

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

In the Matter of
Consolidated Communications Holdings, Inc.
Petition for Waiver of Section 61.41(c) of the
Commission's Rules
WC Docket No. 15-74

ORDER

Adopted: October 6, 2015

Released: October 6, 2015

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. By this order, we grant the petition of Consolidated Communications Holdings, Inc. (Consolidated) for waiver of section 61.41(c) of the Commission's rules, the price cap "all-or-nothing rule." On October 14, 2014, Consolidated, an incumbent local exchange carrier (ILEC) holding company with price cap subsidiaries, acquired control of three companies operating as rate-of-return carriers (the subsidiaries). Consolidated seeks a waiver of the all-or-nothing rule so that it can continue to operate these subsidiaries as rate-of-return carriers. As discussed below, we find that the public interest would be served by granting the requested waiver while the Commission is considering a number of regulatory reform proposals that could impact these subsidiaries.

II. BACKGROUND

2. Section 61.41 of the Commission's rules 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. This rule is commonly referred to as the "all-or-nothing" rule. Specifically, section 61.41 provides that, if an individual rate-of-return carrier or study area converts to price cap regulation, all of its affiliates or study areas must also do so, except for those using average schedules. This section also provides that, if a price cap carrier enters into a merger, acquisition, or similar transaction, it must

1 See 47 C.F.R. § 61.41; Petition of Consolidated Communications Holdings, Inc. for Waiver of Section 61.41(c) of the Communication's Rules (filed Mar.10, 2015) (Petition). The Bureau sought comment on the Consolidated petition on March 20, 2015. Wireline Competition Bureau Seeks Comment on Consolidated's Petition for Waiver of Section 61.41(c) of the Commission's Rules, WC Docket No. 15-74, Public Notice, 30 FCC Rcd 2648 (2015). No comments or replies were filed.

2 Consolidated gained indirect control of ILECs Mankato Citizens Telephone Company (Mankato), Mid-Communications, Inc. (Mid-Communications), and Heartland Telecommunications Company of Iowa (Heartland) (collectively, the Subsidiaries) through a merger with Enventis Corporation. Petition at 3; see Notice of Consummation, WC Docket No. 14-111 (filed Oct. 22, 2014). Mankato and Mid-Communications operate in Minnesota; Heartland operates in Iowa, South Dakota, and Minnesota. Petition at 3.

3 Petition at 2.

4 47 C.F.R. § 61.41.

5 47 C.F.R. § 61.41(b).

continue to operate under price cap regulation after the transaction.<sup>6</sup> 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>7</sup>

3. These 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. This would allow the rate-of-return affiliate to charge higher rates than would otherwise be permitted to recover its higher revenue requirement, while simultaneously increasing the profits of the price cap affiliate as a result of these cost savings. Second, a carrier might attempt to “game the system” by switching back and forth between rate-of-return regulation and price cap regulation. That is, a price cap carrier could convert to rate-of-return regulation prior to making large network investments and/or increase its operating costs to levels that would support significant rate increases and then, once rates are established, convert back to price cap regulation and reduce its costs to a more efficient level, thereby maximizing its profits at the expense of ratepayers.<sup>8</sup>

4. As a general matter, in recent years the Commission has been reviewing various aspects of the regulatory treatment of rate-of-return carriers and potential options for regulatory reform. In the *USF/ICC Transformation Order*,<sup>9</sup> the Commission established new rules requiring rate-of-return and price cap carriers to adjust many of their switched access charges while transitioning to bill-and-keep regulation.<sup>10</sup> As part of the transition plan, the Commission encouraged carriers to convert from rate-of-return to price cap regulation. The Commission, however, declined to detail a rule to govern such conversions, noting that future conversions from rate-of-return regulation to price cap regulation would be addressed through the waiver process.<sup>11</sup> For example, the Commission granted two petitions permitting carriers to convert from rate-of-return to price cap regulation subsequent to the *USF/ICC Transformation Order*.<sup>12</sup> In both instances, the Commission required the converting carriers to adopt the intercarrier compensation transition schedule applicable to price cap carriers, which significantly reduced the rates and shortened those carriers’ transition to bill-and-keep for terminating switched access rates.<sup>13</sup> The

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<sup>6</sup> 47 C.F.R. § 61.41(c)(1).

