

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

In the Matter of)	
)	
Connect America Fund)	WC Docket No. 10-90
)	
Developing a Unified Intercarrier Compensation Regime)	CC Docket No. 01-92
)	
)	
Petitions for Waiver of Section 51.917(b)(7) of the Commission’s Rules)	

ORDER

Adopted: August 7, 2014

Released: August 7, 2014

By the Commission: Commissioners Clyburn and O’Rielly issuing a joint statement.

I. INTRODUCTION

1. In the *Transformation Order*, the Commission comprehensively reformed the intercarrier compensation (ICC) system to provide more predictability to regulated carriers than existed under the *status quo*.¹ In particular, the Commission adopted bill-and-keep as the default methodology for all ICC charges, and established a transition path to move ICC charges to such a methodology.² The Commission also adopted a recovery mechanism to partially mitigate revenue reductions that incumbent local exchange carriers (LECs) would experience as a result of these ICC reform measures.³ At the same time, the Commission recognized the need to limit the burdens such recovery might impose on end-user customers and universal service contributors.⁴ Accordingly, the Commission designed the recovery mechanism and associated rules to recognize carrier reliance on ICC revenues, but limit recovery in a reasonable manner consistent with the Commission’s goals.

2. In this Order, we grant in part, subject to identified conditions, two petitions seeking waiver of certain recovery rules. These waivers would allow the requesting carriers to include in their recovery calculations funds they were unable to collect from a carrier customer due to an access avoidance scheme and subsequent bankruptcy. We believe that incumbent LECs, upon a showing of good cause, should be permitted to include in their recovery calculations revenues associated with traffic eligible for compensation that was terminated during FY 2011⁵ and that otherwise meets the criteria spelled out in our revenue recovery rules. Including such revenue conforms to the policies underlying the recovery mechanism, and excluding them would undermine those policies.

¹ See *Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 18026-28, paras. 970-71 (2011) (*Transformation Order*), *pets. for review denied sub nom. In re: FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014).

² *Id.* at 17904, para. 740, 17932, para. 798; *see also* 47 C.F.R. § 51.713.

³ See *Transformation Order*, 26 FCC Rcd at 17956-87, paras. 847-904.

⁴ See *id.* at 17985-86, para. 903.

⁵ For the purposes of the recovery mechanism, Fiscal Year 2011 (FY 2011) is defined as Oct. 1, 2010 to Sept. 30, 2011. See 47 C.F.R. § 51.903(e).

3. As explained in more detail below, the petitions seek waiver of certain rules implementing the recovery mechanism so that the requesting incumbent LECs would be able to include additional revenue in their ICC Base Period Revenue (BPR, or baseline) amounts.⁶ One petition was filed by TDS Telecommunications Corp. (TDS Telecom), seeking to add \$560,402 to its BPR calculations.⁷ Specifically, TDS Telecom requests a waiver that would permit it “to include within [its] Base Period Revenues unpaid amounts billed to Halo Wireless, Inc. (Halo), for intrastate usage during Fiscal Year 2011.”⁸ The other petition was filed jointly by Cimarron Telephone Company, L.L.C., Cross Telephone Company, L.L.C., and The Pottawatomie Telephone Co., L.L.C. (Cimarron et al.) (collectively with TDS Telecom, the Petitioners), seeking to add a total of \$245,987 to their BPR calculations.⁹ Petitioners claim that they were unable to include revenues from intrastate access charges billed to Halo for service provided during FY 2011 because Halo initially and wrongly refused to pay for the access services provided, and Halo’s subsequent bankruptcy likely will preclude Petitioners from ever receiving payment for such services.¹⁰

4. For the reasons discussed below, we believe that Petitioners have demonstrated good cause for waiver to allow them to add to their BPRs amounts reflecting intrastate access service provided to Halo during FY 2011, and billed to, but not collected from, Halo. Absent such waivers, the unique combination of Halo’s alleged “re-origination” of intrastate access traffic as CMRS-originated traffic, Halo’s refusal to pay access charges for that traffic, and Halo’s subsequent bankruptcy and corporate liquidation would result in significant reductions to Petitioners’ ICC recovery mechanism revenues.¹¹ Further, as described below, this impact on recovery amounts would continue far into the future, such that Petitioners would suffer ongoing harm because of Halo’s behavior, without some form of Commission action.¹²

5. We grant Petitioners’ waiver requests subject to the following conditions. Prior to implementation of the relief granted in this Order, each petitioner must certify that: (1) it terminated all intrastate access traffic sent to it by Halo during FY 2011 that it seeks to add to its BPR calculations; (2) it billed Halo intrastate access charges for such traffic during FY 2011; (3) a court or regulatory agency of competent jurisdiction has made a finding of liability regarding the compensation for such traffic; (4) it filed a timely claim in the Halo bankruptcy case requesting compensation for such traffic; and (5) it did not include in its BPR adjustment amounts any interest, late payment fees, collection fees, or attorney

⁶ The rule to which the petitioners refer in their waiver petitions, 47 C.F.R. § 51.917(c), is now codified at 47 C.F.R. § 51.917(b)(7).

