

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

In the Matter of)
Blue Valley Telecommunications, Inc.)
and)
United Telephone Company of Kansas) CC Docket No. 96-45
Joint Petition for Waiver of the Definition of)
"Study Area" Contained in Part 36 of the)
Commission's Rules; Petition for Waiver of)
Section 69.3(e)(11) of the Commission's Rules.)

ORDER

Adopted: November 29, 2005

Released: November 29, 2005

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order, we grant a joint request from United Telephone Company of Kansas (United) and Blue Valley Telecommunications, Inc. (Blue Valley) (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. This waiver will permit United to remove two exchanges comprising approximately 1,586 access lines from its Kansas study area. This waiver also will permit Blue Valley to add these exchanges to its existing Kansas study area. We also grant Blue Valley a waiver of section 69.3(e)(11) of the Commission's rules in order to allow it to continue to use the National Exchange Carrier Association (NECA) as its tariff pool administrator.

1 See 47 C.F.R. Part 36, App.; United Telephone Company of Kansas and Blue Valley Telecommunications, Inc., Joint Petition for Waiver of the Definition of "Study Area" of the Appendix-Glossary of Part 36 of the Commission's Rules, CC Docket No. 96-45 (filed January 10, 2005) (Petition). The Petition also includes a request by Blue Valley for waiver of section 69.3(e)(11) of the Commission's rules. United owns and operates, as an price cap incumbent local exchange carrier (LEC), approximately 72,000 access lines in the state of Kansas. Blue Valley currently owns and operates approximately 1,463 access lines in the state of Kansas. See Petition at 2-3.

2 Blue Valley is acquiring the Onaga and Westmoreland exchanges from United. See id. at 2.

3 47 C.F.R. § 69.3(e)(11).

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, 1984.⁴ 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.⁵

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.⁶ Section 54.305(b) is meant to discourage a carrier from transferring an exchange merely to increase its share of high-cost universal service support.⁷ 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.⁸

4. *The Petition for Waiver.* United and Blue Valley filed a joint petition for a waiver of the study area boundary freeze and Blue Valley requested a waiver of section 69.3(e)(11) on January 10, 2005. On February 16, 2005, the Wireline Competition Bureau (Bureau) released a public notice seeking comment on the petitions.⁹ A study area waiver would permit United to alter the boundaries of its Kansas

⁴ 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.

⁵ *Part 67 Order* at para. 1.

⁶ 47 C.F.R. § 54.305(b). This rule applies to high-cost loop support and local switching support. 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. Prior to July 1, 2004, this rule also applied to long term support (LTS), which is described in section 54.303 of the Commission's rules. Since July 1, 2004, LTS 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.

⁷ 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 (5th Cir. 1999).

⁸ 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 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). See 47 U.S.C. § 153(37). Both carriers in this proceeding are classified as rural telephone companies within the definition of "rural telephone company" in the Act. The mechanism for non-rural carriers calculates support to carriers based on the forward-looking economic cost of operating a given exchange. See 47 C.F.R. § 54.309.

⁹ See *Wireline Competition Bureau Seeks Comment on the Joint Petition for Waiver of Blue Valley Telecommunications, Inc. and United Telephone Company of Kansas to Waive the Study Area Boundary Freeze*, as (continued...)

study area by removing the two exchanges that it is transferring to Blue Valley. The study area waiver also would permit Blue Valley to add the acquired exchanges to its existing Kansas study area. The Petitioners argue that granting of the waiver is in the public interest.¹⁰ Moreover, the Petitioners state that the change in study area boundaries will not adversely affect the universal service fund because section 54.305 of the Commission's rules limits the acquiring carrier's support to the same per-line support levels for which those lines were eligible prior to the transfer of the exchanges.¹¹ The Petitioners note, however, that Blue Valley may be eligible for additional support for new investment pursuant to the Commission's "safety valve" rules and for additional ICLS.¹² The Petitioners also submitted a copy of the order issued by the State Corporation Commission of the State of Kansas approving Blue Valley's application for a certificate of convenience and authority to provide incumbent LEC services in the two exchanges.¹³

