

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

In the Matter of)
Federal-State Joint Board on Universal Service) CC Docket No. 96-45
Beaver Creek Cooperative Telephone Company)
Qwest Corporation)
Joint Petition for Waivers of the Definition of)
"Study Area" Contained in Part 36, Appendix-)
Glossary of the Commission's Rules)

ORDER

Adopted: February 4, 2011

Released: February 4, 2011

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this order, we grant a joint petition of Beaver Creek Cooperative Telephone Company (Beaver Creek) and Qwest Corporation (Qwest) 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 Qwest to remove a territory from its Oregon study area and permit Beaver Creek to add that same territory to its existing Oregon study area.

II. 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, to prevent the establishment of high-cost exchanges within existing service territories as separate study areas merely to maximize universal service 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. 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

1 See 47 C.F.R. Part 36 App.; Beaver Creek Cooperative Telephone Company and Qwest Corporation, Joint Petition for Waiver of the Definition of "Study Area" of the Appendix-Glossary in Part 36 of the Commission's Rules, CC Docket No. 96-45 (filed June 29, 2007) (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); see also 47 C.F.R. Part 36 App.

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

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.* Beaver Creek and Qwest filed a joint petition for a waiver of the study area boundary freeze on June 29, 2007.⁶ On October 5, 2007, the Wireline Competition Bureau (Bureau) released a public notice seeking comment on the petition.⁷ The petitioners request a waiver to add an area outside of Oregon City, Oregon, known as the Fairway Downs Subdivision and surrounding environs, to Beaver Creek's existing Oregon study area and to remove this area from Qwest's existing Oregon study area.⁸ No facilities or customers will be transferred from Qwest to Beaver Creek.⁹

5. The area subject to this proceeding was approved for transfer from Qwest to Beaver Creek by the Oregon Public Utility Commission (Oregon Commission) in 1997 based on Qwest's representation that it had no customers in the area to be transferred to Beaver Creek.¹⁰ It subsequently was discovered that Qwest had a number of customers within the transferred area.¹¹ In 2004, the Oregon Commission concluded that Beaver Creek had made substantial investment in the area and that the public interest would be best served by Beaver Creek assuming carrier of last resort obligations.¹² Currently, there are 314 customers served by Beaver Creek in the subject area.¹³

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 Beaver Creek operates, as an incumbent LEC, approximately 4,400 access lines in one study area in Oregon; Qwest operates, as an incumbent LEC, approximately 950,000 access lines in one study area in the state of Oregon. See Petition at 2.

⁷ See *Comment Sought on the Petition of Beaver Creek Cooperative Telephone Company and Qwest Corporation to Waive the Study Area Boundary Freeze, as Codified in Part 36 of the Commission's Rules*, CC Docket No. 96-45, Public Notice, 22 FCC Rcd 18078 (Wireline Comp. Bur. 2007). No comments were filed in this proceeding.

⁸ See Petition at 1-2.

⁹ *Id.* at 5; Letter from Daphne E. Butler, Qwest Corporation, to Marlene H. Dortch, Federal Communications Commission, CC Docket No. 96-45 (Apr. 8, 2008) (Qwest Letter).

¹⁰ See Petition at 4-5, Exhibit 2 (attaching *Application of U S West Communications, Inc., for an Order Transferring Right to Exclusively Served Territory to Beaver Creek Cooperative Telephone Company*, Public Utility Commission of Oregon, Docket No. UA 55, Order No. 97-297 (Aug. 6, 1997)). According to the Petition, at the time of the transfer in 1997, Beaver Creek served no customers in the area. See Petition at 6.

¹¹ See Petition at 5. According to the Petition, Qwest had no more than 150 unidentified customers in the subject area at the time of the initial transfer.

¹² See Petition at 5; see also *U S West Telecommunications Inc. (Qwest Corporation) Application for an Order Transferring Right to Exclusively Served Territory, Fairway Downs, Oregon City, to Beaver Creek Telephone Company*, Public Utility Commission of Oregon, Docket No. UA 55, Order No. 04-225 (Apr. 27, 2004).

¹³ See Petition at 5-6. Qwest states that it currently does not provide any telecommunications services in the subject area. See Qwest Letter.

6. *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.¹⁴ 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.¹⁵

III. DISCUSSION

7. For the reasons discussed below, we conclude that the petitioners have satisfied the three-part standard that the Commission applies to determine whether a study area 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 transfer the territory as described above.¹⁶

8. *Impact on the Universal Service Fund.* 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.¹⁷ Section 54.305(c) of the Commission's rules, however, states that a carrier that entered into a binding agreement to buy or acquire exchanges from an unaffiliated carrier prior to May 7, 1997, will receive universal service support for the newly acquired lines based upon the average cost of all its lines.¹⁸ Qwest filed its application with the Oregon Commission to transfer the territory to Beaver Creek on April 25, 1997. Thus, the evidence indicates that parties had a binding agreement before May 7, 1997 and therefore section 54.305 does not apply in this instance. Nevertheless, the petitioners indicate that in 2006, the year before the petition was filed, Beaver Creek received approximately \$146,000 in universal service high-cost support for the 314

¹⁴ 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, at para. 5 (1995) (*PTI/Eagle Order*).

