

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

In the Matter of)
)
Gorham Telephone Company, Inc., and Rural)
Telephone Service Company, Inc.) CC Docket No. 96-45
)
Joint Petition for Waiver of the Definition of)
"Study Area" Contained in Part 36, Appendix-)
Glossary of the Commission's Rules; Petition for)
Waiver of Section 69.3(e)(11) of the)
Commission's Rules)

ORDER

Adopted: October 25, 2006

Released: October 25, 2006

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order, we grant a joint request from Gorham Telephone Company, Inc., (Gorham) and Rural Telephone Service Company, Inc., (RuralTel) (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. The study area waiver will permit RuralTel to remove two exchanges comprising approximately 272 access lines from its Kansas study area. The waiver also will permit Gorham to add these exchanges to its existing Kansas study area. We also grant Gorham 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

1 See 47 C.F.R. Part 36 App.; Gorham Telephone Company, Inc. and Rural Telephone Service Company, 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 June 15, 2006) (Petition). The Petition also includes a request by Gorham for waiver of section 69.3(e)(11) of the Commission's rules. Id. On July 25, 2006, the Wireline Competition Bureau (Bureau) released a public notice seeking comment on the petitions. See Wireline Competition Bureau Seeks Comment on the Petition of Gorham Telephone Company, Inc., and Rural Service Telephone Company, Inc., to Waiver the Study Area Boundary Freeze, as Codified, in Part 36, and Gorham Telephone Company's Request for Waiver of Section 69.3(e)(11) of the Commission's Rules, CC Docket No. 96-45, Public Notice, 21 FCC Rcd 8514 (2006). We note that the Bureau has granted transfer of control of the exchanges. See Notice of Streamlined Domestic 214 Applications Granted, WC Docket Nos. 06-112, 06-116, & 06-117, Public Notice, 21 FCC Rcd 8709 (2006).

2 Gorham is acquiring the Luray and Paradise exchanges from RuralTel. See Petition at 1. The two exchanges subject to this transaction were recently acquired by RuralTel from United Telephone Company of Kansas and are included as part of a companion study area waiver granted today by the Bureau. See Rural Telephone Service Company, Inc., Nex-Tech, Inc., United Telephone Company of Kansas, and United Telephone Company of Eastern Kansas, Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary of the Commission's Rules; Petition for Waiver of Section 69.3(e)(11) of the Commission's Rules, CC Docket No. 96-45, Order, DA 06-2111 (rel. Oct. 25, 2006) (RuralTel-United Waiver Order).

pool administrator.³

II. STUDY AREA WAIVER

A. Background

2. Study Area. A study area is a geographic segment of an incumbent local exchange carrier's (LEC) telephone operations. 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 universal service 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

4. The Petition for Waiver. Gorham and RuralTel filed a joint petition for a waiver of the study area boundary freeze on May 31, 2006. A study area waiver would permit RuralTel to alter the boundaries of its Kansas study area by removing the two exchanges that it is transferring to Gorham and would permit Gorham to add the acquired exchanges to its existing Kansas study area.⁸ The Petitioners state that granting of the waiver is in the public interest.⁹ Moreover, the Petitioners state that the change in study area boundaries will not adversely affect the universal service fund because of the operation of section 54.305 of the Commission's rules.¹⁰ The Petitioners note, however, that Gorham may be eligible for additional support for new investment pursuant to the Commission's "safety valve" rules and for additional interstate common line support (ICLS).¹¹ The State Corporation Commission of the State of

³ See 47 C.F.R. § 69.3(e)(11).

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, which is not subject to the limitations set forth in section 54.305(b). See 47 C.F.R. § 54.902.

⁷ See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 8942-43 (1997) (subsequent history omitted).

⁸ Including the exchanges recently acquired from United, RuralTel owns and operates approximately 16,000 access lines in 41 exchanges in one study area in the state of Kansas. See Petition at 2; *RuralTel-United Waiver Order* at paras. 1, 4. Gorham owns and operates approximately 330 access lines in one study area in the state of Kansas. See Petition at 2.

⁹ See Petition at 5-6. See also *infra* para. 10.

¹⁰ See Petition at 4-5. See also 47 C.F.R. § 54.305(b).

¹¹ See Petition at 4-5; 47 C.F.R. §§ 54.305(d)-(f) and 54.902(b).