5. Standards for Waiver. Generally, the Commission may waive its rules for good cause shown.¹⁴ The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.¹⁵ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.¹⁶ 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.¹⁷

(...continued from previous page)

Codified in Part 36 of the Commission's Rules and Section 69.3(e)(11) of the Commission's Rules, CC Docket No. 96-45, Public Notice, DA 05-429 (rel. February 16, 2005). NTCA filed comments on March 7, 2005 in support of granting the requested waivers. See NTCA Comments. We note that the Bureau has granted transfer of control of the exchanges. See Notice of Streamlined Domestic 214 Applications Granted, Public Notice, DA 04-3223 (rel. October 8, 2004).

¹⁰ Specifically, the Petitioners state that Blue Valley will provide the customers with new services from a locally-based carrier specializing in meeting the communications needs of the rural communities; will provide quality basic services and improve the network where necessary; will install all new outside plant with fiber-to-the-home and packet switching capability; and will offer advanced services including high speed Internet access and video services. See Petition at 6-7.

¹¹ See *id.* at 5. See also 47 C.F.R. § 54.305(b).

¹² See Petition at 5; 47 C.F.R. §§ 54.305(d)-(f) and 54.902(b).

¹³ See Petition at Appendix A (attaching In the Matter of the Joint Application of United Telephone Company of Kansas, Inc. (United) and Blue Valley Tele-Communications, Inc. (Blue Valley), Blue Valley O&W Telecom, Inc. (Blue Valley O&W) For Permission of United to Cease Operating as a Telephone Public Utility in its Onaga and Westmoreland Exchanges, to Grant Blue Valley a Certificate of Public Convenience for the Onaga and Westmoreland Exchanges and for Authority to Transfer Property, Plant and Equipment of United Located in the Onaga and Westmoreland Exchanges to Blue Valley and Complete all matters Incident to the Transfer, State Corporation Commission of the State of Kansas, Order and Certificate, Docket No. 04-BVTT-780-COC (December 27, 2004)).

¹⁴ 47 C.F.R. § 1.3.

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

¹⁶ *Wait Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), cert. denied, 409 U.S. 1027 (1972); *Northeast Cellular*, 897 F.2d at 1166.

¹⁷ 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*).

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.¹⁸ Rural carriers' high-cost loop support is a percentage of their unseparated loop costs, depending on the number of loops they serve and the degree to which their costs per loop exceed the national average cost per loop.¹⁹ High-cost loop support is subject to an indexed cap, which limits total nationwide support to the previous year's total, increased by the sum of the annual loop growth for rural carriers and an inflation factor.²⁰ 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.²¹ Subsequently, the Commission adopted section 54.305.²² This rule 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.²³ As a result, the one-percent guideline no longer operates as an a necessary limitation on our evaluation of study area waiver requests because, 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.

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 United to alter the boundaries of its existing Kansas study area by removing the two exchanges that it is transferring to Blue Valley. We also find that good cause exists to permit Blue Valley to add the two acquired exchanges to its existing Kansas 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 by granting this study area waiver. With regard to the 1,586 lines that United is transferring to Blue Valley, section 54.305(b) of the Commission's rules limits high-cost loop support and local switching support.²⁴ Blue Valley is limited to the same per-line levels of support that United was receiving prior to the transfer. Although Blue Valley may be eligible for safety valve support for investments in the acquired lines, there is nothing in the record to suggest such eligibility would significantly increase the high-cost fund or would come close to the one percent threshold.²⁵ As stated

¹⁸ See *PTI/Eagle Order*, 10 FCC Rcd at 1774, paras. 14-17; see *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).

¹⁹ See 47 C.F.R. §§ 36.601, *et seq.*

²⁰ See 47 C.F.R. §36.603.

²¹ See *PTI/Eagle Order*, 10 FCC Rcd at 1773, paras. 13-15.

²² 47 C.F.R. § 54.305.

²³ See 47 C.F.R. § 54.305(b).

