has not demonstrated that special circumstances warrant a

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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, 11298, para. 133 (2001) (*Rural Task Force Order*). 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).

⁵ *Id.*

⁶ 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 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).

⁷ See FiberNet Petition at 1.

⁸ FiberNet Petition at 2.

⁹ FiberNet Petition at 4.

¹⁰ 47 C.F.R. § 1.3.

¹¹ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

¹² *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

¹³ *WAIT Radio*, 418 F.2d at 1159; *Northeast Cellular*, 897 F.2d at 1166.

deviation from the line-count filing deadline provided in section 54.307(c)(3) of the Commission's rules. Because USAC processes a tremendous amount of line-count data each year, it is administratively necessary to require carriers to meet the line-count filing deadlines absent special circumstances. FiberNet received its ETC designation from the Public Service Commission of West Virginia (PSCWV) on November 20, 2001 – more than one month before the line-count filing deadline for second quarter support.¹⁴ While we recognize that some effort is necessary to meet the line-count filing deadlines, the burdens associated with compiling and filing line-count data for the first time do not establish special circumstances that warrant a deviation from the Commission's rule.¹⁵ In particular, it is the responsibility of the ETC to plan accordingly so it is in a position to assure that its submissions are filed in a timely manner.¹⁶ Otherwise, recently designated ETCs could seek to circumvent program rules by merely alleging that they do not have prior experience with the line-count filing procedures. We therefore deny FiberNet's request for waiver of section 54.307(c)(3).

IV. ORDERING CLAUSE

6. 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 54.307(c)(3) of the Commission's rules, 47 C.F.R. § 54.307(c) filed by FiberNet, LLC on February 12, 2002, IS DENIED, as described herein.

FEDERAL COMMUNICATIONS COMMISSION

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

¹⁴ FiberNet Petition at 3. FiberNet filed its line-count data on February 12, 2003.

¹⁵ See e.g., *Request for Review by Gardner Unified School District 231, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, File No. SLD-189138, CC Docket Nos. 96-45 and 97-21, Order, DA 03-1575, para. 2 (Wireline Comp. Bur. rel. May 15, 2003) (Reaffirming that applicants have the burden of meeting filing deadlines to qualify for funding under the Commission's schools and libraries program and reaffirming that applicants are responsible for complying with program rules and procedures). In contrast, in instances where an ETC designation occurred after a line count filing deadline, the Wireline Competition Bureau (Bureau) has granted waiver of that deadline. See *RFB Cellular Waiver Order*, (Bureau determining that "it would be inconsistent with the Commission's goal of competitive neutrality and section 254(e) to delay" the receipt of high-cost support because a carrier received its ETC designation after certain line count filing deadlines). *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 2487, 24391, para. 10 (Wireline Comp. Bur. 2002).

¹⁶ We also note that many carriers choose to collect and file their line count data prior to their ETC designations in order to avoid missing any filing deadlines.