

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

In the matter of	)	
	)	
Valor Communications Group, Inc.	)	WCB/Pricing No. 05-37
(New Valor)	)	
	)	
Petition for Waiver	)	
	)	
	)	
	)	

**ORDER**

**Adopted: January 31, 2006**

**Released: January 31, 2006**

By the Chief, Wireline Competition Bureau:

**I. INTRODUCTION**

1. By this Order, we grant New Valor’s petition<sup>1</sup> requesting that the Commission waive relevant portions of the Commission’s “all-or-nothing” rule codified in section 61.41 of the Commission’s rules.<sup>2</sup> New Valor will be formed as a result of the merger of Valor Communications Group, Inc. (“Valor”), and the wireline properties of ALLTEL Holding Corp., a wholly-owned subsidiary of ALLTEL Corporation (“ALLTEL”).<sup>3</sup> With this waiver, New Valor will be able to continue to operate the ALLTEL and Valor properties under the existing regulatory regime applicable to each of the local exchange companies, which includes existing waivers under which ALLTEL and Valor each hold incumbent local exchange companies – some of which operate under price cap regulation and others that operate under rate-of-return regulation.<sup>4</sup> As discussed below, we find that grant of the unopposed waiver request would be in

<sup>1</sup> Valor Communications Group, Inc., Petition for Waiver (filed Dec. 22, 2005) (“Petition”), *erratum*, (Dec. 30, 2005).

<sup>2</sup> 47 C.F.R. § 61.41.

<sup>3</sup> New Valor states that it likely will be renamed after consummation of the merger. Petition at 1 n.5. Valor serves approximately 550,000 access lines in four states, and ALLTEL serves approximately 2.9 million access lines in fifteen states. Petition at 2. The associated domestic section 214 application for transfer of control was granted on January 25, 2006. *Wireline Competition Bureau Grants Consent for Transfer of Control of Valor Communications Group, Inc. and Its Subsidiaries From Valor Communications Group, Inc. to New Valor, and the Transfer of Control of ALLTEL Holding Corp. and Its Subsidiaries From ALLTEL Corporation to New Valor*, WC Docket No. 05-354, Public Notice, DA 06-154 (WCB/CPD rel. Jan. 25, 2006).

the public interest, subject to the outcome of the pending review of the all-or-nothing rule.<sup>5</sup>

## II. BACKGROUND

2. Section 61.41 of the Commission's rules, commonly referred to as the "all-or-nothing rule," is designed to ensure that all of a carrier's study areas and affiliates are subject to a single form of pricing regulation – either price cap regulation or rate-of-return regulation. Specifically, the rule provides that, if an individual rate-of-return carrier or study area converts to price cap regulation, all of its affiliates or study areas also must do so, except for those using average schedules.<sup>6</sup> This section also provides that, if a price cap carrier enters into a merger, acquisition, or similar transaction, it must continue to operate under price cap regulation after the transaction.<sup>7</sup> In addition, when rate-of-return and price cap carriers merge or acquire one another, the rate-of-return carrier must convert to price cap regulation within one year,<sup>8</sup> except that rate-of-return carriers may bring recently acquired price cap lines back to rate-of-return regulation without obtaining a waiver.<sup>9</sup> The all-or-nothing requirements address two concerns the Commission has regarding mergers and acquisitions involving price cap and non-price cap companies. First, a carrier might attempt to shift costs from its price cap affiliates to its non-price cap affiliates.<sup>10</sup> This would allow a non-price cap affiliate to charge higher rates than otherwise possible to recover its higher revenue requirement while simultaneously increasing profits of a price cap affiliate as a result of its cost savings.<sup>11</sup> Second, a carrier might attempt to "game the system" by switching back and forth between rate-of-return regulation and price cap regulation.<sup>12</sup> A rate-of-return carrier could build a large rate base in order to raise rates, and then return to price cap regulation and reduce costs to an efficient level, thereby maximizing its profits at the expense of ratepayers.<sup>13</sup>

3. The all-or-nothing rule is under consideration in the *MAG Second Further*

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(...continued from previous page)

<sup>4</sup> See *Valor Telecommunications, LLC Petition for Waiver of Section 61.41 of the Commission's Rules*, WCB/Pricing 02-26, Memorandum Opinion and Order, 17 FCC Rcd 25544 (WCB 2002) ("*Valor Waiver Order*"); *ALLTEL Corporation Petition for Waiver of Section 61.41, et al.*, CCB/CPD Nos. 01-28, 99-01, 01-36, 01-30, and 99-36, Memorandum Opinion and Order, 17 FCC Rcd 27696 (WCB 2002) ("*ALLTEL Waiver Order*").