²⁴ See *id.*

²⁵ In reaching this conclusion, we note that the proposed study area waiver directly involves the transfer of only approximately 1,586 access lines. Moreover, safety valve support is capped at 50 percent of any positive difference between a rural carrier's calculated high-cost loop support for the transferred exchanges and the index year amount. See 47 C.F.R. § 54.305(d). Also, the total amount of safety valve support available to rural carriers is 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. See 47 C.F.R. § 54.305(e).

above, ICLS is not subject to the limitations of section 54.305(b) of the Commission's rules.²⁶ The Petitioners estimate that as a result of this transaction ICLS will increase by \$26,000 annually.²⁷ The Petitioners also estimate that United's interstate access support (IAS) will be reduced by \$151,129 annually as a result of this transaction.²⁸ The increase in ICLS, therefore, is more than offset by the decrease in IAS. Thus, we are persuaded that granting this waiver will not have an adverse effect on the universal service fund.

9. *Position of State Commission.* On December 27, 2004, the State Corporation Commission for Kansas issued an order approving Blue Valley's application for a certificate of convenience and authority to provide incumbent LEC services in the two exchanges.²⁹ Thus, we find that the state commission with regulatory authority over the transferred exchanges does not oppose the transfer.

10. *Public Interest Analysis.* Finally, we are persuaded that the public interest is served by a waiver of the study area freeze rule to permit United to remove from its Kansas study area the Onaga and Westmoreland exchanges and to permit Blue Valley to add the acquired exchanges to its existing Kansas study area. The Petitioners state that Blue Valley: will provide the customers with new services from a locally-based carrier specializing in meeting the communications needs of the rural communities; will provide quality basic services and improve the network where necessary; will install all new outside plant with fiber-to-the-home and packet switching capability; and will offer advanced services including high speed Internet access and video services.³⁰ Based on the totality of these representations, we conclude that the transfer of the Onaga and Westmoreland exchanges to Blue Valley will serve the public interest by, among other things, providing increased access to advanced services.

III. WAIVER OF SECTION 69.3(e)(11)

A. BACKGROUND

11. Under section 69.3 of the Commission's rules, annual access tariffs, including the tariffs filed by NECA on behalf of companies that participate in NECA's access tariffs, go into effect on July 1 of each year.³¹ To minimize the complexity of administering NECA's common line pool, any change in NECA common line tariff participation resulting from a merger or acquisition of telephone properties is effective on the next annual access tariff filing effective date following the merger or acquisition.³² Because the next annual access tariff filing effective date is July 1, 2006,³³ Blue Valley would have to wait until that date to participate in NECA's access tariffs and would be required to file its own interstate tariff for the interim period. To avoid the burdens associated with filing its own tariff during this interim period, Blue Valley has requested a waiver of section 69.3(e)(11) of the Commission's rules.³⁴ The

²⁶ See *supra* n.6.

²⁷ See Letter from David Cosson, Counsel for Blue Valley, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 96-45 (filed May 26, 2005).

²⁸ *Id.* As an interstate price cap LEC, United is eligible for IAS. See 47 C.F.R. §§ 54.800, *et seq.*

²⁹ See Petition at Appendix A.

³⁰ See Petition at 6-7.

³¹ See 47 C.F.R. § 69.3(a).

³² 47 C.F.R. § 69.3(e)(11). See *Amendment of Part 69 of the Commission's Rules Relating to the Common Line Pool Status of Local Exchange Carriers Involved in Mergers or Acquisitions*, CC Docket No. 89-2, Report and Order, 5 FCC Rcd 231, 248 (1989).

³³ See 47 C.F.R. § 69.3(a).

