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

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
Accipiter Communications, Inc. Petition for Temporary Waiver of Certain High-Cost Universal Service Rules	))))	

ORDER

Adopted: December 20, 2012 **Released: December 20, 2012**

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order, the Wireline Competition Bureau (Bureau) approves limited, interim relief from certain rules governing the calculation of high-cost universal service support for Accipiter Communications, Inc. (Accipiter).[1] As discussed below, Accipiter recently filed an amendment to its Petition, in addition to other data, which is still under consideration by the Bureau. We grant this limited, interim relief because we find that it is necessary and will ensure the continuation of Accipiter's wireline voice and broadband service during the pendency of our review. This interim support will be subject to true-up following the Bureau's final determination on the merits of the Petition.

II. BACKGROUND

2. In the *USF/ICC Transformation Order*, the Commission comprehensively reformed universal service funding for high-cost, rural areas, adopting fiscally responsible, accountable, incentive-based policies to preserve and advance voice and broadband service while ensuring fairness for consumers who pay into the universal service fund.[2] Among other things, the Commission imposed a presumptive per line cap of $250 per month on total high-cost universal service support for all eligible telecommunications carriers and found that support in excess of the $250 cap should not be provided without further justification.[3] Consistent with the Commission's goal to provide reasonable transitions so companies affected by reform have time to adapt to changing circumstances,[4] the Commission phased in the $250 cap over three years.[5] From July 1, 2012 through June 30, 2013, carriers will receive no more than $250 per line per month plus two-thirds of the difference between their uncapped per-line amount

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[1] Accipiter Communications, Inc. Petition for Temporary Waiver of the Commission's Rules, WC Docket No. 10-90 et al. (filed Apr. 18, 2012) (Accipiter Petition or Petition).

[2] *See Connect America Fund et al.*, WC Docket No. 10-90, et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17670, para. 11 (2011) (*USF/ICC Transformation Order*); *pets. for review pending sub nom.* In re: FCC 11-161, No. 11-9900 (10th Cir. filed Dec. 8, 2011).

[3] *USF/ICC Transformation Order*, 26 FCC Rcd at 17765, para. 274.

[4] *Id.* at 17671, para. 11.

[5] *Id.* at 17765, para. 275.

and $250. From July 1, 2013 through June 30, 2014, carriers will receive no more than $250 per line per month plus one-third of the difference between their uncapped per-line amount and $250. Beginning July 1, 2014, carriers shall receive no more than $250 per line per month.

3. The Commission reformed high-cost loop support (HCLS) by adopting a benchmarking rule that is intended to moderate the expenses of rate-of-return carriers with very high costs compared to their similarly situated peers, while further encouraging other rate-of-return carriers to invest, and thereby advance broadband deployment.[6] The new rule responded to problematic incentives and inequitable distribution of support created by the prior rules, under which some carriers with high costs could receive reimbursement for up to 100 percent of their marginal expenditures on loop costs reimbursed from the federal universal service fund. The Commission adopted the benchmarking rule to reverse these incentives and address these problems by, for the first time, placing reasonable overall limits on costs eligible for reimbursement through HCLS and redistributing freed-up HCLS to carriers that stay within these limits to encourage new broadband investment. The Commission delegated to the Bureau the authority to adopt and implement a specific methodology within the parameters set forth by the Commission after receiving public input in response to the proposal.[7] On April 25, 2012, the Bureau adopted a specific methodology for establishing benchmarks that will be used in the formula that determines HCLS.[8]

4. The Commission also instituted a waiver process to allow "any carrier negatively affected by the universal service reforms . . . to file a petition for waiver that clearly demonstrates that good cause exists for exempting the carrier from some or all of those reforms, and that waiver is necessary and in the public interest to ensure that consumers in the area continue to receive voice service."[9] In the *USF/ICC Transformation Order*, the Commission stated that "[w]e envision granting relief only in those circumstances in which the petitioner can demonstrate that the reduction in existing high-cost support would put consumers at risk of losing voice services, with no alternative terrestrial providers available to provide voice telephony service."[10] In the recent *Fifth Order on Reconsideration*, the Commission

[6] *See id.* at 17741-47, paras. 210-26.