<sup>5</sup> See *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers; Federal-State Joint Board on Universal Service*, CC Docket Nos. 00-256 and 96-45, Report and Order and Second Further Notice of Proposed Rulemaking, 19 FCC Rcd 4122 (2004) ("*MAG Second Further Notice*").

<sup>6</sup> 47 C.F.R. § 61.41(b).

<sup>7</sup> 47 C.F.R. § 61.41(c)(1).

<sup>8</sup> 47 C.F.R. § 61.41(c)(2).

<sup>9</sup> 47 C.F.R. § 61.41(c)(3); *MAG Second Further Notice*, 19 FCC Rcd at 4129-31, paras. 10-15.

<sup>10</sup> *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers; Federal-State Joint Board on Universal Service*, CC Docket Nos. 00-256 and 96-45, Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 19613, 19781, para. 261 (2001) ("*MAG Further Notice*").

<sup>11</sup> *Id.*

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

<sup>13</sup> *Id.*

*Notice*.<sup>14</sup> In the *Notice*, the Commission stated that it was looking at the issues surrounding alternative regulation plans for rate-of-return carriers and the modification or retention of the all-or-nothing rule as it relates to the ability of rate-of-return carriers to elect to adopt an alternative regulation plan for only some of its study areas.<sup>15</sup> The Commission tentatively concluded that any alternative regulation plan would be optional on the part of the rate-of-return carrier and would permit a rate-of-return carrier to elect participation in the alternative plan by study area.<sup>16</sup> To provide a degree of certainty to mergers and acquisitions, the Commission also tentatively concluded that the CALLS plan, the access charge and universal service plan applicable to price cap carriers, was not designed to be open to new carriers or study areas.<sup>17</sup> Finally, addressing the outstanding waivers of the all-or-nothing rule, the Commission tentatively concluded that, whatever final rule it adopts with respect to the election of alternative regulation on a study area basis, that rule should also apply when carriers under different regulatory plans come together by merger or acquisition.<sup>18</sup> The Commission accordingly determined that all outstanding interim waivers of the all-or-nothing rule that depend on the Commission's review of the all-or-nothing rule shall continue in effect until the Commission issues a final order.<sup>19</sup>

### III. DISCUSSION

4. Generally, the Commission's rules may be waived for good cause shown.<sup>20</sup> As noted by the Court of Appeals for the D.C. Circuit, however, agency rules are presumed valid.<sup>21</sup> The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.<sup>22</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>23</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>24</sup>

5. New Valor states that granting a waiver here is consistent with Commission

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<sup>14</sup> *MAG Second Further Notice*, 19 FCC Rcd at 4153-64, paras. 69-94. The examination was a continuation of the inquiry begun in the *MAG Further Notice* 16 FCC Rcd at 19703-11, paras. 213-240, 19717-24, paras. 260-71.

<sup>15</sup> *MAG Second Further Notice*, 19 FCC Rcd at 4161, para. 85.

<sup>16</sup> *Id.* at 4161, para. 86.

<sup>17</sup> *Id.* at 4163, para. 93 (discussing *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Low-Volume Long Distance Users, and Federal-State Joint Board On Universal Service*, CC Docket Nos. 96-262, 94-1, 99-249, and 96-45, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, 15 FCC Rcd 12962 (2000) (subsequent history omitted)).

<sup>18</sup> *Id.* at 4164, para. 94.

<sup>19</sup> *Id.* at 4129 n.40.

<sup>20</sup> 47 C.F.R. § 1.3.

<sup>21</sup> *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

<sup>22</sup> *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

<sup>23</sup> *WAIT Radio*, 418 F.2d at 1159; *Northeast Cellular Telephone*, 897 F.2d at 1166.

