

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

In the Matter of)
Connect America Fund) WC Docket No. 10-90
Regulation of Business Data Services for Rate-of-) WC Docket No. 17-144
Return Local Exchange Carriers)

ORDER

Adopted: March 29, 2024

Released: March 29, 2024

By the Chief, Pricing Policy Division, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order, we grant a petition filed by Filer Mutual Telephone Company (Filer Mutual), a rate-of-return incumbent local exchange carrier (carrier), seeking waiver of section 69.3(e)(6) and (i)(1) of the Commission’s rules.1 These sections of the Commission’s rules require telephone companies to provide certain notifications concerning tariff participation to the National Exchange Carrier Association, Inc. (NECA) by March 1 of the relevant tariff year.2 Because Filer Mutual missed the March 1 notification date, it seeks a waiver of these rules so that it may withdraw from the NECA traffic-sensitive tariff pool for their business data service (BDS) offerings effective July 2024.3 For the reasons discussed below, we find that Filer Mutual demonstrates good cause for a limited waiver of the Commission’s rules to withdraw its BDS offerings from the NECA traffic-sensitive tariff pool.4

II. BACKGROUND

2. In the Rate-of-Return BDS Order, the Commission allowed rate-of-return carriers receiving Alternative Connect America Cost Model (A-CAM) or fixed high-cost universal service support (electing carriers) to voluntarily elect to transition their BDS offerings from rate-of-return to incentive regulation pursuant to section 61.50 of the Commission’s rules.5 Under incentive regulation, electing carriers are no longer required to provide burdensome cost studies justifying their BDS rates or required to file tariffs for certain BDS offerings, enabling them to pass those cost savings on to their customers or

1 Letter from Bob Kraut, General Manager, Filer Mutual Telephone Company, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 17-144 (filed Mar. 14, 2024) (Petition); Letter from Bob Kraut, General Manager, Filer Mutual Telephone Company, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 17-144 (filed Mar. 20, 2024) (Filer Mutual Mar. 20 Letter); Letter from Bob Kraut, General Manager, Filer Mutual Telephone Company, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 17-144 (filed Mar. 22, 2024) (Filer Mutual Mar. 22 Letter); see 47 CFR §§ 1.3, 69.3(e)(6), (i)(1).

2 47 CFR §§ 69.3(e)(6), (i)(1).

3 Petition at 1.

4 See 47 CFR § 1.3. The NECA traffic-sensitive pool is contained in NECA F.C.C. Tariff No. 5. Other BDS offerings are tariffed in NECA F.C.C. Tariff No. 6.

5 Regulation of Business Data Services for Rate-of-Return Local Exchange Carriers et al., WC Docket No. 17-144 et al., Report and Order, Further Notice of Proposed Rulemaking, and Second Further Notice of Proposed Rulemaking, 33 FCC Rcd 10403, 10404, para. 1 (2018) (Rate-of-Return BDS Order); 47 CFR § 61.50; see 47 CFR§ 69.801(a) (defining business data services).

invest in their networks.⁶ To prevent internal cost-shifting among study areas, the Commission required “electing carriers to elect incentive regulation at the holding company-level for study areas in all states where that carrier receives fixed support.”⁷ Although a voluntary election, the Commission made election irrevocable, prohibiting carriers from returning their study areas to rate-of-return regulation.⁸ The Commission provided eligible carriers with two initial opportunities to elect incentive regulation in 2019 and 2020.⁹ The Commission also provided eligible carriers that accept future offers of A-CAM support or that otherwise transition away from legacy support mechanisms with an additional opportunity to elect incentive regulation for their BDS offerings effective July 1 in the year following their election.¹⁰

3. The Commission acknowledged in the *Rate-of-Return BDS Order* that most rate-of-return carriers establish their BDS rates by participating in the NECA traffic-sensitive tariff pool, which sets BDS rates based on projected aggregate costs (or average schedule settlements) and demand for pool members targeted to earn the authorized rate of return.¹¹ The Commission required that carriers electing incentive regulation remove their BDS offerings from the NECA traffic-sensitive tariff pool, but allowed electing carriers to continue participating in the tariff pool for access services other than BDS.¹² For pool participants accepting future offers of A-CAM support and electing BDS incentive regulation, the Commission established rules requiring that carriers notify NECA by March 1 of their election year consistent with section 69.3 of the Commission’s rules.¹³ Section 69.3(e)(6) and (i)(1) provide that a carrier participating in NECA tariffs that elects to file its own tariff and withdraw from a NECA tariff shall notify NECA of this election to withdraw by March 1 of the relevant tariff year.¹⁴

