

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

In the Matter of
Federal-State Joint Board on
Universal Service
Grande Communications, Inc.
Petition for Waiver of Sections 54.307 and 54.314
of the Commission's Rules and Regulations
CC Docket No. 96-45

ORDER

Adopted: August 16, 2004

Released: August 16, 2004

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

I. INTRODUCTION

1. In this Order, we grant a request from Grande Communications, Inc. (Grande), a competitive eligible telecommunications carrier (ETC), for waiver of the January 1, 2003 certification filing deadline set forth in section 54.314(d) of the Commission's rules for high-cost universal service support in areas served by CenturyTel, Inc. (CenturyTel), a rural local exchange carrier (LEC). We also grant Grande's request for waiver of the December 30, 2002 and March 30, 2003 quarterly filing deadlines for line count data set forth in section 54.307(c) of the Commission's rules for high-cost universal service support and interstate common line support (ICLS). Granting Grande's waiver requests will allow it to receive universal service support as of May 22, 2003, the date the Public Utility Commission of Texas (Texas Commission) designated Grande 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, other requirements also 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 ETCs to receive universal service support in areas served by rural LECs must file an

1See Grande Communications, Inc., Petition for Waiver, filed June 30, 2003 (Grande Petition).

2See id.; Grande Communications, Inc., Clarification to Petition for Waiver, filed Jan. 21, 2004 (Grande January 21 Supplement).

347 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).

447 U.S.C. § 254(e).

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.”<sup>5</sup> In instances in which 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>6</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>7</sup> If a state or an ETC misses the October 1 deadline, it must file the certification by January 1 for support to begin in the second quarter of the year, by April 1 for support to begin in the third quarter, and by July 1 for support to begin in the fourth quarter.<sup>8</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>9</sup>

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.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup> USAC uses line count data filed on September 30 to calculate high-cost 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.<sup>13</sup> In addition, USAC uses line count data due

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<sup>5</sup>47 C.F.R. § 54.314. The certification requirement for ETCs serving areas served by non-rural LECs is found in section 54.313 of the Commission’s rules. 47 C.F.R. § 54.313.

<sup>6</sup>See *Federal-State Joint Board on Universal Service*, Fourteenth Report and Order and Twenty-Second Order on Reconsideration, CC Docket No. 96-45, *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, Report and Order, CC Docket No. 00-256, 16 FCC Rcd 11244, 11318, para. 189 (rel. May 23, 2001) (*Rural Task Force Order*); 47 C.F.R. § 54.314(b).

<sup>7</sup>See 47 C.F.R. § 54.314(d)(1).

<sup>8</sup>See 47 C.F.R. § 54.314(d).

<sup>9</sup>See *Rural Task Force Order*, 16 FCC Rcd at 11319, para. 191. Under the Commission’s rules, USAC submits estimated demand for the universal service support mechanisms to the Commission 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.

<sup>10</sup>See 47 C.F.R. § 54.307(a).

<sup>11</sup>See 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, quarterly line count filings have always been mandatory. See 47 U.S.C. § 54.307(b).

<sup>12</sup>*Id.*

<sup>13</sup>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).

on September 30 to calculate ICLS for first quarter, line count data filed on December 30 to calculate ICLS for second quarter, line count data submitted on March 30 to calculate ICLS for third quarter, and line count data filed on July 31 to calculate ICLS for fourth quarter.<sup>14</sup>

4. Generally, the Commission's rules may be waived for good cause shown.<sup>15</sup> The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.<sup>16</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>17</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.<sup>18</sup> Moreover, in demonstrating whether a waiver is warranted, the burden of proof rests with the petitioner.<sup>19</sup>

5. *Grande Communication's Petition for Waivers*. On May 22, 2003, the Texas Commission designated Grande as an ETC.<sup>20</sup> On June 27, 2003, consistent with section 54.314(d) of the Commission's rules, the Texas Commission filed a certification with the Commission and USAC stating that Grande would use universal service support "for the provision, maintenance, and upgrading of its facilities and services as intended."<sup>21</sup> On June 30, 2003, Grande filed a request for waiver of the January 1, 2003 certification filing deadline so that it can receive support beginning May 22, 2003, the date Grande was designated as an ETC by the Texas Commission.<sup>22</sup> In addition, Grande requests a waiver of the December 30, 2002 and March 30, 2003 quarterly line count filing deadlines in section 54.307 so that it can receive support for the second quarter of 2003, beginning May 22, and, for the third and fourth quarters of 2003.<sup>23</sup> In its petition, Grande contends good cause exists for granting its waiver of sections 54.314(d)(2) and 54.307(c)(4) of the Commission's rules because it could not have met the deadlines set

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<sup>14</sup>Interstate common line support provides per-line support to offset a portion of the interstate common line revenue requirement of rate-of-return ILECs, with competitive ETCs receiving receiving per-line support equivalent to the incumbent LECs's support per the incumbent LEC's working loop. *See* 47 C.F.R. § 54.901.

