Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

In the Matter of:	)	
	)	AAD No. 95-67
BPS Telephone Co.	)	
Petition for Waiver of	)	
Section 69.605(c)	)	
of the Commission's Rules	)	

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: September 9, 1997 Released: September 10, 1997

By the Chief, Accounting and Audits Division

I. INTRODUCTION

1. On April 30, 1997, we issued an Order denying a petition for waiver filed by BPS Telephone Company Inc. (BPS)[1]. In the Order, we denied BPS's request to waive section 69.605(c) of the Commission's rules[2] to permit it to convert from cost study settlements to average schedule settlements. On May 30, 1997, BPS sought reconsideration of that ruling arguing that the Order was contrary to both Commission precedent and the Commission's average schedule policy.[3] In this Order, we affirm our previous order for reasons explained below.

II. BACKGROUND

2. In 1982, the Commission adopted a comprehensive system of tariffed charges, generally known as the access charge plan, for the recovery of incumbent local exchange carriers' (ILECs) costs associated with the origination and termination of interstate calls.[4] The Commission's access charge rules also required the establishment of an association of exchange carriers to file tariffs and

[1] BPS Telephone Co. Petition for Waiver of Section 69.605(c) of the Commission's Rules, *Memorandum Opinion and Order*, 12 FCC Rcd 4702 (Com. Car. Bur. 1997)(Order).

[2] 47 C.F.R. § 69.605(c).

[3] *See* BPS Petition for Reconsideration.

[4] MTS and WATS Market Structure, *Third Report and Order*, 93 FCC 2d 241 (1983). The access charge rules are codified in 47 C.F.R. Part 69.

administer revenue pools on behalf of ILECs.[5] To fulfill this requirement, the ILECs formed the National Exchange Carrier Association (NECA). Each company that participates in a NECA access tariff charges rates appearing in that tariff.[6] In the settlement process, each pool participant receives revenues from the pool to cover its cost of providing service plus a *pro rata* share of the pool's earnings.[7] A NECA pool participant's costs are determined either on the basis of cost studies conducted by that ILEC or average schedule formulas. By settling on an average schedule, exchange carriers are permitted to avoid the expense of performing a detailed cost study by using estimated costs that are based on "the costs of a hypothetical exchange company."[8]

3. Section 69.605(c) of the Commission's rules states, in pertinent part, that "a telephone company that was participating in average schedule settlements on December 1, 1982, shall be deemed to be an average schedule company."[9] The Commission sanctioned the average schedule status of these ILECs based on the assumption that these small carriers lacked sufficient financial resources or expertise to justify a requirement that they perform jurisdictionally separated cost studies for determining their compensation for originating and terminating interstate telecommunications services.[10] While the Commission allowed small carriers to maintain their average schedule status, they were not required to do so. The Commission stated that, "any exchange carrier that believes the average schedules do not provide appropriate compensation . . . is entitled to be compensated on a cost basis."[11]

4. Average schedule settlement companies may convert to cost settlement status at any time. The Commission concluded, however, that an unrestricted opportunity for cost companies to convert to average schedule status would likely operate to the detriment of interstate ratepayers because the

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[5] 47 C.F.R. § 69.601.

[6] NECA files an access charge tariff that contains "terms and conditions for access service" offered by participant LECs. 47 C.F.R. § 69.603(g). The rates in NECA's access tariff are based on the pooled costs of over 1,200 LECs. *See* Regulation of Small Telephone Companies, *Report and Order*, 2 FCC Rcd 3811, para. 2 (1987). NECA computes "monthly pool revenues distribution" based on the access revenues and cost data filed by pool participants. 47 C.F.R. § 69.605(a).

[7] *See generally* 47 C.F.R. §§ 69.601-612.

[8] MTS and WATS Market Structure: Average Schedule Companies, *Report and Order*, 103 FCC 2d 1017, 1019 (1986)(*Average Schedule Order*).

[9] 47 C.F.R. § 69.605(c).

[10] *Average Schedule Order*, 103 FCC 2d at 1018.