4. In the *Enhanced A-CAM Order*, the Commission adopted the Enhanced A-CAM program as a voluntary path for A-CAM carriers and legacy rate-of-return carriers to elect to receive model-based universal service support beginning January 1, 2024.¹⁵ The Commission acknowledged that, “[p]ursuant to the *Rate-of-Return BDS Order*, Enhanced A-CAM recipients that have not already done so will also be eligible to move their business data services offerings to incentive regulation.”¹⁶ In authorizing Enhanced A-CAM recipients, the Bureau reminded NECA carriers accepting Enhanced A-CAM support and

⁶ *Rate-of-Return BDS Order*, 33 FCC Rcd at 10405, para. 4.

⁷ *Id.* at 10413, para. 22; 47 CFR § 61.50(a) (“A rate-of-return carrier may elect to offer business data services subject to incentive regulation pursuant to this section [section 61.50] only if all affiliated rate-of-return carriers meeting the requirements of...[section 61.50(b)]...make the election. A carrier’s election under this section is irrevocable.”).

⁸ *Rate-of-Return BDS Order*, 33 FCC Rcd at 10413, para. 25.

⁹ *Id.* at 10412-13, para. 23.

¹⁰ *Id.* at 10411, para. 20.

¹¹ *Id.* at 10416-17, para. 34. The rates for carriers participating in the NECA traffic-sensitive pool are contained in NECA F.C.C. Tariff No. 5.

¹² *Rate-of-Return BDS Order*, 33 FCC Rcd 10415, para. 30; 47 CFR § 61.50(d).

¹³ *Rate-of-Return BDS Order*, 33 FCC Rcd at 10445, para. 119 (citing 47 CFR § 69.3(e)(6), (i)(1)).

¹⁴ 47 CFR § 69.3(e)(6) (“a telephone company or group of telephone companies may file a tariff that is not an association tariff...provided: . . . a telephone company or companies that elect to file such a tariff shall notify the association not later than March 1 of the year the tariff becomes effective”); 47 CFR § 69.3(i)(1) (“a telephone company or group of affiliated companies that participates in one or more association tariffs during the current tariff year and that elects to file...optional incentive regulation tariffs effective July 1 of the following tariff year shall notify the association by March 1 of the following tariff year that it is withdrawing from association tariffs, subject to the terms of this section, to participate in . . . optional incentive regulation.”).

¹⁵ See *Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order, Notice of Proposed Rulemaking, and Notice of Inquiry, FCC 23-60, at 2, para. 2 (July 24, 2023) (*Enhanced A-CAM Order*).

¹⁶ See *id.* at 39, para. 91 (citing *Rate-of-Return BDS Order*, 33 FCC Rcd 10421-22, para. 44).

electing BDS incentive regulation that they “must notify NECA by March 1, 2024 that they will not participate in the NECA traffic-sensitive tariff pool for their BDS offerings effective July 1, 2024” but may continue to participate in the traffic-sensitive tariff pool for access services other than BDS.¹⁷

5. On March 14, 2024, Filer Mutual filed a petition for waiver of sections 69.3(e)(6) and (i)(1) of the Commission’s rules “so that it may transition certain business data service (BDS) offerings out of rate-of-return regulation and into an incentive regulation framework effective July 1, 2024.”¹⁸ Filer Mutual has two affiliated study areas receiving model-based universal service support that participate in the NECA traffic-sensitive tariff pool for their BDS offerings: Filer Mutual Telephone Company d/b/a TruLeap Technologies – Nevada (SAC 552220) (Filer Mutual-Nevada)¹⁹ and Filer Mutual Telephone Company d/b/a TruLeap Technologies – Idaho (SAC 472220) (Filer Mutual-Idaho).²⁰ Filer Mutual-Nevada was authorized to receive A-CAM II support in 2019.²¹ Filer Mutual-Idaho was authorized to receive Enhanced A-CAM support beginning January 1, 2024, “making the company eligible to transition certain BDS offerings to incentive regulation under section 61.50 of the Commission’s rules.”²²

