

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

In the Matter of
Federal-State Joint Board on Universal Service
Eagle Telephone System, Inc.
and
Midvale Telephone Exchange, Incorporated
Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36 of the Commission's Rules
CC Docket No. 96-45

ORDER

Adopted: May 19, 2010

Released: May 19, 2010

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this order, we grant a joint request from Eagle Telephone System, Inc. (Eagle) and Midvale Telephone Exchange, Incorporated (Midvale) (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 Midvale to remove the Connor Creek area located in northeast Oregon and a small portion of Idaho from its Idaho study area and permit Eagle to add that same territory to its existing Oregon study area.

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. The Commission took this action to prevent carriers from establishing high-cost exchanges within existing service territories as separate study areas merely to maximize their receipt of universal service

1 See 47 C.F.R. Part 36 App.; Eagle Telephone System, Inc. and Midvale Telephone Exchange, Incorporated, 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 Oct. 29, 2008) (Petition).

2 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); 47 C.F.R. Part 36 App.

high-cost support. A carrier must therefore apply to the Commission for a waiver of the study area boundary freeze if it wishes to acquire or transfer exchanges.³

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 universal service high-cost support for which the acquired exchanges were eligible prior to their transfer.⁴ This rule is meant to discourage a carrier from acquiring an exchange merely to increase its share of universal service high-cost support.⁵

4. *The Petition for Waiver.* Eagle and Midvale filed a joint petition for a waiver of the study area boundary freeze on October 29, 2008.⁶ On March 19, 2009, the Wireline Competition Bureau (Bureau) released a public notice seeking comment on the petition.⁷ The area to be transferred from Midvale to Eagle, known as Conner Creek, is located in northeast Oregon and a small portion of Idaho and is adjacent to Eagle's Richland exchange in Oregon.⁸ Although the Conner Creek area is primarily located in Oregon, it has been recognized as part of Midvale's Idaho study area.⁹ The Petitioners state that it is proving to be difficult for Midvale to serve this area because of the distance from Midvale's other operations to the remote area in northeast Oregon and that a service call requires a trip of approximately three hours each way.¹⁰ Because of the distance, Eagle has begun to handle service calls on behalf of Midvale.¹¹ The Petitioners state that Eagle has built or is building new state-of-the-art facilities throughout the area which will allow customers to receive advanced services for the first time, including access to broadband services.¹² The Petitioners state that there are approximately 22 homes in the Conner Creek area and it is estimated that in five years there will be approximately 50 homes in the area.¹³ The Oregon Public Utility Commission (Oregon Commission) has issued an order approving the transfer of the subject area.¹⁴

³ *Part 67 Order*, 50 Fed. Reg. at 939, para. 1.

⁴ 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.

⁵ *See Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 8942-43, para. 308 (1997) (subsequent history omitted).

⁶ Eagle operates, as an incumbent LEC, approximately 445 access lines in one study area in the state of Oregon. Midvale operates, as an incumbent LEC, approximately 247 access lines in one study area in Oregon and approximately 1,102 access lines in one study area in Idaho. *See* Petition at 2.

⁷ *See Comment Sought on the Joint Petition of Eagle Telephone System, Inc. and Midvale Telephone Exchange, Incorporated, to Waive the Study Area Boundary Freeze as Codified in Part 36 of the Commission's Rules*, CC Docket No. 96-45, Public Notice, 24 FCC Rcd 3253 (Wireline Comp. Bur. 2008). No comments were filed.

⁸ *See* Petition at 4. The physical boundaries of the territory subject to this transaction are specified in Exhibit 1 of the Petition.

⁹ The customers reside in Oregon with the exception of one customer in Idaho. *See* Petition at 2.

¹⁰ *See id.* at 4.

¹¹ *Id.*

¹² *Id.* at 5.

¹³ *Id.*

¹⁴ *See* Petition at Exhibit 2 (attaching Eagle Telephone System, Inc., and Midvale Telephone Exchange, Application for the Unallocation, Transfer and Allocation of Certain Territory, Order No. 08-404, UA 114 (Oregon Commission, Aug. 2, 2008) (Oregon Order)).