³⁴ See Petition at 7-8.

waiver would enable Blue Valley to include the acquired access lines in the NECA carrier common line tariff upon the closing date of its acquisition transaction with United. The Petition indicates that the inclusion of the small number of access lines that it is acquiring from United in the NECA carrier common line tariffs would represent a minimal increase in NECA common line pool participation.³⁵ NECA has indicated that it has no objection to the inclusion of the acquired lines in the NECA common line tariff.³⁶

B. DISCUSSION

12. We find that Blue Valley has demonstrated that special circumstances warrant a deviation from section 69.3(e)(11) of the Commission's rules and that it would be in the public interest to grant Blue Valley's waiver request. According to NECA, "the proposed addition of lines to the common line pool will not significantly impact common line pool revenue requirements and will not impose any undue administrative burdens on NECA."³⁷ Based on NECA's representation in its letter, we conclude that including the acquired access lines in the NECA carrier common line tariff represents a minimal increase in NECA common line pool participation. Also, we believe that it would be administratively burdensome for Blue Valley to develop and file its own interstate tariff until July 1, 2006 for a relatively small number of access lines. Consequently, we find that Blue Valley presents special circumstances to justify a waiver of section 69.3(e)(11). Moreover, we believe that a waiver of section 69.3(e)(11) will be in the public interest because Blue Valley will be able to devote additional resources to providing improved telecommunications services to the affected rural areas that, absent the waiver, may otherwise be spent preparing a tariff filing that will be effective only until the next NECA access tariff period begins on July 1, 2006. We therefore conclude that good cause exists to grant a waiver of section 69.3(e)(11) to Blue Valley.

IV. OTHER MATTERS

13. Section 61.45(d) of the Commission's rules grants us discretion to require price cap carriers to make adjustments to their price cap indices to reflect cost changes resulting from rule waivers.³⁸ Accordingly, we require United to adjust its price cap indices to reflect the removal of the transferred access lines from its Kansas study area.

14. Finally, on May 11, 2001, the Commission adopted an order requiring incumbent LECs to freeze, on an interim basis, the Part 36 jurisdictional separations factors beginning July 1, 2001.³⁹ In the *Separations Freeze Order*, the Commission addressed how an incumbent LEC acquiring exchanges from another incumbent LEC shall recalculate its frozen separations factors.⁴⁰ Accordingly, Blue Valley is required to recalculate its jurisdictional separations factors pursuant to the *Separations Freeze Order* and the Commission's rules.⁴¹

³⁵ *Id.*

³⁶ See Letter from Richard A. Askoff, Executive Director, Regulatory and Government Relations, National Exchange Carrier Association, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 96-45 (filed May 4, 2005).

³⁷ *Id.*

³⁸ See 47 C.F.R. § 61.45(d).

³⁹ See generally *Jurisdictional Separations and Referral to the Federal-State Joint Board*, Report and Order, CC Docket No. 80-286, 16 FCC Rcd 11382 (2001) (*Separations Freeze Order*). See also 47 C.F.R. § 36.3(c) and (d).

⁴⁰ See *Separations Freeze Order*, 16 FCC Rcd at 11405-7, paras. 48-53.

⁴¹ See 47 C.F.R. § 36.3(d).

V. ORDERING CLAUSES

15. 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 joint petition for waiver of the study area boundary freeze as codified in Part 36, Appendix-Glossary, of the Commission's rules, filed by United Telephone Company of Kansas and Blue Valley Telecommunications, Inc., on January 10, 2005, IS GRANTED, as described herein.

16. 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 69.3(e)(11) of the Commission's rules, 47 C.F.R. § 69.3(e)(11), filed by Blue Valley Telecommunications, Inc. on January 10, 2005, IS GRANTED, as described herein.

17. 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, 1.3, 36.3(d), and 36.3(e) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 1.3, 36.3(d), and 36.3(e), that Blue Valley Telecommunications, Inc. SHALL ADJUST its jurisdictional separations factors to reflect this transaction, consistent with this Order.

18. 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, 1.3, and 61.43 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 1.3, and 61.43, that United Telephone Company of Kansas SHALL ADJUST its price cap indices in its annual price cap filing to reflect cost changes resulting from this transaction, consistent with this Order.

FEDERAL COMMUNICATIONS COMMISSION

Thomas J. Navin
Chief
Wireline Competition Bureau