[7] *See id.* at 17743-44, paras. 214, 217.

[8] *See generally Connect America Fund; High-Cost Universal Service Support*, WC Docket Nos. 10-90, 05-337, Order, 27 FCC Rcd 4235 (2012) (*HCLS Benchmarks Implementation Order*). The Commission is considering pending petitions for reconsideration and applications for review of the *HCLS Benchmarks Implementation Order*.

[9] *USF/ICC Transformation Order*, 26 FCC Rcd at 17839-40, paras. 539, 540. The Commission did not intend to replace the ordinary standard for granting waivers under section 1.3 of the Commission's rules, but rather to provide guidance in advance to potential applicants of the circumstances that would be persuasive and compelling grounds for grant of a waiver under that waiver standard to assist potential applicants in effectively formulating their waiver petitions. *See Connect America Fund et al.*, WC Docket No 10-90 et al., Fifth Order on Reconsideration, 27 FCC Rcd 14549, 14556-57, para. 19 (2012) (*Fifth Order on Reconsideration*). Generally, the Commission's rules may be waived if good cause is 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. *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.

[10] *USF/ICC Transformation Order*, 26 FCC Rcd at 17840, para. 540.

clarified that waiver petitions will be evaluated not just based on the impact of reforms on voice service, but also on the continued operation of existing broadband-capable networks and the effect on consumer rates.[11] The Commission also stated that although carriers were not necessarily entitled to receive support under the Commission's previous rules while their waiver petitions were pending, to the extent immediate or interim relief is necessary while a waiver petition is evaluated, such relief can be provided on a case-by-case basis.[12] Finally, the Commission also noted that it did not anticipate granting waivers of the $250 cap for an undefined duration, but would expect carriers to periodically re-validate any need for support above the $250 cap.[13] The Commission provided guidance on the types of information that would be relevant for such waiver requests and delegated authority to the Bureau and the Wireless Telecommunications Bureau to rule on all such requests.[14]

5. Accipiter is an incumbent local exchange carrier providing voice telephony and high-speed Internet service to a study area of 1,010 square miles northwest of Phoenix, Arizona.[15] On April 18, 2012, Accipiter filed a petition seeking a temporary waiver of the $250 per line limit on high cost universal service support and a postponement of the HCLS benchmarking rule, which had not yet been implemented at that time.[16] Following the release of the Bureau's *HCLS Benchmarks Implementation Order*, Accipiter amended its petition to, among other things, seek relief from the HCLS benchmarking rule.[17] Finally, on November 1, 2012, Accipiter filed a second amendment to its waiver petition.[18] In this Second Amendment, Accipiter states that it seeks a waiver of the $250 per line limit and waiver of the HCLS benchmarking rule through December 31, 2014.[19]

6. Accipiter generally argues that the $250 per line limit and the benchmark limits should not apply to it because, unlike most other rural, rate of return carriers, it is a growing company with rapidly increasing subscribership. Accipiter argues that it had significantly higher costs while it was expanding, especially when calculated on a per-line basis. For example, Accipiter's study area loop count increased by 46 percent from its 2009 cost study to its 2010 cost study.[20] Moreover, Accipiter argues that while in recent years it made significant investments to extend its network into previously unserved areas, it is now positioned to add customers with relatively smaller incremental capital expenditures and

[11] *Fifth Order on Reconsideration*, 27 FCC Rcd at 14557, para. 20.

[12] *Id*. at 14558, para. 23.

[13] *USF/ICC Transformation Order*, 26 FCC Rcd at 17766, para. 278.

[14] *Id.* at 17840-42, paras. 542, 544.

[15] Petition at 6. Accipiter was incorporated in 1995 and is authorized by the Arizona Corporation Commission to serve portions of Maricopa and Yavapai counties in the state.

[16] *Id*. at 2.

[17] *See* Accipiter Communications Inc. Petition for Waiver of the Commission's Rules Implementing Reform of Universal Service Support, Amendment to Petition for Temporary Waiver, WC Docket No. 10-90 at 1-2 (filed July 19, 2012) (First Amendment).

