

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of )  
 )  
GVNW Inc./Management )  
Petition for Declaratory Ruling, or ) AAD 95-120  
Alternatively, a Waiver of Section )  
36.612(a) of the Commission's Rules )  
USF Data Collection )

ORDER

Adopted: October 22, 1996

Released: October 23, 1996

By the Chief, Common Carrier Bureau

I. INTRODUCTION

1. On June 30, 1995, GVNW Inc./Management (GVNW), by its attorneys, filed a Petition for Declaratory Ruling (Petition), or alternatively, a waiver of Section 36.612(a) of the Commission's rules regarding the Universal Service Fund (USF) data collection. GVNW seeks a ruling or a waiver that would allow the USF administrator to adjust the USF distributions of incumbent local exchange carriers (ILECs) involved in mergers and acquisitions subsequent to the grant of a study area waiver and the transfer of exchanges from the seller to the buyer.

2. In a Public Notice dated November 24, 1995, the Accounting and Audits Division invited comments from interested parties regarding this request. Comments were filed by nine parties and reply comments by five parties.<sup>1</sup>

II. BACKGROUND

3. The USF is a support program that allows local exchange carriers with high local loop costs to allocate an additional portion of those costs to the interstate jurisdiction, enabling the

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<sup>1</sup> Comments were filed by Cathey, Hutton & Associates, Inc. (CHA), AT&T Corp. (AT&T), the National Exchange Carrier Association, Inc. (NECA), the United States Telephone Association (USTA), the National Telephone Cooperative Association (NTCA), Citizens Utility Company (Citizens), Humboldt Telephone Company (Humboldt), MCI Communications Corp. (MCI), and ICORE, Inc. (ICORE). Reply comments were filed by AT&T, GVNW, NECA, USTA and NTCA.

state jurisdictions to establish lower local exchange rates in study areas receiving such assistance. The USF is funded through a tariffed interstate charge paid by interexchange carriers (IXCs).

4. Pursuant to Sections 36.611 of the Commission's rules and a 1992 Waiver Order,<sup>2</sup> ILECs are required to report data, including certain expenses, investment costs and loop counts, by July 31 of each year for the preceding 12 months. This information may be updated at the option of the carrier pursuant to Section 36.612(a). NECA, as the USF administrator, calculates the USF expense adjustment on the basis of data for the preceding calendar year and then prepares USF tariffs designed to recover that amount from contributing IXCs during the subsequent annual rating period.

5. The USF data collection rules incorporate the definition of study area contained in Part 36, Appendix-Glossary of the Commission's rules, which states that boundaries of a study area shall be frozen as they were on November 15, 1984.<sup>3</sup> The Commission adopted the requirement that study area boundaries be frozen to prevent companies from setting up separate high cost exchanges within their existing service territory to maximize high cost support. To form a new study area, companies are required to seek a waiver of that provision freezing study area boundaries.<sup>4</sup>

6. During the past several years, GVNW has provided consulting and management services to numerous independent telephone companies that have acquired local exchange(s) from other carriers. GVNW states that even though the Commission has approved the study area boundary changes associated with merger/acquisition transactions, NECA does not recalculate USF distributions to recognize study area changes. As a result of the time lag built into the USF data collection rules, the buying company must wait for up to two years to receive USF support payments for acquired exchanges. During this time, the USF support payments continue to be

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<sup>2</sup> National Exchange Carrier Association, Inc. Petition for Waiver of Sections 36.611(a) and 36.613(a) of the Commission's Rules, AAD 92-19, 7 FCC Rcd 3863 (rel. June 9, 1992).

<sup>3</sup> 47 C.F.R Part 36, Appendix-Glossary.

<sup>4</sup> The Commission's three primary concerns when it reviews study area boundary change petitions are: (1) that the change does not have an adverse impact on the USF support program; (2) that the state commission(s) having regulatory authority do not object to the change; and (3) the public interest supports such a change. See U S West Communications, Inc. and Eagle Telecommunications, Inc., Joint Petition for Waiver of Definition of "Study Area" Contained in Part 36, Appendix-Glossary of the Commission's Rules, *Memorandum Opinion and Order*, 10 FCC Rcd 1771, ¶ 5 (1995).

paid to the selling carrier although the buying company incurs the cost of operating the exchanges.<sup>5</sup>

### III. PETITION FOR DECLARATORY RULING

#### A. GVNW Petition

7. GVNW seeks a declaratory ruling that will direct NECA to recalculate the USF distributions of ILECs involved in mergers and acquisitions subsequent to the grant of a study area waiver and the transfer of exchanges from the selling company to the buying company and to distribute those revenues to the current owner of the exchanges. According to GVNW, NECA should remove the investment, expense and loop count of the acquired exchanges from the selling company's study area and associate the data with the buying company's study area.<sup>6</sup> In addition, GVNW proposes two reporting methodologies to be used by buyers that have operated exchanges for only a portion of the calendar year.<sup>7</sup>

#### B. Positions of the Parties

8. With the exception of AT&T, the commenters support some form of Commission action to direct NECA to recalculate USF distributions in conjunction with study area changes. Six out of nine commenters support a declaratory ruling.<sup>8</sup> Of these commenters, however, only two argue that the Petition represents a correct interpretation of the rule.<sup>9</sup> The remaining four support the Petition because the current rule undermines the Commission's goals in establishing the USF by directing payments to carriers who no longer bear the expense of the high cost

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<sup>5</sup> The GVNW Petition is filed on behalf of carriers that acquired exchanges that were already current USF recipients. The Petition does not mention immediate USF payments for carriers who have acquired exchanges that are not current USF recipients.

<sup>6</sup> GVNW Petition at 4.

<sup>7</sup> *Id.* at 12.

