

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

In the Matter of)
Madison River Telephone Company, LLC)
MebTel, Inc. d/b/a MebTel Communications)
and)
BellSouth Telecommunications, Inc.) 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 Madison River Telephone Company, LLC, its wholly owned subsidiary MebTel, Inc. d/b/a MebTel Communications (Madison River) and BellSouth Telecommunications, Inc. (BellSouth) (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 BellSouth to remove two exchanges comprising approximately 3,522 access lines from its North Carolina study area. This waiver also will permit Madison River to add these exchanges to its MebTel study area in North Carolina. We also grant Madison River 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.; Madison River Telephone Company, LLC, MebTel, Inc. d/b/a MebTel Communications and BellSouth Telecommunications, Inc., Joint Petition for Waiver of the Definition of "Study Area" of the Appendix-Glossary of Part 36 of the Commission's Rules, Petition for Waiver of Section 69.3(e)(11) of the Commission's Rules, CC Docket No. 96-45 (filed January 27, 2005) (Petition). Madison River owns and operates, as an interstate average schedule incumbent local exchange carrier (LEC), approximately 12,200 access lines in the state of North Carolina. Madison River intends to convert its North Carolina study area to cost basis settlements on or before the effective date of the acquisition. BellSouth currently owns and operates as a price cap incumbent LEC approximately 1,915,062 access lines in the state of North Carolina. See Petition at 2-3.

2 Madison River is acquiring the Milton and Gatewood exchanges from BellSouth. See id. at 3.

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 acquiring 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:* Madison River and BellSouth filed a joint petition for a waiver of the study area boundary freeze on January 27, 2005. On March 1, 2005, the Wireline Competition Bureau (Bureau) released a public notice seeking comment on the petition for waivers.⁹ A study area

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, section 54.305 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). 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 *Madison River Telephone Company, LLC, MebTel, Inc. d/b/a MebTel Communications and BellSouth Telecommunications, Inc. Seek Waiver of the Study Area Boundary Freeze as Codified in Part 36 and Waiver of Section 69.3(e)(11)*, CC Docket No. 96-45, Public Notice, DA 05-521 (rel. March 1, 2005). Pay Tel Communications, Inc. (Pay Tel) filed comments in opposition of the transfer of control of the Milton and Gatewood

(continued...)

waiver would permit BellSouth to alter the boundaries of its North Carolina study area by removing the two exchanges that it is transferring to Madison River. The study area waiver also would permit Madison River to add the acquired exchanges to its existing North Carolina 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 Madison River may be eligible for additional support for new investment pursuant to the Commission's "safety valve" rules and for additional ICLS.¹²

5. *Standards for Waiver.* Generally, the Commission may waive its rules for good cause shown.¹³ The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.¹⁴ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.¹⁵ 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.¹⁶

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.¹⁷ 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.¹⁸ 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

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exchanges. See Pay Tel Comments. We note that the Bureau has granted transfer of control of the exchanges. See *Nonstreamlined Domestic 214 Application Granted*, Public Notice, DA 05-1086 (rel. April 14, 2005).

¹⁰ Specifically, the Petitioners state that Madison River will provide the customers with new services from a locally-based carrier specializing in meeting the communications needs of the rural communities and Madison River will introduce digital subscriber line and voice mail services. See Petition at 7.

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

¹² See Petition at 6. See 47 C.F.R. §§ 54.305(d)-(f) and 54.902(b).

¹³ 47 C.F.R. § 1.3.

¹⁴ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

¹⁵ *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.

¹⁶ 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*).

¹⁷ 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).

¹⁸ See 47 C.F.R. §§ 36.601, *et seq.*

growth for rural carriers and an inflation factor.¹⁹ 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.²⁰ Subsequently, the Commission adopted section 54.305.²¹ 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.²² As a result, the one-percent guideline no longer operates as 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 BellSouth to alter the boundaries of its existing North Carolina study area by removing the two exchanges that it is transferring to Madison River. We also find that good cause exists to permit Madison River to add the two acquired exchanges to its existing North Carolina 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 3,522 lines that BellSouth is transferring to Madison River, section 54.305(b) of the Commission's rules limits high-cost loop support and local switching support.²³ Accordingly, Madison River is limited to the same per-line levels of support that BellSouth was receiving prior to the transfer. Although Madison River may be eligible for safety valve support for investments in the acquired lines, there is nothing in this record to suggest such eligibility would significantly increase the high-cost fund or would come close to the one percent threshold.²⁴ As stated above, ICLS is not subject to the limitations of section 54.305(b) of the Commission's rules.²⁵ The Petitioners estimate that as a result of this transaction Madison River's ICLS will increase by \$47,244 annually.²⁶ The Petitioners also estimate that BellSouth's interstate access support (IAS) will be reduced by \$117,800 annually as a result of this transaction.²⁷ 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.