[18] Accipiter Communications Inc. Petition for Waiver of the Commission's Rules Implementing Reform of Universal Service Support, Second Amendment to Petition for Temporary Waiver, WC Docket No. 10-90 (filed Nov. 1, 2012) (Second Amendment).

[19] *Id*. at 1.

[20] Petition at 29.

operating expenses.[21] For this reason, Accipiter states that with ongoing subscriber growth, it expects that by 2015 it will no longer require a waiver.[22]

7. In its Second Amendment to its Petition, Accipiter provided updated financial forecasts that reflected, among other things, an unexpected reduction in revenues from the NECA settlements pool.[23] As a result of these reductions, Accipiter now argues that without a waiver, it **[REDACTED]**.[24]

III. DISCUSSION

8. We find that providing limited, interim relief to Accipiter is necessary pending further review of its Petition and supplemental information recently filed at the Bureau's request. We note that Accipiter recently filed responses to Bureau requests, and the Bureau needs time to evaluate the filings and determine whether additional information is necessary to make a final determination on its Petition. As specifically discussed below, we will provide a fixed amount of $383,679 plus $27,337 per month beginning January 2013, for a period of up to 6 months, or until the Bureau resolves Accipiter's Petition, whichever comes first.[25] This amount is intended to maintain the status quo in Accipiter's service area during the pendency of our review, and we find that it is necessary in this instance to provide such interim relief for the reasons described below. This interim relief will be subject to true-up following the Bureau's final determination on the merits of the Petition.[26]

9. After review of the financial forecasts submitted in Accipiter's Second Amendment, and Revenue Clarification Letter,[27] we find that interim relief in this amount is appropriate for several reasons. First, we observe that Accipiter is a rapidly growing company with financial projections that project it will, within a short timeframe, no longer have its support limited by either the Commission's $250 per line overall limit or the HCLS benchmarks rule.[28] Second, based on our initial review, Accipiter's expenses appear to be reasonable, although we have not completed that review. For example, according to data submitted by NECA, companies with 500 to 1500 loops have corporate operations expenses that

[21] *Id*. at 3.

[22] Second Amendment at 1. The National Telecommunications Cooperative Association and Cox filed in response to Accipiter's petition. *See generally* Comments of the National Telecommunications Cooperative Association, WC Docket No 10-90, WT Docket No. 10-208, at 1 (filed June 5, 2102); Cox Communications, Inc. Opposition to Petition for Waiver, WC Docket No. 10-90, WT Docket No. 10-208 (filed June 5, 2012) (Cox Opposition). Those filings focused on the ultimate merits of Accipiter's petition, rather than on possible interim support, and we thus do not comprehensively address those filings here.

[23] Second Amendment at 3-4; Exhibits 1-2.

[24] *Id*. at 4.

[25] These figures were derived from financial statements provided by Accipiter in a November 30, 2012 *ex parte* filing. *See* Second Amendment, Exhibits 1 and 2 and Letter from Kenneth C. Johnson, Counsel to Accipiter, Bennett & Bennett, PLLC, to Marlene H. Dortch, Secretary, Federal Communications Commission (filed Nov. 30, 2012) (Revenue Clarification Letter).

[26] The amount of interim relief we provide to Accipiter relies upon forecasts that Accipiter provided to the Bureau. This amount is subject to a true-up based on the Bureau's further review of the record and/or other developments that occur during the period of interim relief.

[27] *See* Second Amendment at Exhibits 1 and 2; Revenue Clarification Letter at Exhibit 1.

[28] *See* Petition at 4.

are on average 40 percent of their total loop revenue requirement.[29] NECA reported that Accipiter had 935 loops as of year-end 2011, and Accipiter's 2011 corporate operations expenses were 19 percent of its total loop revenue requirement, which is significantly lower than similarly sized peers.[30] Finally, we also find that limited interim relief is necessary **[REDACTED]** until we have an opportunity to complete our evaluation of its Petition.

10. We emphasize that we have not completed our review, and have not fully assessed the merits of the Petition, including the reasonableness of Accipiter's expenses or the objections raised by Cox.[31] Accordingly, the interim support we approve today does not prejudge the ultimate disposition of Accipiter's Petition.