<sup>8</sup> CHA comments at 6; USTA reply comments at 2; NTCA comments at 4 and reply comments at 3; Citizens comments at 5; Humboldt comments at 5; and ICORE comments at 3.

<sup>9</sup> Citizens comments at 2 and Humboldt comments at 2.

exchanges and creates financial hardships for the new owners who do.<sup>10</sup> Five commenters recommend rule changes to accommodate study area changes.<sup>11</sup>

9. MCI opposes the Petition because, it argues, the method proposed by GVNW would enable companies to recover costs they had not incurred.<sup>12</sup> AT&T recommends that the Petition be denied because it "alleges no ambiguity whatever in the language of any Commission rule but merely disputes the fairness of the results that follow" from its application.<sup>13</sup>

### C. Discussion

10. We agree with AT&T. The Commission may, in accordance with Section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty.<sup>14</sup> GVNW argues that the remedy sought in its Petition represents a correct interpretation of the rules and that NECA may be administering the rules inappropriately.<sup>15</sup> GVNW, however, does not identify any language in the rules that support its interpretation.<sup>16</sup> Instead, GVNW urges us to read into the rules policies and procedures that were simply not contemplated when the rules were drafted. Substantive modifications such as those posed by GVNW require a rulemaking. In fact, the USF assistance mechanism is currently being re-evaluated in a separate proceeding. The rule changes proposed

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<sup>10</sup> USTA comments at 3; NTCA comments at 2; CHA comments at 4; and ICORE comments at 1. *See also* Humboldt comments at 3 and Citizens comments at 4.

<sup>11</sup> CHA comments at 6; USTA comments at 3; NTCA comments at 4; NECA comments at 8; and MCI comments at 3.

<sup>12</sup> MCI comments at 5.

<sup>13</sup> AT&T comments at 4.

<sup>14</sup> 47 C.F.R. § 1.2.

<sup>15</sup> GVNW reply comments at 3. *See also* Citizens comments at 2 and Humboldt comments at 2.

<sup>16</sup> Humboldt cites the language contained in each of the subparts of Section 36.611 directing that the amount for particular items reflect the "actual expense for the calendar year preceding each June filing" to support the use of such cost data by the purchasing company. Humboldt comments at 2. NECA responds that for transactions involving sales of partial study areas, study area data would need to be adjusted to reflect the transfer and that the Commission has not specified any accounting procedures for allocating study-area wide expenses among specific access lines. NECA reply comments at n. 7.

by the commenters in this matter restate their proposals in that pending rulemaking.<sup>17</sup> Therefore, GVNW's petition for a declaratory ruling is denied.

#### IV. REQUEST FOR WAIVER

##### A. GVNW Petition

11. As an alternative, GVNW requests a waiver of Section 36.612(a) for its client companies that have acquired local exchange properties from other carriers "in order to permit eligibility for USF support to begin on the date that study area boundaries changed."<sup>18</sup>

##### B. Positions of the Parties

12. Only Citizens explicitly supports GVNW's request for a waiver.<sup>19</sup> NTCA recommends that future study area waivers include provisions for allocating USF distributions.<sup>20</sup> NECA voices general support for resolving the issue through the use of waivers.<sup>21</sup> MCI opposes GVNW's request because it does not demonstrate why purchasers generally should be treated differently than companies with unexpected high growth rates in lines nor does it allege how any individual company has been adversely affected by the rules.<sup>22</sup> AT&T recommends that GVNW's request for a waiver be denied because GVNW "has not described any special circumstances at all with respect to any of the 14 client companies it claims are affected by these rules."<sup>23</sup> According to AT&T, granting the waiver "would effectively abrogate the waiting period provided" in the rules.<sup>24</sup>

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<sup>17</sup> See Federal-State Joint Board on Universal Service, *Notice of Proposed Rulemaking and Order Establishing a Joint Board*, CC Docket No. 96-45, FCC 96-93 (rel. Mar. 8, 1996).

<sup>18</sup> GVNW Petition at 9.

<sup>19</sup> Citizens comments at 5-6.

<sup>20</sup> NTCA comments at 4 and reply comments at 3.

<sup>21</sup> NECA comments at 7.

<sup>22</sup> MCI comments at 3.

<sup>23</sup> AT&T comments at 8.

<sup>24</sup> *Id.*

**C. Discussion**

13. Again, we agree with AT&T. Under Section 1.3 of our rules, we are authorized to grant waivers "if good cause therefor is shown."<sup>25</sup> As interpreted by the courts, this requires that a petitioner demonstrate that "special circumstances warrant a deviation from the general rule and such a deviation will serve the public interest."<sup>26</sup> GVNW, however, has not articulated any rationale as to why its clients in particular warrant special treatment. GVNW's request applies broadly to all exchange purchasers, in effect modifying the rule for the entire class of companies. Such changes may only be instituted through a rulemaking proceeding. Because special circumstances have not been demonstrated, we need not consider whether a waiver would be in the public interest. GVNW's request for a waiver is denied.

**V. ORDERING CLAUSE**

14. Accordingly, **IT IS ORDERED** that, pursuant to authority delegated under Sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91 and 0.291, GVNW's Petition for a Declaratory Ruling or Alternatively, a Waiver of Section 36.612(a) is denied.

**FEDERAL COMMUNICATIONS COMMISSION**

Regina Keeney, Chief  
Common Carrier Bureau

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<sup>25</sup> 47 C.F.R. § 1.3.

<sup>26</sup> *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1966 (D.C. Cir. 1990), citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969). See also *Industrial Broadcasting Co. v. FCC*, 437 F.2d 680 (D.C. Cir. 1970) (indicating need for articulation of special circumstances beyond those considered during regular rulemaking).