

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

In the Matter of)
)
Connect America Fund) WC Docket No. 10-90
)
)

ORDER

Adopted: December 20, 2018

Released: December 20, 2018

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order, we grant on our own motion a one-time waiver of sections 54.901 and 54.903 of the Commission’s rules to allow rate-of-return local exchange carriers to report their actual rates for consumer broadband-only lines to determine 2017 revenues on their FCC Form 509, rather than imputing revenues based on the maximum rate that would have been assessible pursuant to section 69.132.¹ A significant amount of uncertainty existed regarding actual demand for consumer broadband-only service initially, which resulted in demand projections for many carriers that would have produced rates that were not sustainable in the market. Imputing revenues based on these maximum rates would have the effect of significantly overstating the revenues for many carriers and, as a result, causing a similarly significant reduction in universal service support. For these reasons, we find that a one-time waiver of these rules will serve the public interest.

II. BACKGROUND

2. In the *Rate-of-Return Reform Order*, the Commission adopted significant changes to the Universal Service Fund (USF) for areas served by rate-of-return carriers.² Among other things, the reforms modernized the rate-of-return program to support standalone broadband offerings, as well as the previously supported interstate portion of the common line, in a single Connect America Fund Broadband Loop Support (CAF BLS) mechanism.³ In essence, CAF BLS supports voice and broadband-only lines to the extent that the carrier’s costs (*i.e.*, revenue requirements) exceed its revenues, subject to a budget constraint. CAF BLS is paid preliminarily using forecasted cost and revenue data, but later is trued up based on actual cost and revenue data.⁴ The true-ups prevent carriers from recovering more revenues from end users and universal service than are necessary to meet their revenue requirements.

3. To determine CAF BLS, a carrier first files FCC Form 508, which forecasts its interstate common line and consumer broadband-only costs and revenues for the upcoming July 1 to June 30 tariff year.⁵ For the purpose of forecasting consumer broadband-only revenue, carriers impute the lesser of the

¹ 47 CFR §§ 54.901(a)(2)(ii), 54.903(a)(4).

² *Connect America Fund, ETC Annual Reports and Certifications, Developing a Unified Intercarrier Compensation Regime*, WC Docket No. 10-90, et al., Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, 31 FCC Rcd 3087 (2016 *Rate-of-Return Reform Order*).

³ *Id.* at 3119-24, paras. 86-94.

⁴ *See id.* at 3157, para. 187; 47 CFR § 54.903(b)(3).

⁵ 47 CFR § 54.903(a)(3).

forecasted annual consumer broadband-only revenue requirement or \$42 times the number of forecasted consumer broadband-only lines times 12 months.⁶ This effectively imputes, for the initial calculation of CAF BLS, a consumer broadband-only rate of \$42 per month per loop, unless the carrier's costs are lower. A budget control mechanism is applied subsequently to that calculation, as required, which reduces the amount of CAF BLS disbursed.⁷ As a result, a carrier may be permitted to assess a consumer broadband-only rate higher than \$42 as necessary to meet its forecasted consumer broadband-only revenue requirement.⁸

4. Later, each carrier files actual cost and revenue data on FCC Form 509.⁹ For the purpose of determining consumer broadband-only revenue, the Commission's rules impute the lesser of the consumer broadband-only revenue requirement or \$42 per month per line, unless the carrier was permitted to assess a higher consumer broadband-only rate. In that case, revenues would be imputed based on the highest allowable rate, even if the carrier charged a rate lower than what was permitted.¹⁰ This has the effect of preventing carriers from abusing CAF BLS by charging unreasonably low rates and recovering any lost end-user revenues from CAF BLS.

5. The new CAF BLS mechanism and the new consumer broadband-only service were implemented on a compressed schedule, having been adopted in March 2016 to be effective in January 2017, leaving a very short time in which to estimate demand for consumer broadband-only and to establish rates. Many carriers cautiously forecasted a minimal amount of consumer broadband-only demand—in some cases, carriers forecasted a single line—when they were first implementing the new service for 2017, which resulted in extremely high permissible consumer broadband-only rates after the budget constraint was applied. Most of these carriers, however, chose to charge lower, more commercially reasonable rates, and were therefore able to achieve much higher subscription rates than forecasted. For the purposes of FCC Form 509, the combination of extremely high permissible consumer broadband-only rates (based on very low demand) and normal demand would result in unreasonably high imputed consumer broadband-only revenues. These unreasonably high imputed revenues would, in turn, reduce the calculated amount of CAF BLS and may require, in many instances, higher than anticipated true-ups (i.e. recovery of previously awarded support) against the preliminarily disbursed CAF BLS.

6. In March, the Commission reconsidered implementation of the budget control mechanism affecting claims from July 2017 to June 2018.¹¹ Specifically, the Commission directed USAC to make payments retroactively to fully fund support claims for that period to the affected carriers. Those payments were made in a lump sum payment in the fourth quarter of 2018.¹² Each carrier was directed to report the payments relating to CAF BLS on its FCC Form 509 for the applicable year and USAC was to apply true-ups as necessary.¹³

⁶ 47 CFR § 54.901(a)(2).

