

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

In the Matter of
Regulation of Business Data Services for Rate-of-
Return Local Exchange Carriers
WC Docket No. 17-144

ORDER

Adopted: May 31, 2019

Released: May 31, 2019

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order, the Wireline Competition Bureau (Bureau) grants petitions filed by Cass Telephone Company (Cass) and Magna5 RTC LLC d/b/a Richmond Telephone Company (Magna5) for waiver of the rule requiring a rate-of-return carrier to notify the Bureau by May 1, 2019, of its intention to elect incentive regulation for its business data services (BDS). Upon review of the Petitions, we find that both Cass and Magna5 have demonstrated that their requests for waiver present special circumstances that warrant deviation from our rules—and that the grant of their requests serve the public interest by furthering the Commission’s goals of encouraging competition and reducing regulatory burden by allowing certain carriers subject to rate-of-return regulation to transition to a lighter touch regulatory framework for their BDS offerings.

II. BACKGROUND

2. In the Rate-of-Return BDS Order, the Commission adopted a path for rate-of-return carriers that receive model-based or other forms of fixed high cost universal service support to voluntarily elect to transition their BDS offerings to incentive regulation. Carriers electing to move their BDS offerings to incentive regulation in 2019 and that participate in the National Exchange Carrier Association (NECA) pool were required to notify NECA by March 1, 2019, that they would not participate in the upcoming annual filing of the NECA traffic-sensitive tariff for their BDS offerings, a requirement of our rules designed to provide NECA sufficient time to prepare annual access tariff filings for participating pool members. They were also required to notify the Bureau of their election by May 1, 2019 “to

1 Petition for Waiver by Cass Telephone Company of the May 1, 2019 BDS Election Notice to the Wireline Competition Bureau, WC Docket No. 17-144 (filed May 22, 2019) (Cass Petition); Petition for Waiver May 1, 2019 BDS Election Notice to the Wireline Competition Bureau, WC Docket No. 17-144 (filed May 23, 2019) (Magna5 Petition) (each seeking a waiver of 47 CFR 61.50(l)(1)).

2 Regulation of Business Data Services for Rate-of-Return Local Exchange Carriers et al., WC Docket Nos. 17-144 et al., Report and Order, 33 FCC Rcd 10403 (2018) (Rate-of-Return BDS Order or Order).

3 Id. at 10445, para. 119.

4 See 47 CFR § 69.3(e)(6); see also id. § 69.3(i)(1); Letter from Jeffrey E. Dupree, NECA, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 17-144 et al., at 1 (filed October 17, 2018) (referencing the “administrative efforts that would be required by NECA to implement the proposed business data services offerings”).

facilitate implementation of the revised tariffs.”<sup>5</sup> Neither the *Order* nor our rules provided specific direction on what mailing or electronic address electing carriers should use to notify the Bureau that a carrier is moving to incentive regulation.

3. *The Petitions.* Petitioners are small rate-of-return local exchange carriers (LEC) that receive model-based universal service support, but do not make regular filings with the Commission. Each of the Petitioners notified NECA in advance of the March 1, 2019 deadline that it would elect to remove its BDS offerings from the NECA pool, effective July 2, 2019. Both Petitioners explain that they intended to notify the Commission in advance of the May 1, 2019 Bureau notification deadline. According to Cass, it mailed its notification 10 days in advance, but to an address the Commission has not used since 2017.<sup>6</sup> Magna5 acknowledges that it did not timely submit its notice, because its Chief Financial Officer was not available to sign the notice until May 3, 2019.<sup>7</sup> Proper routing of Magna5’s notice within the Commission also did not take place in a timely fashion because the notice contained no reference to the relevant docket.<sup>8</sup> As soon as they discovered their elections were not received by the Bureau, Cass and Magna5 each sought a waiver of the requirement that they notify the Bureau of their election by May 1, 2019.

### III. DISCUSSION

4. The Commission’s rules may be waived for good cause shown.<sup>9</sup> Waiver of the Commission’s rules is appropriate only if both: (1) special circumstances warrant a deviation from the general rule, and (2) such deviation will serve the public interest.<sup>10</sup> The Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.<sup>11</sup> Here, we find good cause to grant both Cass’s and Magna5’s petitions.

5. *Special Circumstances.* In light of Petitioners’ timely notice to NECA of their intent to transition their BDS services to incentive regulation, the work that NECA has done to implement those withdrawals, and the relatively short delay in the Bureau receiving notice of Petitioners’ election of incentive regulation, we find that special circumstances exist to grant this waiver.

6. Although they missed the May 1, 2019 deadline to notify the Bureau of their elections, both Cass and Magna5 took the steps that were functionally necessary to move to incentive regulation. Cass timely provided NECA with its election notice by March 1, 2019, and filed its cost study in April 2019 to allow NECA to calculate revised tariff rates,<sup>12</sup> thus taking “all the necessary steps to finalize the BDS Election with NECA.”<sup>13</sup> Magna5 also notified NECA of its election in a timely manner,<sup>14</sup> and

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<sup>5</sup> *Rate-of-Return BDS Order*, 33 FCC Rcd at 10445, para. 119; *see also* 47 CFR 61.50(l)(1) (setting the Bureau deadline at May 1, 2019).