6. Although Filer Mutual intended to transition certain BDS offerings to incentive regulation and thus, withdraw from the NECA traffic-sensitive tariff pool, it “inadvertently missed the March 1st deadline to notify NECA.”²³ Filer Mutual explains that it was “focused on the May 1st deadline for notifying the Wireline Competition Bureau of the company’s election” and had a number of regulatory filings due on March 1 that it was also focused on completing.²⁴ Once Filer Mutual discovered that it had missed the deadline, it promptly notified NECA on March 4 and took immediate steps to exit the NECA traffic-sensitive pool, including seeking a waiver of the notification deadline contained in section 69.3 of the Commission’s rules.²⁵

¹⁷ *Wireline Competition Bureau Authorizes 368 Companies in 44 States to Receive Enhanced Alternative Connect America Cost Model Support to Expand Rural Broadband*, WC Docket No. 10-90, Public Notice, DA 23-1025, at 3-4 (WCB Oct. 30, 2023) (*Enhanced A-CAM Authorizations PN*) (citing *Rate-of-Return BDS Order*, 33 FCC Rcd at 10445, para. 119; 47 CFR § 69.3 (e)(6), (i)(1)); see *Enhanced A-CAM Order* at para. 91. The Bureau required carriers participating in the NECA common line tariff pool, which is separate from the traffic-sensitive tariff pool, to notify NECA by November 17, 2023 that they are withdrawing from the NECA common line pool effective January 1, 2024. *Enhanced A-CAM Authorizations PN* at 3; see 47 CFR § 69.3(e)(9) (otherwise requiring carriers to notify NECA by March 1 that the carrier elects to file its own common line tariff).

¹⁸ Petition at 1.

¹⁹ Filer Mutual March 22 Letter at 1.

²⁰ See NECA F.C.C. Tariff No. 5, 91st rev. p. 17-29.4.1, § 17.3.10(A)(1) (eff. Feb. 1, 2024).

²¹ Filer Mutual March 22 Letter at 1. *Wireline Competition Bureau Authorizes 171 Rate-of-Return Companies to Receive \$491 Million Annual in Alternative Connect America Cost Model II Support to Expand Rural Broadband*, WC Docket No. 10-90, Public Notice, DA 19-808, at 1 & n.2 (WCB Aug. 22, 2019); FCC, CAF – A-CAM 2.5.2 - Authorization Report Version 6.2 (dated Feb. 15, 2022), <https://docs.fcc.gov/public/attachments/DOC-359222A1.xlsx> (listing Filer Mutual (SAC 552220) as an A-CAM recipient).

²² Petition at 2; see *Enhanced A-CAM Authorizations PN* at 1 n.2 (citing FCC, *Enhanced A-CAM – Authorization Report Version 1* (dated Oct. 30, 2023), <https://www.fcc.gov/document/enhanced-cam-authorization-report>) (listing Filer Mutual (SAC 472220) as an Enhanced A-CAM recipient).

²³ Petition at 2.

²⁴ Filer Mutual Mar. 20 Letter at 2. Filer Mutual further noted that, during this same timeframe, it was preparing a bulk challenge addressing more than 460 discrepancies in the location data contained in Version 4 of the Broadband Serviceable Location Fabric. *Id.*

²⁵ *Id.*

III. DISCUSSION

7. Generally, the Commission's rules may be waived for good cause shown.²⁶ The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.²⁷ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.²⁸ Waiver of the Commission's rules is appropriate when special circumstances warrant a deviation from the general rule, and such deviation will serve the public interest.²⁹

8. We find that good cause exists to waive section 69.3(e)(6) and (i)(1) of the Commission's rules to allow Filer Mutual to exit the NECA traffic-sensitive pool and elect BDS incentive regulation. The circumstances described by Filer Mutual involve an administrative oversight that the carrier diligently attempted to correct shortly after learning of the error. We conclude that these circumstances, combined with the hardship Filer Mutual would endure if they are not permitted to exit the NECA traffic-sensitive pool and elect BDS incentive regulation this year renders strict compliance with the March 1 procedural deadline inconsistent with the public interest.