5. Standard for Waiver. In evaluating petitions seeking a waiver of the rule freezing study area boundaries, the Commission applies a three-part 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.¹⁵ In evaluating whether a study area boundary change will have an adverse impact on the universal service fund, the Commission analyzes 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.¹⁶

B. Discussion

6. For the reasons discussed below, we conclude that the Petitioners have satisfied the three-part standard that the Commission applies to determine whether a waiver is warranted. We therefore 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 the Petitioners to exchange territories as described above.¹⁷

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. Section 54.305(b) of the Commission's rules limits high-cost loop support and local switching support for acquired exchanges to the same per-line support levels for which the exchanges were eligible prior to their transfer.¹⁸ Eagle is therefore limited to the same per-line levels of high-cost loop support and local switching support that Midvale was receiving prior to the transfer.¹⁹ Although Eagle may be eligible for safety valve and interstate common line 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.²⁰ We

¹⁵ 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*).

¹⁶ 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).

¹⁷ Generally, the Commission's rules may be waived for good cause shown. 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. *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. *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166. Waiver of the Commission's rules is appropriate only if both (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest. *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008), *Northeast Cellular*, 897 F.2d at 1166.

¹⁸ 47 C.F.R. § 54.305(b).

¹⁹ The Petitioners state that Midvale receives total support of \$83.17 per-line per month for the 22 working loops in the Conner Creek area. See Petition at 6.

²⁰ In reaching this conclusion, we note that the proposed study area waiver directly involves the transfer of only approximately 22 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). We find it highly unlikely that any increases in high-cost support, as a result of this transaction, could approach the current one-percent threshold of \$49 million. See Universal Service Administrative Company, Federal Universal Service

(continued....)

find that the circumstances in the instant Petition meet our existing framework and precedents for granting such a waiver.²¹

8. *Position of State Commission.* The Oregon Commission previously issued an order approving the transfer.²² Thus, we find that the state commission with regulatory authority over the transferred area does not oppose the transfer.²³

9. *Public Interest Analysis.* We are persuaded that the public interest is served by grant of the proposed waiver of the study area freeze rule to permit Midvale to transfer the area known as Conner Creek to Eagle as described. The Conner Creek area is some distance from Midvale's other operations, but adjacent to Eagle's Richland exchange. Eagle is in a better position to service the area. Based on the totality of these circumstances, we conclude that the transfer of the Conner Creek area will serve the public interest.²⁴

III. ORDERING CLAUSES

10. 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 Eagle Telephone System, Inc. and Midvale Telephone Exchange, Incorporated on October 29, 2008, IS GRANTED.

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Support Mechanism, Fund Size Projection for the Second Quarter 2010, Table HC02 (Jan. 29, 2010) (projecting total annual high-cost support of approximately \$4.9 billion).

²¹ See, e.g., *M&L Enterprises, Inc., d/b/a Skyline Telephone Company, Petition for Waiver of Sections 36.611, 36.612, and 69.2 (hh) of the Commission's Rules*, CC Docket No. 96-45, Order, 19 FCC Rcd 6761 (2004); *Qwest Corporation, Pine Telephone Systems, Inc., Oregon Telephone Corporation, Qwest Corporation, Pine Telephone, Inc., Joint Petition for Waivers of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary of the Commission's Rules*, CC Docket No. 96-45, Order, 24 FCC Rcd 4986 (Wireline Comp. Bur. 2009).

²² See *supra* note 14.

²³ The territory to be transferred includes approximately 21 customers located in Oregon and one customer in Idaho. See Petition at 2, 5. Because the customers are primarily located in Oregon with only one customer in Idaho and Eagle's study area is in Oregon, we find that approval of this transaction is not necessary from the Idaho Public Utilities Commission.

²⁴ We note that the Bureau has granted transfer of control of certain assets from Midvale to Eagle. See *Notice of Domestic Section 214 Authorization Granted*, WC Docket No. 09-6, Public Notice, 24 FCC Rcd 2882 (Wireline Comp. Bur. 2009).

11. IT IS FURTHER ORDERED, pursuant to section 1.102(b)(1) of the Commission's rules, 47 C.F.R. § 1.102(b)(1), that this order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Sharon E. Gillett
Chief
Wireline Competition Bureau