[11] MTS and WATS Market Structure: Average Schedule Companies, *Memorandum Opinion and Order*, 3 FCC Rcd 834 (1986).

conversion may result in inflated interstate revenue requirements.[12] By buying or selling regulated assets, "exchange carriers can manipulate, and increase, compensation that is received under the Commission's rules without any corresponding benefit to the carrier's customers."[13]

5. For this reason, an ILEC under cost-settlement status must apply to the Commission for a waiver of the average schedule rule if it seeks to obtain average schedule settlement status. Waivers of this rule have only been granted in very limited instances when ILECs have been able to show special circumstances such as individualized hardship or inequity.[14] BPS, a corporation formed to buy three exchanges from GTE in 1994, requires a waiver of section 69.605(c) because it was not "participating in average schedule settlements on December 1, 1982."[15]

III. PETITION

6. In its Petition for Reconsideration, BPS states that our requirement that it show individual hardship or inequity in order to be granted a waiver is contrary to precedent.[16] In support of this assertion, BPS cites the Commission's grant of a waiver of section 69.605(c) to the New Castle Telephone Company, an ILEC of 1,550 access lines.[17] BPS argues that its situation is analogous to that in *New Castle* because BPS similarly lacks the information and records necessary to produce a cost study and wishes to avoid the burdens and costs of settling on a cost basis.[18] BPS also states that it meets the four factors that were considered in granting the waiver in *New Castle*: (1) it is a small, newly-created telephone company; (2) the transaction does not appear to be designed to increase interstate revenue requirements materially or to have that effect; (3) the effect on interstate revenue requirements is *de minimis;* and (4) it would not increase Universal Service Fund (USF) revenue requirements.[19]

7. BPS, further claiming that the Order is inconsistent with the Commission's "average schedule policy," argues that the waiver should be granted because the "Commission has always acted

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[12] NECA's Proposed Waiver of Section 69.605(c) of the Commission's Rules, *Memorandum Opinion and Order*, 2 FCC Rcd 3960 (1987)(*5,000 Line Waiver Order*).

[13] New Castle Telephone Co. Petition for Waiver of Section 69.605(c) of the Commission's Rules, *Memorandum Opinion and Order*, 7 FCC Rcd 2081, para. 12 (Com. Car. Bur. 1992) (*New Castle*).

[14] *See e.g.*, Papago Tribal Utility Authority Petition for Waiver of Section 69.605(c) of the Commission's Rules, *Memorandum Opinion and Order*, 2 FCC Rcd 6631 (Com. Car. Bur. 1987).

[15] 47 C.F.R. § 69.605(c).

[16] *See* BPS Petition for Reconsideration at 2-3.

[17] *Id.*

[18] BPS Petition for Reconsideration at 3.

[19] *Id.* (citing *New Castle* at para. 10).

to protect small and rural carriers from burdensome administrative requirements."[20] BPS indicates that it "understands and appreciates the Commission's concern that 'reclassification of assets from cost study basis to average schedule settlement status can inflate interstate revenue requirements' and that carriers may 'receive a windfall . . . if . . . permitted to elect to depreciate plant to the 'cross over' point [under cost settlements] and then receive average schedule treatment,'"[21] but insists that neither of those circumstances are present in its case. BPS states that it will not receive a windfall because, as a newly formed ILEC, it will not be able to depreciate its assets prior to electing average schedule status.[22]

IV. DISCUSSION

A. Commission Precedent

8. We reject BPS's contention that our precedent dictates that its petition for waiver be granted. We are not persuaded by BPS's argument that the waiver in *New Castle* was granted under circumstances that are closely analogous. Furthermore, we do not consider the factors relied upon in the *New Castle* Order to be the establishment of a four part test that can be applied generically in any section 69.605(c) waiver situation. At the time we granted the *New Castle* waiver, we were persuaded that New Castle Telephone faced "uniquely limited circumstances."[23] BPS has failed to show that a waiver of section 69.605(c) is warranted for its situation.

9. A petition for waiver of the Commission's rules may be granted for good cause shown.[24] The Commission may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest.[25] The Court of Appeals for the D.C. Circuit has stated that a waiver may permit a more rigorous adherence to an effective regulation by allowing the agency to take into account considerations of hardship, equity, or more effective implementation of overall policy on an individualized basis, while also emphasizing that "[a]n applicant for waiver faces a high hurdle even at the starting gate."[26] In *WAIT Radio*, the court explained that "[t]he very essence

[20] BPS Petition for Reconsideration at 4.