<sup>24</sup> *Id.*

policy and prior waiver decisions regarding the all-or-nothing rule.<sup>25</sup> It notes that, in the *MAG Second Further Notice*, the Commission specifically stated that, “until such time as the all-or-nothing rule may be further revised, carriers can continue to petition for waiver of the all-or-nothing rule so that they may operate affiliates under both rate-of-return and price cap regulation.”<sup>26</sup> New Valor states that the Commission has routinely granted or extended waivers to carriers, including ALLTEL and Valor, as a result of the pending rulemaking on the all-or-nothing rule.<sup>27</sup> Furthermore, New Valor argues that strict application of the all-or-nothing rule would be inconsistent with the purposes and structure of price cap regulation. It asserts that its small size and dispersed service areas make it especially unsuited for price cap regulation, which was designed for the operating characteristics of much larger carriers.<sup>28</sup> New Valor states that the merger does not change these characteristics.<sup>29</sup> New Valor also states that the vast majority of its exchange areas will have fewer than 2000 access lines and that the average density is 25 access lines per square mile, compared to 128 for the non-rural carriers.<sup>30</sup>

6. New Valor further asserts that the policy concerns underlying the all-or-nothing rule are not implicated by this waiver request. The increasing vigor of both inter- and intramodal competition and the Commission’s pro-competitive policies have suppressed cross-subsidization incentives and undercut cost shifting opportunities, according to New Valor.<sup>31</sup> New Valor also states that it is not attempting to game the system. It only seeks to maintain the status quo and will not be shifting between price cap and rate-of-return regulation.<sup>32</sup>

7. Finally, New Valor contends that a waiver would promote the public interest. Under the waiver, customers of New Valor’s price cap and rate-of-return companies, according to New Valor, will continue to enjoy the respective benefits of those policies rather than having to move all study areas to either price caps or rate of return.<sup>33</sup> It notes that, under the tentative conclusion in the *MAG Second Further Notice*, it would not receive universal service support under the CALLS regime applicable to price cap carriers.<sup>34</sup> New Valor states that it will improve broadband penetration to the rural public, will realize significant economic, marketing, and technical service synergies and efficiencies, and will benefit from the substantial managerial and technical expertise and resources of the combined operations.<sup>35</sup> Thus, New Valor states that there is good cause for the requested waiver. No party has opposed the grant of the requested

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

<sup>26</sup> *Id.*; *MAG Second Further Notice*, 19 FCC Rcd at 4129 n.39.

<sup>27</sup> Petition at 4 (citing *ALLTEL Waiver Order*, 17 FCC Rcd 27696 (the order also extended outstanding waivers for ALLTEL/Aliant, CenturyTel, and Puerto Rico Telephone Company pending the review of the all-or-nothing rule); *Valor Waiver Order*, 17 FCC Rcd 25544).

<sup>28</sup> Petition at 9-10.

<sup>29</sup> Petition at 5, 10-11.

<sup>30</sup> Petition at 12.

<sup>31</sup> Petition at 5.

<sup>32</sup> Petition at 5, 12-16.

<sup>33</sup> *Id.* at 16-17.

<sup>34</sup> *Id.* at 16; *MAG Second Further Notice*, 19 FCC Rcd at 4164, para. 94.

<sup>35</sup> Petition at 17-18.

waiver.

8. We find good cause to grant New Valor's unopposed request for waiver of the Commission's all-or-nothing rule. When the Commission adopted the all-or-nothing rule, it noted that it would entertain requests for waiver of the rule because efficiencies created by the purchase and sale of exchanges may outweigh the threat of cost shifting or gaming the system.<sup>36</sup> In addition, the Commission has stated that, although it believes that incentive-based regulation is generally superior to rate-of-return regulation, it is sensitive to the needs of smaller carriers.<sup>37</sup> In prior waiver orders, the Commission has observed that the public interest can be served by allowing smaller carriers to purchase exchanges.<sup>38</sup> The Commission also has noted that rate-of-return carriers confront numerous serious and complex issues regarding universal service support whenever the all-or-nothing rule requires them to convert to price cap regulation.<sup>39</sup> Here, we believe that the benefits to be gained from the proposed merger outweigh any threat of cost shifting or gaming the system. To safeguard against possible gaming that could result from attempts to elect price cap regulation while these rules are under review, we extend to New Valor the requirement already applicable to ALLTEL to seek prior Commission approval before seeking to elect price cap regulation.<sup>40</sup> At that time, we can determine whether the transaction raises concerns addressed by section 61.41.