Kansas (Kansas Commission) has approved Gorham's application for a certificate of convenience and authority to provide incumbent LEC services in the two exchanges.¹²

5. 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) the state commission having regulatory authority over the transferred exchanges does not object to the transfer; and (3) the transfer must be in the public interest.¹³ In evaluating whether a study area boundary change will have an adverse impact on the universal service fund, we analyze whether a study area waiver will result in an annual aggregate shift in an amount equal to or greater than one percent of high-cost support in the most recent calendar year.¹⁴ The Commission began applying the one-percent guideline in 1995 to limit the potential adverse impact of exchange sales on the overall fund, also recognizing that, because high-cost loop support is capped, an increase in the draw of any fund recipient necessarily reduces the amounts that other LECs receive from the fund.¹⁵ After the Commission adopted section 54.305, it continued to apply the one-percent guideline to determine the impact on the universal service fund in light of the adoption of safety valve support and ICLS.¹⁶

B. Discussion

6. 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 RuralTel to alter the boundaries of its existing Kansas study area by removing the two exchanges that it is transferring to Gorham.¹⁷ We also find that good cause exists to permit Gorham 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 study area waiver is warranted.

¹² See *infra* note 24.

¹³ 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*).

¹⁴ See *id.* at 1774, paras. 14-17. See also *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).

¹⁵ See *PTI/Eagle Order*, 10 FCC Rcd at 1773, para. 13.

¹⁶ See *supra* note 6. See also *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers in CC Docket No. 00-256, Federal-State Joint Board on Universal Service in CC Docket No. 96-45, Access Charge Reform for Incumbent Local Exchange Carriers Subject to Rate-of-Return Regulation in CC Docket No. 98-77, Prescribing the Authorized Rate of Return From Interstate Services of Local Exchange Carriers in CC Docket No. 98-166*, Second Report and Order and Further Notice of Proposed Rulemaking, Fifteenth Report and Order, and Report and Order, 16 FCC Rcd 19613, 19667-69, paras. 155-57 (2001), *recon. pending*.

¹⁷ Generally, the Commission may waive its rules for good cause shown. See 47 C.F.R. § 1.3. The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest. See *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*). In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. See *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. 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.

7. 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 272 lines that RuralTel is transferring to Gorham, section 54.305(b) of the Commission's rules limits high-cost loop support and local switching support.¹⁸ Therefore, Gorham is limited to the same per-line levels of support that RuralTel was receiving prior to the transfer.¹⁹ Although Gorham may be eligible for safety valve support for investments in the acquired lines, there is nothing in the record to suggest that such eligibility would significantly increase the federal universal service fund or would come close to the one-percent threshold.²⁰ As stated above, ICLS is not subject to the limitations of section 54.305(b) of the Commission's rules.²¹ The Petitioners state that as a result of this transaction, for the year 2007, Gorham's ICLS will increase by approximately \$39,500 and RuralTel's ICLS will be reduced by approximately \$132,000.²² As a result, there is a net decrease of approximately \$92,500 in universal service support as a result of this transaction. We find, therefore, that this transaction will have no adverse impact on the universal service fund.

8. To further ensure that this transaction is in the public interest, we direct Gorham, as part of its annual universal service data submissions, to file a schedule showing its methodology for excluding the costs associated with the acquired access lines from the costs associated with Gorham's pre-acquisition exchange.²³

9. State Commission Position. On August 9, 2006, the Kansas Commission issued an order approving Gorham's application for a certificate of convenience and authority to provide incumbent LEC services in the two exchanges.²⁴ 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 RuralTel to remove from its Kansas study area the two exchanges and to permit Gorham to add the acquired exchanges to its existing Kansas study area. Importantly, Gorham intends to make several improvements to the facilities in the Paradise and Luray exchanges, including installing fiber and/or Digital Subscriber Line technology throughout the acquired

¹⁸ See 47 C.F.R. § 54.305(b).

¹⁹ We note that because RuralTel's high cost support for the Luray and Paradise exchanges were already subject to section 54.305 as a result of the exchanges being recently acquired from United, the same per-line support that United received prior to its transaction with RuralTel is passed to Gorham. See *supra* note 2; *RuralTel-United Waiver Order* at note 22.

²⁰ In reaching this conclusion, we note that the proposed study area waiver directly involves the transfer of only approximately 272 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).

²¹ See *supra* note 6.

²² See Petition at Exhibit A.

²³ See 47 C.F.R. §§ 36.611, 54.301.