9. At the outset, we acknowledge that the NECA notification deadline contained in section 69.3(e)(6) and (i)(1) serves an important purpose.³⁰ The March 1 notification deadline is necessary to provide NECA with adequate time to review and process cost, demand, and revenue data, calculate support and pool settlements, reband, and determine rate levels and take any other steps needed to prepare for the July 1 annual access charge tariff filings on behalf of remaining pool members.³¹ Absent special circumstances, NECA pool members must ordinarily comply with the Commission's filing deadlines and timely notify NECA of pool elections.

10. Although Filer Mutual missed the March 1 deadline, Filer Mutual and its consultant acted in good faith, recognizing their error in failing to provide timely notice to NECA, and diligently attempted to remedy this error by cooperating with Commission staff and NECA to provide actual notice of their election to withdraw from the NECA traffic-sensitive pool. Upon learning of the error on March 4, Filer Mutual promptly requested that NECA accept the company's late-filed election to exit the NECA traffic-sensitive pool for its BDS offerings.³² After NECA denied this request, Filer Mutual "contacted staff in the FCC's Wireline Competition Bureau . . . to inquire about the possibility of a waiver of the March [1st] deadline to notify NECA."³³ While we are concerned that Filer Mutual failed to meet the March 1st deadline, we recognize their good faith efforts to promptly remedy the administrative oversight.

11. We further find that denying Filer Mutual this one-time opportunity to move its BDS offerings to incentive regulation based on its minor delay in notifying NECA of its election would result in undue hardship. Carriers are not able to elect BDS incentive regulation on a routine basis and may only do so during specific election periods. Filer Mutual-Idaho was not eligible to elect BDS incentive regulation in 2019 and 2020 because it was receiving high-cost support through a legacy support mechanism, Connect America Fund Broadband Loop Support (CAF BLS), as opposed to model-based or

²⁶ 47 CFR § 1.3.

²⁷ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

²⁸ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166.

²⁹ *Northeast Cellular*, 897 F.2d at 1166.

³⁰ 47 CFR §§ 69.3(e)(6), (i)(1).

³¹ See *Rate-of-Return BDS Order*, 33 FCC Rcd at 10444, para. 118 (explaining NECA's preparation for purposes of a tariff filing implementing elections of BDS incentive regulation that involves "cost studies for the remaining pool members, calculate support for existing members, reband, and undertake other steps").

³² Filer Mutual Mar. 20 Letter at 2.

³³ See *id.*

other fixed universal service support, and, as a result, was ineligible to elect BDS incentive regulation at that time.³⁴ Because Filer Mutual-Idaho recently elected to receive Enhanced A-CAM support, it is now, for the first time, eligible to elect BDS incentive regulation. Consistent with section 61.50(a) of the Commission's rules and the *Rate-of-Return BDS Order*, as an affiliate of Filer Mutual-Idaho receiving A-CAM support, Filer Mutual-Nevada, may also exit the NECA traffic-sensitive pool and move its BDS offerings to incentive regulation this year.³⁵

12. We agree with Filer Mutual that deviation from the March 1 deadline “will serve the public interest because it will allow Filer to elect BDS incentive regulation, and that election, in turn, will benefit Filer’s customers and service area.”³⁶ Filer Mutual explains that, by moving its BDS offerings from cost-based rate-of-return to incentive regulation, Filer Mutual will realize “efficiencies gained from reducing regulatory burdens,” enabling Filer Mutual to “pass . . . cost savings on to their customers” consistent with the goals of the *Rate-of-Return BDS Order*.³⁷ Filer Mutual must be able to withdraw its BDS offerings from the NECA traffic-sensitive tariff to be able to move their BDS rates from rate-of-return to incentive regulation. Accordingly, permitting Filer Mutual to move its BDS offerings to incentive regulation despite its notification delay would serve the public interest.

