

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

In the Matter of	)	
	)	
Northwest Communications Cooperative	)	
	)	
and	)	
	)	CC Docket No. 96-45
Noonan Farmers Telephone Company	)	
	)	
Petition for Waiver of the Definition of "Study Area" Contained in Part 36 of the Commission's Rules	)	

**ORDER**

**Adopted: September 14, 2005**

**Released: September 14, 2005**

By the Chief, Wireline Competition Bureau:

**I. INTRODUCTION**

1. In this Order, we grant a joint request from Northwest Communications Cooperative (Northwest) and Noonan Farmers Telephone Company (Noonan) (collectively, the Petitioners) for a waiver of the study area boundary freeze codified in the Appendix-Glossary of Part 36 of the Commission's rules.<sup>1</sup> This waiver will facilitate the proposed acquisition of assets of Noonan by Northwest at which time Noonan will cease as a separate study area and will be included as part of Northwest's existing North Dakota study area.<sup>2</sup>

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<sup>1</sup> See 47 C.F.R. Part 36, App.; Northwest Communications Cooperative and Noonan Farmers Telephone Company, Petition of Local Exchange Carriers for Waiver of "Study Area" Boundaries as defined in the Appendix-Glossary of Part 36 in Connection with a Proposed Acquisition of Assets of Noonan Farmers Telephone Company by Northwest Communications Cooperative Regarding the Companies' Exchange Areas in the State of North Dakota, CC Docket No. 96-45 (filed January 3, 2005) (Petition). Northwest owns and operates, as an interstate average schedule incumbent local exchange carrier (LEC), approximately 5,281 access lines in the state of North Dakota. Noonan owns and operates, as an interstate average schedule incumbent LEC, approximately 247 access lines in the state of North Dakota. See Petition at 2.

<sup>2</sup> Northwest is acquiring the Noonan exchange operated by Noonan. See Petition at 2-3.

## II. STUDY AREA WAIVER

### A. BACKGROUND

2. *Study Area.* A study area is a geographic segment of an incumbent LEC's telephone operations. Generally, a study area corresponds to an incumbent LEC's entire service territory within a state. The Commission froze all study area boundaries effective November 15, 1984.<sup>3</sup> The Commission took this action to prevent the establishment of high-cost exchanges within existing service territories as separate study areas merely to maximize high-cost support. A carrier must therefore apply to the Commission for a waiver of the study area boundary freeze if it wishes to sell or purchase additional exchanges.<sup>4</sup>

3. *Universal Service Support.* Section 54.305(b) 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.<sup>5</sup> Section 54.305(b) applies to high-cost loop support and local switching support.<sup>6</sup> Section 54.305(b) is meant to discourage a carrier from acquiring an exchange merely to increase its share of high-cost universal service support.<sup>7</sup> 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, 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 of its other exchanges.<sup>8</sup>

4. *The Petition for Waiver:* Northwest and Noonan filed a petition for a waiver of the study area boundary freeze on January 3, 2005. On March 2, 2005, the Wireline Competition Bureau (Bureau) released a public notice seeking comment on the petition for waiver.<sup>9</sup> A study area waiver would permit

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<sup>3</sup> 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, Decision and Order, 50 Fed. Reg. 939 (1985) (*Part 67 Order*), adopting Recommended Decision and Order, 49 Fed. Reg. 48325 (1984). See also 47 C.F.R. Part 36, App.

<sup>4</sup> *Part 67 Order* at para. 1.

<sup>5</sup> 47 C.F.R. § 54.305(b). A carrier's acquired exchanges may receive additional support pursuant to the Commission's "safety valve" mechanism. See 47 C.F.R. § 54.305(d)-(f). A carrier acquiring exchanges also may be eligible to receive Interstate Common Line Support (ICLS), which is not subject the limitations set forth in section 54.305(b). See 47 C.F.R. § 54.902.

<sup>6</sup> Prior to July 1, 2004, this rule also applied to long term support, which is described in section 54.303 of the Commission's rules. Since July 1, 2004, long term support has been discontinued for all carriers and, instead, has been merged into ICLS. See 47 C.F.R. §§ 54.303, 54.901. By operation of section 54.901, the elimination of LTS is offset by an increase in ICLS.

<sup>7</sup> See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 8942-43 (1997) (*Universal Service 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 (5<sup>th</sup> Cir. 1999).

<sup>8</sup> 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 mechanism for non-rural carriers calculates support for carriers based on the forward-looking economic cost of operating a given exchange. See 47 C.F.R. § 54.309.