<sup>15</sup>47 C.F.R. § 1.3.

<sup>16</sup>*Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

<sup>17</sup>*WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166.

<sup>18</sup>*Northeast Cellular Telephone Co. v. FCC*, 897 F.2d at 1166.

<sup>19</sup>*Tucson Radio, Inc. v. FCC*, 452 F.2d 1380, 1382 (D.C. Cir. 1971).

<sup>20</sup>*See Application of Grande Communications Networks, Inc. for Designation as an Eligible Telecommunications Carrier (ETC) Pursuant to P.U.C. Subst. R. 26.418 and Eligible Telecommunications Provider (ETP) Pursuant to P.U.C. Subst. R. 26.417*, Order, PUC Docket No. 26404, SOAH Docket No. 473-03-1655 (Public Utility Commission of Texas rel. May 22, 2003) (*Texas Commission ETC Designation Order*).

<sup>21</sup>Letter from Patrick Tyler, Public Utility Commission of Texas, to Marlene H. Dortch, FCC, and Irene Flannery, USAC, dated June 26, 2003; 47 C.F.R. § 54.314. *See also* Letter from Gabriel Garcia, Grande Communications Networks, Inc., to Marlene H. Dortch, FCC, Irene Flannery, USAC, dated June 2, 2003; 47 C.F.R. § 54.904. Competitive ETCs that wish to receive ICLS must file a separate certification with the Commission and USAC stating that any ICLS will be used for its intended purposes. *See* 47 C.F.R. § 54.904. Unlike certifications for receiving high-cost support, certifications for ICLS are not correlated with the quarterly receipt of support. Instead, certifications are due on or before a carrier files its line count data and thereafter on June 30<sup>th</sup> of each year. *See* 47 C.F.R. § 54.904 (d). Because Grande filed its ICLS certification prior to its initial line count filing on July 31, 2003, it met the ICLS certification deadline.

<sup>22</sup>Grande Petition at 1.

<sup>23</sup>*See* Grande Petition at 13; Grande January 21 Supplement. Grande states that it will submit the line count data due on those dates if its petition for waiver is granted. *See id.* We note that USAC uses line count data filed on March 30 for third and fourth quarters of the relevant calendar year.

by the Commission's rules because it did not receive its ETC designation until after the deadlines.<sup>24</sup> Grande also argues that granting its waiver requests is consistent with the Commission's goal of competitive neutrality and will serve the public interest.<sup>25</sup> The Wireline Competition Bureau sought comment on Grande's petition in a public notice released on August 15, 2003.<sup>26</sup> CenturyTel, Inc. (CenturyTel) filed comments opposing Grande's petition.<sup>27</sup>

### III. DISCUSSION

6. Consistent with Commission precedent, we find good cause exists to waive the January 1 deadline contained in section 54.314(d) of the Commission's rules and the December 30, 2002 and March 30, 2003 line count filing deadlines contained in section 54.307(c) of the Commission's rules so that Grande can receive universal service support beginning on May 22, 2003, the date of Grande's designation as an ETC.<sup>28</sup>

7. As a threshold matter, we address CenturyTel's claim that Grande cannot receive support as of May 22, 2003 because, due to Texas procedural rules and the Texas Administrative Procedure Act, Grande's ETC designation did not become effective until July 15 or August 15, 2003.<sup>29</sup> On May 27, 2003, the Texas Commission notified the Commission that it had granted Grande ETC designation request on May 22, 2003.<sup>30</sup> Moreover, despite being provided with an opportunity to comment, the Texas Commission did not oppose Grande's waiver request. It is beyond the Commission's authority to interpret Texas state law and we defer to the Texas Commission as to the date it found that Grande should receive ETC designation. Therefore, absent evidence to the contrary from the Texas Commission, we find no reason to dispute Grande's May 22, 2003 ETC designation.