<sup>7</sup> 47 C.F.R. § 61.41(c)(2).

<sup>8</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 Further Notice of Proposed Rulemaking, 16 FCC Rcd 19613, 19781, para. 261 (2001).

<sup>9</sup> *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 (2011) (*USF/ICC Transformation Order*).

<sup>10</sup> See 47 C.F.R. §§ 51.907(b)-(c), 51.909(b)-(c). The Commission capped the majority of interstate and intrastate switched access rates as of December 29, 2011, and price cap carriers were required to remove their switched access services from the traffic-sensitive and trunking baskets. These switched access charges are effective on July 1<sup>st</sup> of each year. See 47 C.F.R. §§ 51.907(a), 51.909(a).

<sup>11</sup> See *USF/ICC Transformation Order*, 26 FCC Rcd at 17940, para. 814.

<sup>12</sup> *Joint Petition of Price Cap Holding Companies for Conversion of Average Schedule Affiliates to Price Cap Regulation and for Limited Waiver Relief; Consolidated Communications Companies Tariff F.C.C. No. 2; Frontier Telephone Companies Tariff F.C.C. No. 10; Windstream Telephone Systems Tariff F.C.C. No. 7*, WC Docket No. 12-63, Order, 27 FCC Rcd 15753 (2012) (*2012 Average Schedule Conversion Order*); *CenturyLink Petition for Conversion of Average Schedule Affiliates to Price Cap Regulation and for Limited Relief*, WC Docket No. 14-23, Order, 29 FCC Rcd 5140 (2014) (*CenturyLink Waiver Order*)

<sup>13</sup> See *2012 Average Schedule Conversion Order*, 27 FCC Rcd at 15759, para.13; *CenturyLink Waiver Order*, 29 FCC Rcd at paras. 11-17.

Commission also required the converting carriers to convert to the price cap recovery rules for non-CALLS study areas set forth in section 51.915.<sup>14</sup>

5. In the 2014 *Connect America FNPRM*,<sup>15</sup> the Commission asked whether rate-of-return carriers should be allowed to transition on a voluntary basis to an alternative rate regulation approach.<sup>16</sup> The Commission sought comment on alternative rate regulation approaches and the specific implementation details for rate-of-return carriers.<sup>17</sup> The Commission noted that it had previously sought comment on potential reforms that would provide support to rate-of-return carriers under mechanisms other than the current legacy mechanisms.<sup>18</sup> The Commission addressed the all-or-nothing rule in particular, inviting parties to comment on the appropriate regulatory treatment if an electing rate-of-return carrier later becomes affiliated with a price cap carrier.<sup>19</sup>

### III. DISCUSSION

6. While the Commission's rules are presumed valid,<sup>20</sup> they may be waived for good cause shown.<sup>21</sup> More specifically, 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 appropriate if special circumstances warrant a deviation from the general rule and such a deviation will serve the public interest.<sup>24</sup>

7. Consolidated maintains that its petition for waiver of the all-or-nothing rule would serve the public interest<sup>25</sup> and is consistent with prior Commission decisions granting similar waiver requests.<sup>26</sup> It argues that there is no reasonable basis for concern that Consolidated will be able to engage in the kinds of cost shifting that the all-or-nothing rule was intended to prevent.<sup>27</sup> Specifically, Consolidated cites to the fact that the carriers will continue to be subject to the jurisdiction of the Commission and the appropriate state commissions and that the carriers will maintain their own separate books of accounts.<sup>28</sup>

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<sup>14</sup> *2012 Average Schedule Conversion Order*, 27 FCC Rcd at 15763-64, para. 28; *CenturyLink Waiver Order*, 29 FCC Rcd at paras. 17.

<sup>15</sup> *Connect America Fund et al.*, CC Docket No. 01-92, *Report and Order, Seventh Order on Reconsideration and Further Notice of Proposed Rulemaking*, 29 FCC Rcd 7051 (2014) (*Connect America FNPRM*).

<sup>16</sup> *Connect America NPRM*, 29 FCC Rcd at 7139-40, para. 276.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 7140, para. 277.

<sup>19</sup> *Id.* at 7145, para. 298.