⁷ TDS Telecommunications Corp. Petition for Limited Waiver of Section 51.917(c) of the Commission’s Rules, WC Docket No. 10-90 et al. (filed Aug. 9, 2012) (TDS Telecom Petition). The amount TDS seeks to add to its BPR was redacted in the TDS Telecom Petition, but is now included in the public record. *See* Letter from Yaron Dori, Counsel to TDS Telecom, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 10-90 et al. (filed Feb. 18, 2014).

⁸ TDS Telecom Petition at 2.

⁹ Cimarron Telephone Company, L.L.C, Cross Telephone Company, L.L.C and The Pottawatomie Telephone Co., L.L.C Petition for Limited Waiver of Section 51.917(c) of the Commission’s Rules, WC Docket No. 10-90 et al., at 2 (filed Nov. 19, 2012) (“Specifically, the Petitioners request a waiver allowing them to include in their 2011 Base Period Revenues amounts billed, due, and owing from Halo Wireless, Inc., (“Halo”) for intrastate usage during Fiscal Year 2011.”) (Cimarron et al. Petition). The amount Cimarron et al. seeks to add to its BPR was redacted in the Cimarron et al. Petition, but is now included in the public record. *See* Letter from Jacob E. Baldwin, Counsel to Cimarron et al., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 10-90 et al. (filed Feb. 21, 2014).

¹⁰ *See* TDS Telecom Petition Attach. D. (Letters from Halo); Cimarron et al. Petition at 6-8.

¹¹ *See infra* paras. 9-14.

¹² *See infra* para. 7.

fees. In addition, any BPR adjustment for a study area resulting from this Order shall not exceed the intrastate access portion of a Petitioner's bankruptcy claim for that study area.¹³ We emphasize that Petitioners do not seek, and we do not provide, any monetary relief directly related to billing disputes between Petitioners and Halo.¹⁴

II. BACKGROUND

A. ICC Reform Measures Adopted in the *Transformation Order*

6. In the *Transformation Order*, the Commission adopted comprehensive ICC reform measures.¹⁵ These reforms included a transition to reduce certain ICC rates on an annual basis and a recovery mechanism designed to partially offset revenues reduced as a result of the rate transition.¹⁶ For rate-of-return LECs, the recovery mechanism begins with calculation of BPR. BPR is the sum of certain ICC intrastate switched access revenues and net reciprocal compensation revenues received by March 31, 2012, for services provided during FY 2011, and the projected revenue requirement for interstate switched access services provided during the 2011-2012 tariff period.¹⁷ BPR is then reduced by 5% initially and by an additional 5% in each year of the transition.¹⁸ The amount a rate-of-return LEC is entitled to recover in each year of the transition is equal to the adjusted BPR for the year in question less, for each relevant year of the ICC transition, the sum of: (1) projected intrastate switched access revenue; (2) projected interstate switched access revenue; and (3) projected net reciprocal compensation revenue.¹⁹ This amount, known as Eligible Recovery, is recoverable through a newly instituted Access Recovery Charge (ARC) assessed on end-users, and, to the extent not recoverable through ARCs, through Connect America Fund ICC support (CAF ICC support).²⁰ Providers receiving CAF ICC support have to comply with certain broadband obligations, which differ if the carrier is a rate-of-return carrier or price cap carrier.²¹

¹³ See generally Claims Register, *In re: Halo Wireless, Inc.*, Case No. 11-42464, Bkrcty. E.D. Tex. (converted July 19, 2012) (including claims from TDS Telecom's subsidiaries and Cimarron et al.). See also Letter from Yaron Dori, Counsel to TDS Telecom, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 10-90 et al. (filed July 28, 2014).

¹⁴ Petitioners are all creditors in Halo's bankruptcy case, see TDS Telecom Petition at 3 n.6; Cimarron et al. Petition Attach. 2 at 21-24, and the Commission is not the proper venue to request an order of back payment of charges; these collection matters are before the bankruptcy court. See, e.g., *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, Order, 19 FCC Rcd 7457, 7472, para. 23 n.93 (2004) ("Under sections 206-209 of the Act, the Commission does not act as a collection agent for carriers with respect to unpaid tariffed charges. Therefore we expect that LECs will file any claims for recovery of unpaid access charges in state or federal courts, as appropriate."); see also, e.g., *Contel of the South, Inc. v. Operator Communications, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 548, 555-56, para. 19 (2008) (quoting *U.S. TelePacific Corp. v. Tel-America of Salt Lake City, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 24552, 24555-56, para. 8 (2004) ("the Commission does not act as a collection agent for carriers with respect to unpaid tariffed charges")).