8. Waiver of Section 54.314(d). We find good cause exists to waive the certification filing deadline contained in section 54.314 of the Commission's rules so that Grande can receive support beginning May 22, 2003, the date of Grande's designation as an ETC. Although section 54.314(d)

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<sup>24</sup>Grande Petition at 2-3.

<sup>25</sup>Grande Petition at 11, 15-19.

<sup>26</sup>See *Wireline Competition Bureau Seeks Comment on Petition of Grande Communications Inc. for Waiver of Sections 54.307(c) and 54.314(d) of the Commission's Rules*, Public Notice, CC Docket No. 96-45, 18 FCC Rcd 16616 (2003) (*Grande Public Notice*).

<sup>27</sup>See Opposition of CenturyTel, filed Aug. 29, 2003 (CenturyTel Opposition).

<sup>28</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 (2002) (granting a waiver of the October 1 certification filing deadline, the March 30 line count filing deadline, and the September 30 line count 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, 18 FCC Rcd 7138 (2002) (granting a waiver of the October 1 certification filing deadline) (*Guamcell Waiver Order*). See also *Federal-State Joint Board on Universal Service, Western Wireless Corporation, Petition for Waiver of Section 54.314 of the Commission's Rules and Regulations*, Order, CC Docket No. 96-45, 18 FCC Rcd 14689, 14691, para. 6 (2003) (*Western Wireless Order*).

<sup>29</sup>See CenturyTel Opposition at 1-4. Specifically, CenturyTel argues that due various motions for rehearing filed in response to the ETC Designation Order, and the correction of typographical errors in that Order, under Texas Law, Grande Petition was not effective until such matters were resolved. CenturyTel Opposition at 2-4.

<sup>30</sup>See Grande Petition at Exhibit C (*Letter from Janice Ervin, Public Utility Commission of Texas to Marlene H. Dortch, FCC*, dated May 27, 2003).

requires states to meet deadlines for their certifications that competitive ETCs will use universal service support for its intended purposes, we believe in this case that Grande has demonstrated that special circumstances warrant a deviation from the filing deadline in the Commission's rules and that the waiver is consistent with the public interest.

9. We disagree with CenturyTel that Grande has not demonstrated special circumstances that warrant a deviation from the filing deadlines provided in section 54.314(d) of the Commission's rules.<sup>31</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.<sup>32</sup> Because Grande did not receive its ETC designation until May 22, 2003, however, the Texas Commission could not have met, under any circumstances, the January 1, 2003 certification filing deadline so that Grande could begin receiving support in the second quarter of 2003. As the Wireline Competition Bureau has determined in prior orders, it would be onerous to deny an ETC receipt of universal service support for almost two quarters because the ETC designation occurred after the certification filing deadline.<sup>33</sup> In this instance, moreover, these special circumstances outweigh any processing difficulties that USAC may face as a result of the late filed certifications.<sup>34</sup> We therefore find that Grande has demonstrated special circumstances that justify a waiver of section 54.314.

10. We further conclude, contrary to the claims of CenturyTel, that waiver of section 54.314(d) is consistent with the public interest.<sup>35</sup> The Commission has found that "competitively neutral access to support is critical to ensuring that all Americans have access to affordable telecommunications."<sup>36</sup> Denying second and third quarter 2003 support to Grande, a competitive ETC, merely because the timing of its ETC designation precluded the Texas Commission from timely filing the

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<sup>31</sup>See CenturyTel Opposition at 4-5. Moreover, any impact on the universal service fund resulting from grant of this waiver is beyond the scope of this proceeding. See CenturyTel Opposition at 6-7. Specifically, such issues are part of the Commission's proceeding in which it has requested the Joint Board examine the Commission's rules relating to high-cost universal service support. See *Federal-State Joint Board on Universal Service*, Notice of Proposed Rulemaking, CC Docket No. 96-45, FCC 04-127 (rel. June 8, 2004). In addition, granting Grande's Petition will not affect the amount of support distributed to other ETCs. 47 U.S.C. § 254(e); 47 C.F.R. §§ 54.101, 54.201.

<sup>32</sup>See *Western Wireless Order*, 18 FCC Rcd at 14691-92, para. 7.