11. Amount of Support. We direct the Universal Service Administrative Company (USAC) to disburse a fixed amount of $383,679, plus $27,337 per month beginning in January 2013, for a period of 6 months or whenever the Bureau acts on Accipiter's Petition, whichever comes first, to maintain the status quo for Accipiter's wireline voice and broadband service while we complete review of its Petition. This amount will be paid on an interim basis in addition to support provided pursuant to the Commission's existing rules.

12. The interim support amount we provide in this Order reflects the portion of Accipiter's projected operating expenses that is not covered by existing support and other revenues. To calculate this amount of interim support, we relied on financial data and forecasts provided by Accipiter in its November 30 Revenue Clarification Letter.[32] For the $383,679 fixed amount, we relied on the line item reflecting the **[REDACTED]** as a result of the imposition of the $250 per line cap, plus the line item reflecting **[REDACTED]** as a result of the *HCLS Benchmarks Order*,[33] as the amount to be paid in a lump sum for that period. For the monthly support amount, we relied on the line item reflecting the **[REDACTED]** as a result of the imposition of the $250 per line cap. We divided this line item by six to obtain the monthly amount of $27,337. We also took into consideration Accipiter's financial projections, including both non-USF revenues and federal universal service support, and expenses, including RUS debt payments, to determine the amount that it needs to maintain the status quo in its service area during the pendency of our review.

13. The estimate does not incorporate any final determination of the reasonableness of Accipiter's costs. We are currently in the process of evaluating and verifying the reasonableness of both the nature and level of Accipiter's costs. We also expect Accipiter to actively pursue any and all cost

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[29] *See* National Exchange Carrier Association, Inc., Universal Service Fund Data: NECA Study Results, 2012 Report (filed Sept. 28, 2012), http://www.fcc.gov/wcb/iatd/neca.html. 2013 support is based on 2011 cost data filed Sept. 28, 2012.

[30] *See id.*; *see also* Petition at Exhibit 3.

[31] Cox argues that Accipiter is using federal universal service and RUS loans to build its network in suburban areas that do not need support, and where Cox is competing without a subsidy. Cox Opposition at 4-8. However, Accipiter does appear to serve areas where there is no terrestrial alternative, and thus as a matter of ensuring continued service in those areas, we find this interim relief appropriate without reaching the ultimate merits of this issue. We will, however, address Cox's concerns when we make a final determination on the merits of Accipiter's Petition.

[32] *See* Revenue Clarification letter at Exhibit 1.

[33] *See HCLS Benchmarks Implementation Order*, 27 FCC Rcd at 4277-4300, Appendix B.

cutting and revenue-generating measures to reduce its dependency on universal service support to the level of the cap.

14. Term of Support. Interim support will be paid in one lump sum of $383,679, and beginning in January 2013, an amount of $27,337 paid on a monthly basis for a period of 6 months or whenever the Bureau acts on Accipiter's Petition, whichever comes first. We emphasize that we do not intend to extend support beyond six months, by which time the Bureau expects to have completed the review of Accipiter's Petition.[34]

15. As a condition of interim support, Accipiter must maintain its existing services. To the extent that Accipiter must discontinue, reduce or impair service, it must coordinate with the Bureau on a transition plan in order to minimize customer disruption.

IV. CONCLUSION

16. For the reasons discussed above, the Bureau hereby authorizes Accipiter Communications, Inc. Interim Relief in the amount $383,679 plus $27,337 per month, for a period of six months or until the effective date of an order resolving Accipiter's Petition, whichever comes first.

V. ORDERING CLAUSES

17. IT IS ORDERED pursuant to authority contained in sections 4(i), 4(j) and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 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, and paragraph 544 of FCC 11-161, that USAC SHALL MAKE payment to Accipiter Communications, Inc. in accordance with the amount, terms and conditions described herein.

18. IT IS FURTHER ORDERED that, pursuant to section 1.103(a) of the Commission's rules, 47 C.F.R. § 1.103(a), this order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Julie A. Veach
Chief
Wireline Competition Bureau

[34] *See USF/ICC Transformation Order,* 26 FCC Rcd at 17842, para. 544 (providing schedule for public comment and review of waiver petitions).