[21] BPS Petition for Reconsideration at para. 5 (quoting *New Castle* at para. 13).

[22] *See* BPS Petition for Reconsideration at 5.

[23] *New Castle* at para. 10.

[24] *See* section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3.

[25] *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1166 (D.C. Cir. 1990) *(Northeast Cellular)*.

[26] *WAIT Radio v. FCC*, 418 F.2d 1153, 1157, 1159 (D.C. Cir. 1969, *cert. denied*, 409 U.S. 1027 (1972)) *(WAIT Radio)*.

of a waiver is the assumed validity of the general rule. . . ."[27] Given the validity of the rule, the test identified in *WAIT Radio* requires the party seeking the waiver to demonstrate that the rule is unjust as applied to the party given the unique circumstances of the situation.[28] Waiver is thus only appropriate if special circumstances warrant a deviation from the general rule and such deviation will better serve the public interest than adherence to the general rule.[29] Therefore, the test for whether BPS may be granted a waiver is whether it has shown special circumstances as individualized hardship or inequity that warrants deviation from our general rule that cost companies may not change from cost-based settlements to average schedule settlements.[30]

10. The special circumstances used to justify past waivers of section 69.605(c) fall into three broad categories. First, we have granted limited opportunities for exchange carriers serving 5,000 or fewer access lines to convert from cost-based to average schedule settlements.[31] Granting these limited opportunities was a necessary approach to deal with industry-wide changed circumstances.[32] Second, we have granted waivers to certain small exchange carriers that clearly lacked the resources to operate on a cost-study basis. Papago Tribal Utility Authority, serving fewer than 400 lines in a 700 square mile area and lacking the operational expertise of a parent company, falls into this category. The situation in *National Utilities, Inc. and Bettles Telephone Co., Inc.*,[33] can also be seen as an accommodation for very small exchange carriers in light of significant changes in their state regulatory

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[27] *Id.* at 1158.

[28] *See Northeast Cellular*, 897 F.2d at 116 (citing *WAIT Radio v. FCC*, 418 F.2d 1153, and *Industrial Broadcasting Co. v. FCC*, 437 F.2d 680 (D.C. Cir. 1970)).

[29] *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d at 116 (grant of waiver vacated and remanded for failure of the FCC to articulate any standard by which the underlying policy could be determined; the record revealed nothing about the applicant's situation).

[30] 47 C.F.R. § 69.605(c).

[31] *5,000 Line Waiver Order*, *supra*, n. 12; see also Petitions Seeking Average Schedule Settlements for Affiliated Cost Companies with 5,000 or Fewer Access Lines, Memorandum Opinion and Order, 3 FCC Rcd 6003 (Com. Car. Bur. 1988)(granting a "one time opportunity to all exchange carriers with fewer than 5,000 access lines" to elect average schedule settlements). More recently, we have considered and denied a request to extend a similar opportunity to exchange carriers serving 10,000 or fewer access lines. NECA Revision of Section 69.605 of the Commission's Rules to Allow Small Cost Settlement Companies to Elect Average Schedule Settlement Status, *Order*, 1996, 11 FCC Rcd 16504 (Com. Car. Bur. 1996).

[32] *5,000 Lines Waiver Order* at para. 4.

[33] National Utilities, Inc. and Bettles Telephone Co., Inc. Petition for Waiver of Section 69.605(c) of the Commission's Rules, *Report and Order*, 8 FCC Rcd 8723 (Com. Car. Bur. 1993)(*National Utilities, Inc. and Bettles Telephone Co., Inc.*).

environment.[34]

11. Finally, to ensure a smooth settlement process, we have granted section 69.605(c) waivers to average schedule companies that have acquired another company, and we allowed the combined companies to merge into one average schedule study area.[35] "Because jurisdictional separations and USF calculations are perfomed at the study area level, all affiliates in a single study area must be under the same settlement method."[36] In these special cases, we have attached three conditions to minimize the impact of the conversion and reduce the incentive to manipulate Commission rules. We required waiver recipients to: (1) report to NECA on a combined basis for interstate average schedule and USF purposes, and receive distributions on that basis as a consolidated company, (2) convert to cost-based settlement status if an average schedule affiliate in that study area converts to cost-based settlemen*s, or elects section 61.39 treatment,[37] and (3) maintain common control over average schedule affiliates, so that average schedule status terminates when any of the affiliates are sold, transferred, or otherwise assigned.[38] We have always intended for these conditions to "ensure that the waivers will not result in unintended effects on the petitioners' interstate revenue requirements or result in an administrative burden on the Commission or NECA."[39]