<sup>9</sup> See *Domestic Section 214 Application Filed for Transfer of Control of the Assets of Noonan Farmers Telephone Company to Northwest Communications Cooperative*, WC Docket No. 05-60, *Noonan Farmers Telephone Company and Northwest Communications Cooperative Seek Waiver of the Study Area Boundary Freeze as Codified in Part 36 of the Commission's Rules*, CC Docket No. 96-45, Public Notice, DA 05-539 (rel. March 2, 2005). We note that the Bureau has granted transfer of control of the exchanges. See *Wireline Competition Bureau Grants*

(continued....)

Northwest to alter the boundaries of its North Dakota study area by adding the exchange it is acquiring from Noonan.<sup>10</sup> Upon the completion of the transaction Noonan will cease operating as a separate study area. The Petitioners state that there will be no negative impact on the universal service fund because Northwest will not receive more universal service support than would be received by Northwest and Noonan separately, the transaction is in the public interest, and the North Dakota Public Service Commission does not object to the transaction.<sup>11</sup>

5. *Standards for Waiver.* Generally, the Commission may waive its rules for good cause shown.<sup>12</sup> The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.<sup>13</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>14</sup> Waiver of the Commission's rules is therefore appropriate only if special circumstances warrant a deviation from the general rule, and such 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 opposes the transfer; and (3) the transfer must be in the public interest.<sup>15</sup>

6. In evaluating whether a study area boundary change will have an adverse impact on the universal service fund, the Commission has considered whether a study area waiver will result in an annual aggregate shift in an amount equal to or greater than one percent of the total high-cost loop support fund for the most recent calendar year.<sup>16</sup> The Commission recognized that, because of the indexed cap, an increase in the draw of any fund recipient necessarily reduces the amounts that other LECs receive from the fund.<sup>17</sup> After adoption of section 54.305 of the Commission's rules, however, the one-percent guideline, was not, in practice, a necessary limitation because section 54.305 provides that a carrier purchasing exchanges from an unaffiliated carrier is permitted to receive only the same level of per-line high-cost support that the selling company was receiving for the exchanges prior to the transfer.<sup>18</sup> Accordingly, by definition, section 54.305 ensures that there will be no adverse impact on the universal service fund with respect to high-cost loop support and local switching support.

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*Consent for the Transfer of Control of the Assets of Noonan Farmers Telephone Company to Northwest Communications Cooperative*, CC Docket No. 96-45, Public Notice, DA 05-1313 (rel. May 6, 2005).

<sup>10</sup> Four of Northwest's current exchanges border the Noonan exchange. See Petition at 3 & Exhibit 1.

<sup>11</sup> See Petition at 3-4.

<sup>12</sup> 47 C.F.R. § 1.3.

<sup>13</sup> *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

<sup>14</sup> *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969) (*WAIT Radio*), cert. denied, 409 U.S. 1027 (1972); *Northeast Cellular*, 897 F.2d at 1166.

<sup>15</sup> See, e.g., *US WEST Communications, Inc., and Eagle Telecommunications, Inc., Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary of the Commission's Rules*, AAD 94-27, Memorandum Opinion and Order, 10 FCC Rcd 1771, 1772 para. 5 (1995) (*PTI/Eagle Order*).

<sup>16</sup> See *PTI/Eagle Order*, 10 FCC Rcd at 1774, paras. 14-17; *US WEST Communications, Inc., and Eagle Telecommunications, Inc., Joint Petition for Waiver of "Study Area" Contained in Part 36, Appendix-Glossary of the Commission's Rules, and Petition for Waiver of Section 61.41(c) of the Commission's Rules*, AAD 94-27, Memorandum Opinion and Order on Reconsideration, 12 FCC Rcd 4644 (1997).

<sup>17</sup> See *PTI/Eagle Order*, 10 FCC Rcd at 1773-74, paras. 13-15.

<sup>18</sup> See 47 C.F.R. § 54.305(b).

**B. DISCUSSION**

7. We find that good cause exists to waive the study area boundary freeze codified in the Appendix-Glossary of Part 36 of the Commission's rules to permit Northwest to alter the boundaries of its existing North Dakota study area by adding the Noonan exchange to its study area. For the reasons discussed below, we conclude that the Petitioners have satisfied the three-prong standard that the Commission applies to determine whether a waiver is warranted.