²⁴ See *In the Matter of the Joint Application of Rural Telephone Service Company, Inc. (RuralTel) and Gorham Telephone Company, Inc. (Gorham) for Permission of RuralTel to Cease Operating as a Telephone Public Utility in Two Kansas Exchanges It Is Acquiring from United and to Grant Gorham a Certificate of Public Convenience for the Same Two Exchanges, and for Authority to Transfer Property, Plant and Equipment of RuralTel Located in the Two Exchanges to Gorham and Complete All Matters Incident to the Transfer*, State Corporation Commission of the State of Kansas, Docket No. 06-GRHT-1095-COC, Order Approving Stipulation and Agreement and Granting Certificate to Gorham Telephone Company, Inc., Upon the Consummation of the Sale of Exchanges (Aug. 9, 2006).

exchanges and providing services over such facilities at affordable and competitive prices.²⁵ Because expanding the availability of broadband communications is one of the Commission's top priorities, we believe that Gorham's proposed improvements should benefit consumers in the exchanges at issue. Based on the totality of these representations, we conclude that the transfer of the two exchanges to Gorham will serve the public interest by, among other things, providing increased access to advanced services in rural areas.

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.²⁶ 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.²⁷ Because the next annual access tariff filing effective date is July 1, 2007, Gorham 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.²⁸ To avoid the burdens associated with filing its own tariff during this interim period, Gorham has requested a waiver of section 69.3(e)(11) of the Commission's rules.²⁹ The waiver would enable Gorham to include the acquired access lines in the NECA carrier common line tariff. The Petitioners indicate 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.³⁰

B. Discussion

12. We find that Gorham has demonstrated 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 Gorham's waiver request.³¹ NECA has indicated that it has no objection to including the acquired exchanges in the NECA tariff, as this would create no undue administrative burden for NECA.³² 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 Gorham to develop and file its own interstate tariff for use only until July 1, 2007, for a relatively small number of access lines. Consequently, we find that Gorham 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) is in the public interest because it allows Gorham to devote its

²⁵ *Id.* at 6.

²⁶ *See* 47 C.F.R. § 69.3(a).

²⁷ 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).

²⁸ *See* 47 C.F.R. § 69.3(a).

²⁹ *See* Petition at 6-7.

³⁰ *Id.*

³¹ *See supra* note 17.

³² *See* Letter from Tracey E.J. Saltenberger, NECA, to Marlene H. Dortch, Federal Communications Commission, CC Docket No. 96-45 (filed August 25, 2006).

resources to providing improved telecommunications services to the affected rural areas rather than spending those resources on a tariff filing. We therefore conclude that good cause exists to grant a waiver of section 69.3(e)(11) to Gorham.

IV. OTHER MATTERS

13. 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, 2001.³³ In the *Separations Freeze Order*, the Commission addressed how an incumbent LEC acquiring exchanges from another incumbent LEC shall recalculate its frozen separations factors.³⁴ Accordingly, Gorham is required to recalculate its jurisdictional separations factors pursuant to the *Separations Freeze Order* and the Commission's rules.³⁵

V. ORDERING CLAUSES

14. 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 Gorham Telephone Company, Inc., and Rural Telephone Service Company, Inc., on June 15, 2006, IS GRANTED, as described herein.

15. 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 Gorham Telephone Company, Inc., SHALL SUBMIT, as part of its annual universal service data submissions to the fund administrator, a schedule showing the methodology for excluding costs associated with the acquired access lines from costs associated with its pre-acquisition study area.

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 clarification or waiver of section 69.3(e)(11) of the Commission's rules, 47 C.F.R. § 69.3(e)(11), filed by Gorham Telephone Company, Inc., on June 15, 2006, IS GRANTED, as described herein.

³³ See *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*). On May 15, 2006, the Commission extended the separations freeze an additional three years. See *Jurisdictional Separations and Referral to the Federal-State Joint Board, Order and Further Notice of Proposed Rulemaking*, CC Docket No. 80-286, 21 FCC Rcd 5516 (2006). See also 47 C.F.R. § 36.3(c) and (d).

³⁴ See *Separations Freeze Order*, 16 FCC Rcd at 11405-07, paras. 48-53.

³⁵ See 47 C.F.R. § 36.3(d).

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 Gorham Telephone Company, Inc., SHALL ADJUST its jurisdictional separations factors to reflect this transaction, consistent with this Order.

FEDERAL COMMUNICATIONS COMMISSION

Thomas J. Navin
Chief
Wireline Competition Bureau