9. We do not find that the proposed merger presents significantly different circumstances from those analyzed in the earlier separate ALLTEL and Valor waivers so as to warrant a different conclusion from that reached in those decisions. The Commission currently is considering whether to modify or eliminate the all-or-nothing rule.<sup>41</sup> Under these special circumstances, we do not believe the public interest would be served by requiring New Valor to undertake the burdens of converting its merged exchanges to price cap regulation based on a rule that may be modified or eliminated in the near future. For the above reasons, we find good cause to grant the unopposed New Valor request for waiver of the Commission's all-or-nothing rule

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<sup>36</sup> See *Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Order on Reconsideration, 6 FCC Rcd 2637, 2706, n.207 (1991) (subsequent history omitted) (*LEC Price Cap Reconsideration Order*).

<sup>37</sup> See *ALLTEL Corporation Petition for Waiver of Section 61.41 of the Commission's Rules and Applications for Transfer of Control*, CCB/CPD No. 99-1, Memorandum Opinion and Order, 14 FCC Rcd 14191, 14202, para. 34 (1999).

<sup>38</sup> See *Citizens Telecommunications Company of Wyoming and Qwest Corp. Joint Petition for Waiver of the Definition of "Study Area" Contained in the Part 36 Appendix-Glossary of the Commission's Rules*, CC Docket No. 96-45, Order, 16 FCC Rcd 3563, 3567, para. 11 (Com. Car. Bur. 2001) (*Citizens Waiver Order*); *Valor Telecommunications of Texas and GTE Southwest Inc. Joint Petition for Waiver of the Definition of "Study Area" Contained in the Part 36 Appendix-Glossary of the Commission's Rules*, CC Docket No. 96-45, Order, 15 FCC Rcd 15816, 15821, para. 11 (Com. Car. Bur. 2000). See generally *Price Cap Performance Review for Local Exchange Carriers*, CC Docket No. 94-1, First Report and Order, 10 FCC Rcd 8961, 9102, para. 323 (1995); *Price Cap Performance Review for Local Exchange Carriers*, CC Docket No. 94-1, Notice of Proposed Rulemaking, 9 FCC Rcd 1687, 1704, para. 88 (1994).

<sup>39</sup> See, e.g., *Valor Waiver Order*, 17 FCC Rcd at 25547, para. 8; *ALLTEL Waiver Order*, 17 FCC Rcd at 27704, para. 20 (citing *Puerto Rico Telephone Company Petition for Waiver of Section 61.41 or Section 54.303(a) of the Commission's Rules*, CCB/CPD No. 99-36, Order, 15 FCC Rcd 9680, 9682-83 para. 5 (2000)).

<sup>40</sup> See *ALLTEL Waiver Order*, 17 FCC Rcd at 27699, para. 9.

<sup>41</sup> See *MAG Second Further Notice*, 19 FCC Rcd at 4153-64, paras. 69-94.

and to allow it to retain its current regulatory status until the Commission concludes its review of the all-or-nothing rule in the *MAG Second Further Notice*.<sup>42</sup>

#### IV. ORDERING CLAUSES

10. 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 the Commission's rules, 47 C.F.R. § 61.41, filed by New Valor on December 22, 2005, IS GRANTED to the extent described herein.

FEDERAL COMMUNICATIONS COMMISSION

Thomas J. Navin  
Chief, Wireline Competition Bureau

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<sup>42</sup> In the event the Commission modifies the all-or-nothing rule, we anticipate that it will provide carriers with some period of time to evaluate any changes to the rule before carriers are required to elect a particular form of pricing regulation. In the event the Commission chooses not to modify the rule, we expect that it will specify the time period in which carriers with pending waivers must come into compliance with the rule.