<sup>33</sup>See, e.g., *Federal-State Joint Board on Universal Service, Midwest Wireless Iowa, L.L.C., Petition for Waiver of Sections 54.313(d) and 54.314(d) of the Commission's Rules and Regulations*, Order, CC Docket No. 96-45, DA 04-1688, para. 7 (Wireline Compet. Bur., Telecom. Access Policy Div. rel. June 14, 2004); *Western Wireless Order*, 18 FCC Rcd at 14691-92, para. 7.

<sup>34</sup>To facilitate timely payments and to minimize the administrative burden associated with processing those payments, we direct USAC to distribute Grande's retroactive support payments on a phased-in basis. Specifically, we instruct USAC to pair monthly retroactive support payments with regular monthly support payments until all retroactive support has been paid. In other words, USAC shall pair Grande's next support payment following release of this Order with its May 2003 retroactive support payment, continuing in this fashion until all retroactive support has been paid.

<sup>35</sup>See CenturyTel Opposition at 6.

<sup>36</sup>See *Federal-State Joint Board on Universal Service*, Ninth Report and Order and Eighteenth Order on Reconsideration, CC Docket 96-45, 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 Subscriberhip in Unserved and Underserved Areas, Including Tribal and Insular Areas*, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking CC Docket No. 96-45, 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."). See also *Western Wireless Order*, 18 FCC Rcd at 14699, para. 8.

certification would undermine the Commission's goals of competitive neutrality.<sup>37</sup> Further, the Texas Commission, the state entity with the obligation to make the appropriate section 54.314 certification, did not oppose Grande's waiver request. We therefore conclude waiver of this rule is in the public interest.

11. *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 Grande can receive high-cost support for the second, third, and fourth quarters 2003 and ICLS for the second and third quarters 2003. Absent a waiver of the December 30, 2002 deadline and March 30, 2003 deadline, Grande would not begin receiving high-cost support until first quarter 2004 and ICLS until fourth quarter 2003.<sup>38</sup> As noted above and consistent with Commission precedent, it would be inconsistent with the Commission's goal of competitive neutrality and section 254(e) to delay Grande's receipt of high-cost support and ICLS merely because it received its ETC designation on May 22, 2003, after the line count filing deadlines.<sup>39</sup> Moreover, contrary to CenturyTel's claim that Grande should have filed its line counts in anticipation of receiving ETC designation, we note that a carrier may file line counts in anticipation of ETC designation but is not required to file such line counts.<sup>40</sup> Accordingly, we find that a waiver of section 54.307(c) is warranted. We therefore grant Grande's request for waiver of the filing deadlines in section 54.307 of the Commission's rules. Upon release of this Order, Grande shall submit to USAC the data that would have been due for the December 30, 2002 filing deadline and March 30, 2003 filing deadline so that it can receive support as of May 22, 2003.

12. In sum, because Grande did not become eligible to receive high-cost support until after the January 1, 2003 certification deadline, we find that good cause exists to warrant a waiver of section 54.314 of the Commission's rules. Similarly, because Grande became eligible to receive high-cost support after the December 30, 2002 and March 30, 2003 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 Grande's line count data as set forth above. These waivers will allow Grande to be eligible to receive any high-cost support and ICLS that it qualifies for as of May 22, 2003, the date Grande received its ETC designation.

#### IV. ORDERING CLAUSES

13. 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, 47 C.F.R. § 54.314(d), filed by Grande Communications, Inc. on June 30, 2003, IS GRANTED, as described herein.

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<sup>37</sup>In addition, Grande's receipt of support will serve the public interest because it will assist in the completion of the build-out of its facilities based wireline network to rural and high-cost customers in the San Marcos exchange. See Letter from Kelley, Drye, and Warren, LLP, to Marlene H. Dortch, FCC, dated Sept. 19, 2003.

<sup>38</sup>See Grande Petition at 14.

<sup>39</sup>See *RFB Cellular Order*, 17 FCC Rcd at 24391, para. 10.

<sup>40</sup>See CenturyTel Opposition at 5-6. See also 47 C.F.R. § 54.307.

14. 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 Grande Communications, Inc. on June 30, 2003, as amended, IS GRANTED, as described herein.

## FEDERAL COMMUNICATIONS COMMISSION

Narda M. Jones  
Acting Chief, Telecommunications Access Policy Division,  
Wireline Competition Bureau