<sup>6</sup> *Cass Petition* at 2.

<sup>7</sup> *Magna Petition* at 2.

<sup>8</sup> *See* Letter from Joseph O’Hara, Chief Financial Officer, Magna5 LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-144 (filed May 9, 2019).

<sup>9</sup> 47 CFR § 1.3.

<sup>10</sup> *See Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1157-59 (D.C. Cir. 1969), *cert. denied*, 93 S. Ct. 461 (1972)).

<sup>11</sup> *WAIT Radio*, 418 F.2d at 1159; *Northeast Cellular*, 897 F.2d at 1166.

<sup>12</sup> *Cass Petition* at 2.

<sup>13</sup> *Cass Petition* at 3-4.

<sup>14</sup> *Magna5 Petition*, Attach. 5 (confirmation email to Joe O’Hara).

NECA is “ready to finalize” removing “Magna5 RTC from its NECA F.C.C. No. 5 tariff.”<sup>15</sup> NECA has been calculating rates for its tariff under the assumption that both Cass and Magna5 would be withdrawing their BDS offerings from the NECA pool. If we were to deny the carriers’ waiver requests, NECA would have to revisit its rate calculations on very short notice before its deadline for making its annual filing.<sup>16</sup>

7. Moreover, no harm has been done by the short delay in the Bureau receiving notice of Petitioners election.<sup>17</sup> In fact, Cass mailed its election notice to the Bureau on April 19, 2019, more than 10 days before the deadline for filing its notice with the Commission.<sup>18</sup> But for Cass’s use of a formerly valid mailing address, which is no longer in use, its election notice would have been received by May 1, 2019. For its part, Magna5 mailed its notice a few days late, and, but for an internal routing complication caused by a missing docket number, the Bureau would have received it approximately one week after the deadline. When Cass and Magna5 learned of the problems associated with their filings, they consulted with NECA and Commission staff, and promptly filed petitions for waiver to cure the defect.<sup>19</sup> In this case, grant of the waivers would be consistent with the purpose of the rule, which is to facilitate implementation of the revised tariffs. We note that because of NECA’s and the carriers’ prompt actions upon learning of the mail delivery problems, the Bureau received notice in time to facilitate implementation of the revised tariffs in the 2019 cycle.

8. *Public Interest.* The public interest will be served by granting these waiver requests. In the *Rate-of-Return BDS Order*, the Commission found that allowing electing carriers to choose a lighter touch regulatory framework would “help drive competition for BDS offerings in the communities served by those carriers,” “reduce unnecessary regulatory burdens faced by those carriers,”<sup>20</sup> and result in “the right balance of relief from the burdensome aspects of rate-of-return regulation and pricing discipline.”<sup>21</sup> For the reasons described therein, the Commission has already concluded that allowing rate-of-return carriers to transition to incentive regulation will “foster network investment . . . impose downward pressure on prices . . . [and] spur entry, innovation, and competition.”<sup>22</sup> Denying these petitions would delay these carriers’ election of incentive regulation for an additional year and consequently delay for a full year the marketplace benefits associated with the Commission’s revised rules, which would be contrary to the public interest.<sup>23</sup>

9. For all of the reasons explained above, we grant both Cass’s and Magna5’s petitions for waiver.

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<sup>15</sup> *Magna5 Petition* at 3.

<sup>16</sup> Magna5 observes that “[t]ime is of the essence in order for NECA to complete its tariff preparation.” *Magna5 Petition* at 4. Entities filing tariffs on 15 days’ notice must make their annual access tariff filings no later than June 17, 2019 to be effective July 2, 2019. See *July 1, 2019 Annual Access Charge Tariff Filings*, Order, WC Docket No. 19-47, at 1-2, paras. 2-3 (WCB Apr. 4, 2019).

<sup>17</sup> The requests for waiver are unopposed and there is no indication that any entity would be harmed by grant of the requested waivers.

<sup>18</sup> *Cass Petition* at 3.

<sup>19</sup> See generally *Cass Petition*; *Magna5 Petition*.

<sup>20</sup> *Rate-of-Return BDS Order*, 33 FCC Rcd at 10405, para. 4.

<sup>21</sup> *Id.* at 10415, para. 30.

<sup>22</sup> *Id.*

<sup>23</sup> The next opportunity for rate-of-return carriers to elect incentive regulation for their BDS is in 2020. See *Rate-of-Return BDS Order*, 33 FCC Rcd at 10412-13, para. 23.

**IV. ORDERING CLAUSES**

10. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i)—(j), 5(c), 201(b), 202(a), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i)—(j), 155(c), 201(b), 202(a), and 303(r) and sections 0.91, 0.291, and 1.3 of the Commission’s rules, 47 CFR §§ 0.91, 0.291, 1.3, that this Order IS ADOPTED.

11. IT IS FURTHER ORDERED that the petitions for waiver filed by Cass Telephone Company, and Magna5 RTC d/b/a Richmond Telephone Company ARE GRANTED as described herein.

12. 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