¹⁵ See *Transformation Order*, 26 FCC Rcd at 17872-73, para. 648.

¹⁶ See, e.g., *id.* at 17934, para. 801 Fig.9 (Intercarrier Compensation Reform Timeline); see also *id.* at 17957-61, paras. 850-53 (summarizing the Commission's approach to the recovery mechanism).

¹⁷ See 47 C.F.R. § 51.917(b)(7); the 2011-2012 tariff period was July 1, 2011, through June 30, 2012.

¹⁸ See 47 C.F.R. § 51.917(b)(3).

¹⁹ 47 C.F.R. § 51.917(d). The demand projections that are part of these projected revenue calculations are "trued-up" after two years. See 47 C.F.R. § 51.917(d)(iii)(D).

²⁰ See *Transformation Order*, 26 FCC Rcd at 17981, para. 896.

²¹ See *id.* at 17723, para. 150, 17740-41, paras. 206-08.

7. A rate-of-return LEC's BPR is calculated only one time, but is used during each step of the ICC recovery mechanism calculations for each year of the transition.²² Accordingly, accurate BPR calculations are critical to the successful operation of the recovery mechanism. Rate-of-return LECs calculated their BPR once as part of their tariff filings in 2012, the first year of the ICC transition, so any inaccuracies in the BPR calculation would carry forward in future recovery mechanism payments.

8. In the *Transformation Order*, the Commission adopted rules designed to ensure that rate-of-return LECs' BPR calculations capture revenues for FY 2011 ICC services subject to the ICC rate transition, balanced by stringent standards to prevent parties from taking advantage of the recovery mechanism by inflating their BPR.²³ For example, the Commission permitted rate-of-return LECs to calculate their BPR to include minutes-of-use (MOUs) related to access service provided during FY 2011, but prohibited rate-of-return LECs from including in BPR calculations MOUs for which "revenues were not recovered, for whatever reason."²⁴ Constraining BPR in this manner is one of several methods the Commission adopted to prevent excessive recovery from end users and the federal universal service fund (USF).²⁵

B. Halo Wireless

9. Halo is a Commercial Mobile Radio Service (CMRS) provider that functions as an "Intermediate Provider." Specifically, it carries or processes traffic that traverses or will traverse the public switched telephone network, but it neither originates nor terminates traffic.²⁶ Record evidence outlines an access charge avoidance scheme whereby Halo attempted to disguise traffic otherwise subject to access charges as traffic subject to reciprocal compensation under the "intraMTA rule."²⁷

10. Petitioners describe their experiences terminating intrastate access traffic sent to them by Halo during FY 2011, billing Halo for this service, Halo's refusal to pay based on its theory that the

²² See 47 C.F.R. § 51.917(d).

²³ See generally *Transformation Order*, 26 FCC Rcd at 17977-86, paras. 891-904 (describing the recovery mechanism for rate-of-return LECs).

²⁴ See *id.* at 17982, para. 898. The Commission further specified that, in order to be included in a rate-of-return LEC's BPR, revenues associated with MOUs had to be collected by March 31, 2012. 47 C.F.R. § 51.917(b)(7).

²⁵ The Commission also adopted rules requiring rate-of-return LECs to adjust BPR to reflect removal of any increase in revenue requirement or revenues resulting from access stimulation activities during the relevant time period. See 47 C.F.R. § 51.917(c); see also *Transformation Order*, 26 FCC Rcd at 17956, para. 847.

²⁶ See 47 C.F.R. § 64.1601(f). As discussed below, Halo claimed to "re-originate" intrastate access traffic as traffic originating and terminating within the same Major Trading Area ("intraMTA" CMRS traffic), but the Commission rejected this claim. See *Transformation Order*, 26 FCC Rcd at 18042, para. 1006; see also *infra* para. 13.

²⁷ See, e.g., Comments of Rural LEC Section XV Group, WC Docket No. 10-90 et al., at 17 (filed Apr. 1, 2011); Letter from Jerry Weikle, on behalf of Eastern Rural Telecom Association, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 10-90 et al., at 3 (filed July 8, 2011); Letter from Gregory W. Whiteaker, Counsel to Rural LEC Section XV Group, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 10-90 et al., Attach. at 3 (filed Sept. 23, 2011) (Whiteaker *Ex Parte* Letter). Under the intraMTA rule in effect during the relevant time period, CMRS-to-LEC traffic that originated and terminated in the same MTA was subject to reciprocal compensation rather than access charges. 47 C.F.R. § 51.701(b)(2) (2010). This rule was revised by the *Transformation Order* to define such traffic as "Non-Access Telecommunications Traffic." See 47 C.F.R. § 51.701(b) (2012).