13. Taking hardship, equity, and overall implementation of policy into consideration, we conclude that the hardship Filer Mutual would face remaining in the pool and unable to move its BDS offerings to incentive regulation indefinitely outweighs the need to strictly enforce the March 1 deadline. We find that strict enforcement, requiring Filer Mutual to remain in the NECA traffic-sensitive pool due to an administrative oversight of just a few days, would unnecessarily penalize Filer Mutual and be inconsistent with the public interest benefits gained by Filer Mutual in transitioning its BDS offerings from rate-of-return to more efficient incentive regulation.

14. Furthermore, we find that granting a limited waiver for one carrier will not adversely affect NECA’s ability to prepare for the July 1 annual access charge tariff filings on behalf of remaining pool members. Within a few days of the filing deadline, Filer Mutual notified NECA of its intent to elect to exit the traffic-sensitive pool for its BDS offerings.³⁸ We believe that, as long as Filer Mutual immediately notifies NECA regarding the extent to which it is withdrawing its BDS offerings from the NECA traffic-sensitive tariff pool and related tariffs, such notice and the release date of this waiver order should provide NECA with sufficient time to prepare for the July 1 annual access tariff filing for remaining pool members.

15. For these reasons, we find that good cause exists to waive section 69.3(e)(6) and (i)(1) of the Commission’s rules to enable Filer Mutual to exit the NECA traffic-sensitive pool for its BDS offerings and move their BDS offerings from rate-of-return to incentive regulation.³⁹ We condition this limited waiver on Filer Mutual immediately notifying NECA regarding the extent to which it is withdrawing BDS offerings provided by Filer Mutual-Nevada and Filer Mutual-Idaho from NECA F.C.C. Tariffs No. 5 and 6. Upon receipt of such notice, we direct NECA to allow Filer Mutual to withdraw the BDS offerings of its two affiliated study areas, Filer Mutual-Nevada (SAC 552220) and Filer Mutual-Idaho (SAC 472220), from the NECA traffic-sensitive tariff pool effective concurrent with the effective date of the July 2024 annual access charge tariff filing.

³⁴ See FCC, Enhanced A-CAM – Authorization Report Version 1 (dated Oct. 30, 2023), <https://www.fcc.gov/document/enhanced-cam-authorization-report> (listing Filer Mutual Telephone Company’s then-current funding mechanism as CAF BLS before transitioning to Enhanced A-CAM support).

³⁵ See *Rate-of-Return BDS Order*, 33 FCC Rcd at 10413, para. 22; 47 CFR § 61.50(a).

³⁶ Filer Mutual Mar. 20 Letter at 2.

³⁷ *Id.*; see *Rate-of-Return BDS Order*, 33 FCC Rcd at 10405, 10415, paras. 4, 30.

³⁸ Filer Mutual Mar. 20 Letter at 2.

³⁹ See 47 CFR § 69.3(i)(1), (e)(6).

IV. ORDERING CLAUSES

16. ACCORDINGLY, IT IS ORDERED that, pursuant to sections 1, 4(i) and (j), 5, and 201-209 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i)-(j), 155, 201-209, and sections 0.91, 0.291, and 1.3 of the Commission's rules, 47 CFR §§ 0.91, 0.291, that section 69.3(e)(6) and (i)(1) and of the Commission's rules, 47 CFR § 69.3(e)(6) and (i)(1), ARE WAIVED for the limited purposes specified herein and this Order IS ADOPTED.

17. IT IS FURTHER ORDERED, that Filer Mutual Telephone Company immediately notify the National Exchange Carrier Association, Inc. regarding the extent to which it is withdrawing its business data service offerings from NECA F.C.C. Tariff Nos. 5 and 6.

18. IT IS FURTHER ORDERED, that, upon receipt of notification from Filer Mutual Telephone Company, the National Exchange Carrier Association, Inc. shall remove relevant business data service offerings provided by Filer Mutual Telephone Company from the National Exchange Carrier Association, Inc. F.C.C. Tariffs Nos. 5 and 6.

19. 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

Victoria S. Goldberg
Chief, Pricing Policy Division
Wireline Competition Bureau