12. Based on this review of our precedent, we now properly see *New Castle* as an aberration that cannot be relied upon to support a waiver request. At the time we granted New Castle's petition, we believed the necessary unique circumstances were present. This belief was predicated in part on the *de minimis* impact on interstate revenue requirements and in part on the lack of any indication that the waiver recipient "contemplate[d] further exchanges of assets (below the study area level), or further requests for waiver of . . . average schedule status . . . ."[40] In retrospect, we mistakenly

[34] National Utilities, Inc. served 2,350 access lines from eleven exchanges, and Bettles Telephone Co., Inc. served 50 access lines from one exchange. *Id.* at n. 3. Changes in the Alaska Public Utilities Commission's regulations prompted the two companies to file their petition. *Id.* at para. 3.

[35] Petitions for Waivers Filed by Baltic Telecom Cooperative, Inc., East Plains Telecom, Inc., and US West Communications, Inc., *Memorandum Opinion and Order*, 1997 WL 85478(F.C.C.), 12 FCC Rcd 2433 (Com. Car. Bur. Feb. 27, 1997)(*Baltic Telecom*); Petitions Filed by Alpine Communications, et al, *Memorandum Opinion and Order*, 12 FCC Rcd 2367 (Com. Car. Bur. Feb. 14, 1997)(*Alpine Communications*); Petitions for Waivers Filed by Accent Communications, et al, *Memorandum Opinion and Order*, 11 FCC Rcd 11513 (Com. Car. Bur. Apr. 11, 1996)(*Accent*); Petitions for Waivers Filed by BEK Communications, Inc., et al, *Memorandum Opinion and Order*, 11 FCC Rcd 10855 (Com. Car. Bur. Apr. 4, 1996)(*BEK*).

[36] *Baltic Telecom* at para. 19.

[37] Section 61.39 provides an optional method of filing Access Tariffs to certain carriers serving 50,000 or fewer access lines in a study area. 47 C.F.R. § 61.39.

[38] *Accent*, supra, n. 35, at para. 44, *Alpine Communications, supra*, n. 35, at para. 16, *Baltic Telecom, supra*, n. 35, at para. 21, *BEK Communications*, *supra*, n. 35, at para. 39.

[39] *Baltic Telecom* at para. 20.

[40] *New Castle* at para. 15.

attached greater weight to the *de minimis* impact on New Castle's interstate revenue requirements than to the danger of "giving the 'green light' to exchange carrier asset transfers that increase interstate revenue requirements."[41]

13. This is not an appropriate opportunity, however, to revisit the status of New Castle Telephone Company. Removing New Castle's average schedule status would arguably be a retroactive application of this decision. New Castle has operated in reliance on its waiver since 1992 and may continue to do so without being seen as a "green light" for cost-study exchange carriers to convert to average schedule status.

14. Even assuming that the situation in New Castle can still be seen as sufficiently unique to justify a waiver, BPS has not adequately demonstrated that its own situation is closely analogous to that of New Castle. We did not set out a four-part test for section 69.605(c) waivers; these were simply factors that demonstrated, at that time, that New Castle presented a special situation. Again, we found New Castle's situation unique because:

> (1) New Castle is a small telephone company (two exchanges, 1,550 access lines); (2) [the] transaction [did] not appear to be a part of a pattern of asset transfers . . . designed to materially increase interstate revenue requirements . . . ; (3) the effect upon interstate revenue requirements [was likely] to be *de minimis*; and (4) New Castle . . . stated that USF revenue requirements [would] not increase.[42]

Although these four factors do not comprise a four-part test, they do provide a guide for comparing the respective circumstances of BPS and New Castle. BPS, serving 3,373 access lines, is larger than New Castle. BPS is also larger than other small exchange carriers that presented similar, size-based arguments. NUI, for example, served 2,350 lines when we granted its waiver; Papago served 400 access lines over a 700 square mile area; Bettles served only 50 access lines.[43] Nor does BPS share the significant changes in its regulatory environment like those experienced by NUI and Bettles, or the extremely rugged area of operations like Papago.