¹⁹ See 47 C.F.R. §36.603.

²⁰ See *PTI/Eagle Order*, 10 FCC Rcd at 1773, paras. 13-15.

²¹ 47 C.F.R. § 54.305.

²² See 47 C.F.R. § 54.305(b).

²³ See *id.*

²⁴ In reaching this conclusion, we note that the proposed study area waiver directly involves the transfer of only approximately 3,522 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).

²⁵ See *supra* note 6.

²⁶ See Letter from David Cosson, Kraskin, Moorman & Cosson, LLC (counsel for Madison River), to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 96-45 (filed May 25, 2005).

²⁷ *Id.* As an interstate price cap LEC, BellSouth is eligible for IAS. See 47 C.F.R. §§ 54.800, *et seq.*

9. *Position of State Commission.* On April 4, 2005, the North Carolina Utilities Commission filed a letter with the Commission stating that it does not oppose the granting of the requested study area waiver.²⁸ 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 BellSouth to remove from its North Carolina study area the Milton and Gatewood exchanges and to permit Madison River to add the acquired exchanges to its existing North Carolina study area. The Petitioners state that Madison River will provide the customers with new services from a locally-based carrier specializing in meeting the communications needs of the rural communities and Madison River will introduce digital subscriber line and voice mail services.²⁹ Based on the totality of these representations, we conclude that the transfer of the Milton and Gatewood exchanges to Madison River 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.³⁰ 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.³¹ Because the next annual access tariff filing effective date is July 1, 2006,³² Madison River 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, Madison River has requested a waiver of section 69.3(e)(11) of the Commission's rules.³³ The waiver would enable Madison River to include the acquired access lines in the NECA carrier common line tariff upon the closing date of its acquisition transaction with BellSouth. The Petition indicates that the inclusion of the small number of access lines that it is acquiring from BellSouth in the NECA carrier common line tariffs would represent a minimal increase in NECA common line pool participation.³⁴ NECA has indicated that it has no objection to the inclusion of the acquired lines in the NECA common line tariff.³⁵

²⁸ See Letter from James Y. Kerr II, Commissioner, North Carolina Utilities Commission, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 96-45 (filed April 4, 2005).

²⁹ See Petition at 7.

³⁰ See 47 C.F.R. § 69.3(a).

³¹ 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).

³² See 47 C.F.R. § 69.3(a).

³³ See Petition at 7-8.

³⁴ *Id.*

³⁵ 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).

B. DISCUSSION

12. We find that Madison River 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 Madison River'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."³⁶ 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 Madison River to develop and file its own interstate tariff until July 1, 2006 for a relatively small number of access lines. Consequently, we find that Madison River 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 Madison River 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 Madison River.

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.³⁷ Accordingly, we require BellSouth to adjust its price cap indices to reflect the removal of the transferred access lines from its North Carolina 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, 2001.³⁸ In the *Separations Freeze Order*, the Commission addressed how an incumbent LEC acquiring exchanges from another incumbent LEC shall recalculate its frozen separations factors.³⁹ Accordingly, Madison River is required to recalculate its jurisdictional separations factors pursuant to the *Separations Freeze Order* and the Commission's rules.⁴⁰

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 petition for waiver of the study area boundary freeze as codified in Part 36, Appendix-Glossary, of the Commission's rules, filed by Madison River Telephone Company, LLC, MebTel, Inc. d/b/a MebTel Communications and BellSouth Telecommunications, Inc., on January 27, 2005, IS GRANTED, as described herein.

16. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 5(c), 201, and 202 of the

³⁶ *Id.*

³⁷ See 47 C.F.R. § 61.45(d).

³⁸ 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).

³⁹ See *Separations Freeze Order*, 16 FCC Rcd at 11405-7, paras. 48-53.

⁴⁰ See 47 C.F.R. § 36.3(d).

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 Madison River Telephone Company, LLC, MebTel, Inc. d/b/a MebTel Communications on January 27, 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 Madison River Telephone Company, LLC, MebTel, Inc. d/b/a MebTel Communications, 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 BellSouth Telecommunications, Inc., 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