<sup>20</sup> *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

<sup>21</sup> 47 C.F.R. § 1.3.

<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> *Northeast Cellular Telephone*, 897 F.2d at 1166.

<sup>25</sup> Petition at 5-7.

<sup>26</sup> *Id.* at 2 n.3 (citing, e.g., *Iowa Telecommunications Services, Inc., Petition for Waiver of Section 61.41 of the Commission's Rules*, WC Docket No. 09-25, Order, 24 FCC Rcd 8963 (2009); *Valor Communications Group, Inc., WCB Pricing No. 05-37*, Order, 21 FCC Rcd 859 (2006) (*New Valor Order*)).

<sup>27</sup> Petition at 6.

<sup>28</sup> *Id.*

8. Moreover, Consolidated notes that the subsidiaries it acquired are small rural telephone companies and are not the type of company that the Commission has typically compelled to become a price cap carrier.<sup>29</sup> It states that requiring conversion of the subsidiaries would cause substantial financial and administrative burdens, particularly when the Commission may modify the rule in the future to make such conversion unnecessary.<sup>30</sup> Consolidated notes that there are a number of outstanding regulatory reform proposals for rate-of-return carriers and it is difficult to determine how these proposals may impact conversion of the subsidiaries to price cap regulation.<sup>31</sup>

9. We find good cause to grant Consolidated's request for waiver of the all-or-nothing rule. When the Commission adopted this rule, it noted that it would entertain requests for waiver of the rule where efficiencies created by the purchase and sale of exchanges may in particular cases outweigh the threat of cost shifting or gaming the system.<sup>32</sup> Consolidated explains that if it converts the acquired exchanges to price cap regulation it would be required to accelerate its switched access rate reductions and phase-out of CAF support, which will substantially increase its financial and administrative costs.<sup>33</sup> We do not believe the public interest would be served by requiring Consolidated to undertake the financial and administrative costs of converting the acquired rate-of-return exchanges to price cap regulation when the Commission is considering regulatory reforms of rate-of-return regulation and potentially modifying or eliminating the all-or-nothing rule. Moreover, we believe there is minimal threat that Consolidated will engage in cost shifting or system gaming because its subsidiaries will continue to be subject to the jurisdiction of the Commission, and the appropriate state commissions, and the carriers will operate in their own study areas and will maintain their own separate books of account, which would reveal any unlawful cost-shifting or gaming.<sup>34</sup> A waiver will permit Consolidated to retain the subsidiaries' current regulatory status while the Commission is considering these regulatory reform proposals. We emphasize that the relief granted in this Order is subject to any future reforms or rule revisions regarding intercarrier compensation, the regulation of special access services, price cap regulation, or universal service requirements that the Commission may adopt in the future.

#### 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, 202, and section 1.3 of the Commission's rules, 47 C.F.R. § 1.3, and pursuant to the authority delegated under sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, that the petition for waiver of the Commission's rules, 47 C.F.R. § 61.41(c), filed by Consolidated Communications Holdings, Inc., IS GRANTED, to the extent described herein.

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<sup>29</sup> Petition at 5.

<sup>30</sup> *Id.*

<sup>31</sup> Petition at 6.

<sup>32</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>33</sup> Petition at 5. We do note, however, that the Commission required a number of universal service modifications upon Consolidated's acquisition of the subsidiaries. These modifications include that as a rate-of-return affiliate of a price cap carrier, the subsidiaries will be subject to Connect America Phase I and Phase II and will no longer participate in high cost universal service mechanisms for rate-of-return carriers. *Connect America Fund*, WC Docket Nos. 10-90, 14-93, 05-337, Order, 29 FCC Rcd 11776 (2014). On August 27, 2015, Consolidated accepted Phase II model-based support for its operations in six states and will be subject to the Phase II obligations, including for these three subsidiaries. *Wireline Competition Bureau Authorizes Additional Price Cap Carriers to Receive Almost \$950 Million in Phase II Connect America Support*, WC Docket No. 10-90, Public Notice, DA 15-968 (Wireline Comp. Bur. rel. Aug. 28, 2015).

<sup>34</sup> Petition at 6.

FEDERAL COMMUNICATIONS COMMISSION

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