15. Although BPS indicated that the impact on its interstate revenue requirements would be *de minimis*, and thus its interstate revenue requirements would not increase, the potential exists for starting an industry-wide pattern. We have long recognized the incentives to "game" the system[44] to the detriment of interstate ratepayers, and we have consistently stated that the purpose behind section

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[41] *New Castle* at para. 16.

[42] *New Castle* at para. 10.

[43] *See also* The Island Telephone Company, Telephone and Data Systems, Inc., and Contel of Maine, Inc., Petition for Waiver of Various Rules, *Memorandum Opinion and Order*, 7 FCC Rcd 6382, paras.12-15 (Com. Car. Bur. 1992)(granting a temporary waiver of section 69.605(c) to an exchange carrier serving 448 access lines on two coastal islands).

[44] *Average Schedule Order* at para. 14; *see 5,000 Line Waiver Order* at para. 5.; *see also New Castle* at para. 12; *National Utilities, Inc. and Bettles Telephone Co., Inc.* at para. 8.

69.605(c) was to prevent this sort of opportunistic behavior.[45] We reiterate that "[e]ach waiver request is reviewed to ascertain whether it, or it in combination with prior waiver requests, will have a material effect on interstate revenue requirements."[46] Isolated incidents of exchange carriers selecting average schedule settlements may not have a significant impact on interstate revenue requirements; the cumulative effect of many carriers switching from cost-based to average schedule status will almost certainly have a sizeable impact. Stretching the comparisons between BPS and New Castle will only serve to create more opportunities and greater incentives to game the system at the expense of the ratepayers when similarly situated companies also demand the option to receive average schedule settlements.[47]

B. Average Schedule Policy

16. The Commission has consistently acted to protect small and rural exchange carriers from burdensome administrative requirements. BPS, arguing that a denial would be "against public policy,"[48] points to our actions in *National Utilities, Inc. and Bettles Telephone Co., Inc.* to support its wish for less expensive administrative burdens. Our decision in *National Utilities, Inc. and Bettles Telephone Co., Inc.* relied heavily on the specific showing of significant savings to interstate ratepayers. BPS makes no such demonstration. Moreover, several hundred exchange carriers serving fewer lines than BPS successfully operate on cost-based status despite the additional administrative burdens.[49] A policy in favor of reducing administrative burdens simply does not outweigh the Commission's public interest obligation to protect interstate ratepayers or eliminate the requirement for unique circumstances to justify a waiver.

C. Conclusion

17. Based on the information provided in its Petition for Waiver and its Petition for Reconsideration, BPS has failed to show that a waiver of Commission Rule 69.605(c) is warranted. BPS presents no special circumstances that justify a waiver nor does it show that a denial of its petition compromises the Commission's average schedule policy. Accordingly, we deny BPS's Petition for Reconsideration.

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[45] *See e.g., National Utilities, Inc. and Bettles Telephone Co., Inc.* at paras. 7-9.

[46] *New Castle* at para. 16.

[47] Similarly, New Castle claimed that, because its situation closely resembled the circumstances in Papago, previous orders "required" a waiver. *New Castle* at para. 14. By rejecting these claims, we ensured that similarly situated exchange carriers would not take advantage of an opportunity to manipulate the system to the detriment of interstate ratepayers.

[48] BPS Petition for Reconsideration at 4.

[49] Examples include Border to Border Communications (79 access lines), Hat Island Telephone Company (98 access lines), Beehive Telephone Company (553 access lines), Pottawatomie Telephone Company (2104 access lines), Egyptian Telephone Coop. Ass'n (2702 access lines), and Happy Valley Telephone Company (3067 access lines). NECA Universal Service Fund Submission of 1995 Study Results (filed October 1, 1996).

V. ORDERING CLAUSE

18. Accordingly IT IS ORDERED, pursuant to the authority that is contained in Sections 0.91, 0.291 and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291 and 1.3 that BPS's Petition for Reconsideration is DENIED.

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