¹⁵ 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).

¹⁶ 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.

¹⁷ 47 C.F.R. § 54.305(b); *Sacred Wind Communications, Inc. and Qwest Corporation, Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary of the Commission's Rules, Sacred Wind Communications, Inc., Related Waivers of Parts 36, 54, and 69 of the Communication's Rules*, Order, CC Docket No. 96-45, 21 FCC Rcd 9227, 9235-36, para. 20 (Wireline Comp. Bur. 2006) (finding that section 54.305 applied to Sacred Wind's study area transaction when Sacred Wind acquired exchange facilities and customers from Qwest, but did not acquire an entire exchange),

¹⁸ See 47 C.F.R. § 54.305(c).

working loops currently in the Fairway Downs area.¹⁹ Petitioners have not provided universal service high-cost support amounts for subsequent years or estimates for future years. However, we expect that the additional annual high-cost support would be only a fraction of one percent of total annual high-cost support.²⁰

9. *Position of State Commission.* The Oregon Commission previously issued orders approving the transfer at issue.²¹ Thus, we find that the state commission with regulatory authority over the transferred territory does not oppose the transfer.

10. *Public Interest Analysis.* We are persuaded that the public interest is served by grant of the proposed waiver. The petitioners assert that the Oregon Commission concluded that Beaver Creek had made substantial investment in the area, including bringing broadband access to customers, and that the public interest would be best served by the area being served by Beaver Creek as the incumbent LEC with carrier of last resort obligations.²² Based on the totality of these circumstances, we conclude that the transfer of this territory from Qwest to Beaver Creek, as described in the petition, will serve the public interest by continuing to provide basic service and access to broadband services.

11. *Effective Date of Study Area Waiver.* Although Beaver Creek began providing telecommunications services in the Fairway Downs area, an area that was in Qwest's Oregon study area, without the necessary study area waiver, we grant Qwest and Beaver Creek a study area waiver consistent with our decision in *Qwest/Pine/Oregon*.²³ We find that the transfer of territory from Qwest to Beaver

¹⁹ See Petition at 6.

²⁰ For 2011, Beaver Creek's approximately 4,000 lines in its Oregon study area, are projected to receive \$1.3 million in high-cost support. See Universal Service Administrative Company, Federal Universal Service Support Mechanism, Fund Size Projection for the First Quarter 2011, Table HC01 (Nov. 2, 2010). Thus, the projected support for the 314 lines in the territory subject to this petition would be less than \$44 million, which is one percent of the approximately \$4.4 billion that is projected for total annual high-cost support for 2011. *Id.* at Table HC02.

²¹ See *supra* notes 10 and 12.

²² See Petition at 5.

²³ See *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) (*Qwest/Pine/Oregon*). In *Qwest/Pine/Oregon*, we granted the parties a study area waiver to transfer territories from Qwest to Pine Telephone Systems, Inc. (Pine), from Qwest to Oregon Telephone Corporation (Oregon Telephone), and from Oregon Telephone to Pine. Qwest, Pine, and Oregon Telephone had previously transferred these territories without the requisite study area waiver in 1999, which at the time were unserved territories, under the assumption that the applicable precedent appeared to indicate that study area waivers were not required for the transfers of unserved areas. *Id.* at 4990, para 9. Qwest, Pine, and Oregon Telephone subsequently requested study area waivers, in light of the Commission's 2004 *Skyline Order* in which the Commission concluded that treating an area as unserved when it is part of an existing study area would be inconsistent with the purpose of the study area freeze. *Id.* at 4987-8, para. 4; *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, 6765, para. 11 (2004) (*Skyline Order*). The *Skyline Order* clarified that "a study area waiver must be filed with the Commission where a company is seeking to create a new study area from within one or more existing study areas." *Skyline Order*, 19 FCC Rcd at 6767, para. 13.

Creek shall be effective as of August 6, 1997, the date the Oregon Commission approved the transfer.²⁴ Although we are granting a study area retroactive to 1997, Beaver Creek cannot seek additional universal service support as a result of the action we take today for any period prior to the effective date of this order.

IV. ORDERING CLAUSES

12. 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 to the authority delegated in 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 Beaver Creek Cooperative Telephone Company and Qwest Corporation on June 29, 2007, IS GRANTED, as described herein.

13. 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

²⁴ See *supra* note 10. Although, we are granting an effective date for the transfer that was approximately fourteen years ago, the applicable precedent at the time indicated that a study area waiver was not required for the transfers or additions of unserved areas. See *supra* note 23.