⁷ *2016 Rate-of-Return Reform Order*, 31 FCC Rcd at 3121, para. 88.

⁸ *Id.*; 47 CFR § 69.132. A carrier may charge a rate for consumer broadband-only service that is less than the maximum that it could assess pursuant to section 69.132 of the Commission's rules.

⁹ 47 CFR § 54.903(a)(4); *2016 Rate-of-Return Reform Order*, 31 FCC Rcd at 3157, para. 187.

¹⁰ 47 CFR § 54.901(a)(ii). The calculated rate is the maximum permissible rate for a carrier submitting a tariff. 47 CFR § 69.132.

¹¹ *See Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order, Third Order on Reconsideration, and Further Notice of Proposed Rulemaking, FCC 18-29, at paras. 73-82 (2018) (*Rate-of-Return Reform Reconsideration Order*).

¹² *Id.* at para. 81.

¹³ *Id.*, n.257. We note that the *Rate-of-Return Reform Reconsideration Order* stated that carriers would "report" the BCM reimbursement on their FCC Form 509, but USAC already possesses that data and carriers will not be required to report it to USAC separately.

III. DISCUSSION

7. For the reasons discussed below, we waive the Commission's rules to permit carriers to report their actual consumer broadband-only revenues on the FCC Form 509 due on December 31, 2018, rather than the imputed consumer broadband-only revenues based on the maximum permissible consumer broadband-only rate.¹⁴

8. Generally, the Commission's rules may be waived for good cause shown.¹⁵ The Commission may exercise its discretion to waive a rule where the specific facts make strict compliance inconsistent with the public interest.¹⁶ 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 We find that special circumstances are present here that warrant a deviation from the general rule. The uncertainty of consumer broadband-only demand in the initial period and the subsequent reconsideration of the budget control mechanism would result in unreasonable true-ups for 2017 CAF BLS. Allowing legacy rate-of-return carriers to report the consumer broadband-only rates they actually charged in 2017 in filing FCC Form 509, rather than the maximum permissible rates, will serve the public interest by preventing excessively large recovery of support from carriers in the form of true-ups. The higher than anticipated true-ups are neither necessary to prevent carriers from exceeding their revenue requirements (and, in fact, would prevent carriers from meeting their revenue requirements), nor an attempt to increase CAF BLS through artificially low rates.

9. In addition, the Commission's reconsideration of the budget constraint for July 1, 2017 to June 30, 2018 will affect the true-ups of CAF BLS.¹⁸ This reconsideration resulted in a reimbursement of CAF BLS that was claimed, but not disbursed due to the budget constraint, during that time.¹⁹ In effect, the reimbursement provides a level of CAF BLS such that carriers could have met their consumer broadband-only revenue requirement by charging \$42 per consumer broadband-only line per month. If a carrier reports consumer broadband-only revenues based on higher rates, as required by our rules, the need for CAF BLS is reduced and the size of the true-ups increased. In the case of reporting revenues actually received, the true-ups would prevent carriers from exceeding their revenue requirement, as intended. In this case, reporting higher imputed revenues, however, would create excessive true-up amounts that would unreasonably reduce CAF BLS.

10. These factors lead us to find that a waiver to allow carriers to report their actual demand and revenue data for 2017 will further the public interest. The charged rates clearly represent a more commercially viable offering than those originally projected; the higher rates would likely have resulted in no demand and thus nothing to impute. Finally, this approach will result in broadband-only loop rates stabilizing more quickly which will facilitate the deployment of broadband services.

11. Accordingly, we waive sections 54.901(a)(2)(ii) and 54.903(a)(4) as necessary to permit carriers filing FCC Form 509 on December 31, 2018, to report revenues based on their actual consumer broadband-only rates rather than imputing revenues based on their maximum allowable consumer

¹⁴ By operation of the rules, USAC will apply the lesser of the carrier's consumer broadband-only revenue requirement or \$42 per line per month, if that amount is greater than the actual consumer broadband-only revenues reported. 47 CFR § 54.901(a)(2).

¹⁵ 47 CFR § 1.3.

¹⁶ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

¹⁷ The Commission may, on an individual basis, take into account considerations of hardship, equity, or more effective implementation of overall policy. *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166.

¹⁸ *Rate-of-Return Reform Reconsideration Order*, at para. 81.

¹⁹ *Id.*

broadband-only rates. We note that the requirement for carriers to impute \$42 per loop per month or their consumer broadband-only revenue requirement, where that amount exceeds the actual revenues, will remain in effect.

IV. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 5, 201-203, and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155, 201-203, and 254, and sections 0.91, 0.291, and 1.3 of the Commission's rules, 47 CFR §§ 0.91, 0.291, and 1.3, that sections 54.901(a)(2) and 54.903(a)(4) are WAIVED, consistent with this Order.

13. IT IS FURTHER ORDERED that pursuant to section 1.102(b)(1) of the Commission's rules, 47 CFR § 1.102(b)(1), this Order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Kris Anne Monteith
Chief
Wireline Competition Bureau