8. *Impact on the Universal Service Fund.* We conclude that the universal service fund will not be adversely affected. With regard to the 247 lines that Noonan is transferring to Northwest, section 54.305(b) of the Commission's rules limits high-cost loop support and local switching support.<sup>19</sup> Northwest is limited to the same per-line levels of support that Noonan was receiving prior to the transfer. Although Northwest may be eligible for safety valve support for the acquired lines, there is nothing in this record to suggest such eligibility would have a significant adverse effect on the fund. In reaching this conclusion, we note that the proposed study area waiver involves the transfer of only approximately 247 access lines. Moreover, 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 the support amounts that the carrier would qualify for in subsequent years.<sup>20</sup> The total amount of safety valve support available to rural carriers is also capped at five percent of annual high-cost loop support available to rural carriers in any particular year, thereby providing an additional limitation on the amount of safety valve support available to carriers.<sup>21</sup> As stated above, ICLS is not subject to the limitations of section 54.305(b) of the Commission's rules.<sup>22</sup> We are persuaded, however, by Petitioners' showing, which estimates ICLS will not change as result of this transaction.<sup>23</sup> Thus, we find that granting the waiver will not have an adverse effect on the universal service fund.

9. *Position of the State Commission.* The state commission with regulatory authority over the transferred exchanges does not oppose the transfer. On February 22, 2005, the North Dakota Public Service Commission issued an order approving the proposed transaction between Northwest and Noonan.<sup>24</sup>

10. *Public Interest Analysis.* The public interest is served by a waiver of the study area freeze rule to permit Northwest to add the Noonan exchange to its North Dakota study area and to

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<sup>19</sup> See *id.*

<sup>20</sup> See 47 C.F.R. § 54.305(d). The term "rural carrier" refers to an incumbent LEC that meets the definition of "rural telephone company" in section 3(37) of the Communications Act of 1934, as amended (Act). 47 U.S.C. § 153(37).

<sup>21</sup> See 47 C.F.R. § 54.305(e).

<sup>22</sup> See *supra* note 5.

<sup>23</sup> The Petitioners estimate that Northwest and Noonan currently receive \$689,748 and \$36,876, respectively, in annual ICLS prior to this transaction. After the transaction is complete, the Petitioners estimate that the newly combined study area will receive \$726,624 or the same total amount (\$689,748 + \$36,876 = \$726,624) as the two separate study areas received prior to the transaction. See Letter from David L. Nace, Counsel for Northwest and Noonan to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 96-45 (filed July 18, 2005).

<sup>24</sup> See Letter from David L. Nace, Counsel for Northwest and Noonan to Cathy Carpino, Wireline Competition Bureau, Federal Communications Commission, CC Docket No. 96-45 (filed July 18, 2005) (attaching Northwest Communications Cooperative, a Cooperative Association Local Exchange Public Convenience and Necessity, Case No. PU-04-565, Northwest Communications Cooperative, a Cooperative Association Designated Eligible Carrier Application, Case No. PU-04-635, State of North Dakota Public Service Commission, Order (February 22, 2005)).

discontinue the operation of Noonan as a separate study area. We are persuaded that granting of the waiver is in the public interest because all Noonan members who subscribe to local exchange telephone service as of the closing date of the transaction will: become full cooperative members of Northwest, earning capital credits starting as of the closing date; have Extended Area Service with all Northwest exchanges and with the Portal exchange in North Dakota at no charge; have access to additional calling features including voice mail; benefit from operating economies through Northwest's ability to serve a larger number of customers.<sup>25</sup> We further note that it is Northwest's intention to upgrade the Noonan switching equipment capabilities immediately in order that they may function on the Northwest ring and be compliant with all Communications Assistance for Law Enforcement Act (CALEA) and local number portability (LNP) requirements.<sup>26</sup> Based on the totality of these representations we conclude that the addition of the Noonan exchange to Northwest's existing study area and the discontinued operation of the separate of Noonan study area will serve the public interest.

### III. ORDERING CLAUSE

11. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 5(c), 201, 202 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 155(c), 201, 202, and 254, 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 the study area boundary freeze as codified in Part 36, Appendix-Glossary, of the Commission's rules, filed by Northwest Communications Cooperative and Noonan Farmers Telephone Company, on January 3, 2005, IS GRANTED, as described herein.

FEDERAL COMMUNICATIONS COMMISSION

Thomas J. Navin  
Chief, Wireline Competition Bureau

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<sup>25</sup> See Petition at 3.

<sup>26</sup> See Petition at 3-4. See also Communications Assistance for Law Enforcement Act, Pub. L. No. 103-414, 108 Stat. 4279 (1994) (codified as amended in 18 U.S.C. §§ 2522, 3121, and 47 U.S.C. §§ 229, 1001-1010). The Petitioners state that due to Noonan's small size, Noonan has been unable to comply with CALEA and LNP requirements because of the high cost. Petition at 3-4.