traffic is not subject to access charges, and their efforts to collect.²⁸ Notably, Petitioners are all claimants in the Halo bankruptcy case.²⁹

11. The record demonstrates that, when faced with Halo's refusal to pay access charges, TDS Telecom pursued appropriate relief from various state public utility commissions (PUCs).³⁰ Cimarron et al.'s filings described how, in 2011, they noticed indications that Halo "was terminating large amounts of traffic, comparable to national wireless carriers," as well as a "reduction in amounts of wireline traffic terminated," and "devoted significant resources to identify, track down, and collect the necessary evidence to prove Halo's arbitrage scheme."³¹ Cimarron et al. note that they "contemplated seeking relief at the Oklahoma Corporation Commission (OCC) but instead made further efforts to collect from Halo."³²

12. On August 8, 2011, Halo filed for Chapter 11 bankruptcy protection,³³ initiating the automatic stay protection afforded all debtors in bankruptcy. On July 19, 2012, Halo converted its bankruptcy status to Chapter 7 liquidation.³⁴ Cimarron et al. assert that Halo's bankruptcy filing put "an automatic stay on collection efforts and [precluded] direct action to the OCC."³⁵ TDS also notes that Halo's bankruptcy status created a situation where "regulatory authorities could not order Halo to make payment."³⁶

13. In the *Transformation Order*, the Commission considered and rejected Halo's claims that the traffic it sent to Petitioners and other LECs was subject to reciprocal compensation.³⁷ Specifically, the Commission said "that a call is considered to be originated by a CMRS provider for purposes of the intraMTA rule only if the calling party initiating the call has done so through a CMRS provider," and "the 're-origination' of a call over a wireless link in the middle of the call path does not convert a wireline-originated call into a CMRS-originated call for purposes of reciprocal compensation."³⁸

14. The Commission's rejection of Halo's claims in the *Transformation Order* informs our decision here, because Halo's alleged re-origination of wireline-originated calls as CMRS traffic is also

²⁸ See TDS Telecom Petition at 2-9; Cimarron et al. Petition at 3-8; see also Whiteaker *Ex Parte* Letter, Attach. at 4-29.

²⁹ See TDS Telecom Petition at 2-3 n.6 (noting that TDS Telecom is a creditor in Halo's bankruptcy case); Cimarron et al. Petition at 7 (explaining that Cimarron et al. filed proofs of claims in the bankruptcy proceeding in November and December 2011). Petitioners' diligent pursuit of unpaid intrastate access revenue is part of the factual situation that we find persuasive in granting relief in this Order. Petitioners have every incentive to include all amounts, intrastate access and otherwise, that are disputed between themselves and Halo in their bankruptcy claim. Therefore, we expect Petitioners' bankruptcy claims to exceed the amounts by which they would need to adjust their BPR to account for Halo's non-payment of intrastate access charges as described in their petitions. Accordingly, we limit the BPR adjustments resulting from this Order to the intrastate access portion of the relevant Petitioner's bankruptcy claim for any study area.

³⁰ See, e.g., TDS Telecom Petition at 6.

³¹ See Letter from Jacob E. Baldwin, Counsel to Cimarron et al., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 10-90 et al., at 2 (filed Feb. 10, 2014) (Jacob Baldwin Letter).

³² *Id.*

³³ *In re Halo Wireless, Inc.*, Case No. 11-42464, Bkrty. E.D. Tex. (filed Aug. 8, 2011).

³⁴ *In re Halo Wireless, Inc.*, Case No. 11-42464, Bkrty. E.D. Tex. (filed July 19, 2012).

³⁵ Jacob Baldwin Letter at 2.

³⁶ TDS Telecom Petition at 12.

³⁷ *Transformation Order*, 26 FCC Rcd at 18041-44, paras. 1003-08.

³⁸ *Id.* at 18042, para. 1006 (internal citations omitted). This finding was challenged by Halo and its business partner Transcom, but the United States Court of Appeals for the Tenth Circuit upheld the Commission's findings on appeal. *In re: FCC 11-161*, 753 F.3d 1015, 1151-53 (10th Cir. 2014).

Halo's primary defense in the disputes over non-payment of intrastate access charges between Petitioners and Halo. During the same time period, Halo also was subject to numerous state PUC proceedings;³⁹ nine state PUCs found Halo liable to incumbent LECs for disputed intrastate access charges.⁴⁰ No evidence in the record indicates that any state PUC agreed with Halo's position that "re-originating" a call can change ICC obligations.

III. DISCUSSION

15. Generally, the Commission's rules may be waived under section 1.3 of our rules for "good cause shown."⁴¹ The Commission may exercise its discretion to waive a rule where (a) the particular facts make strict compliance inconsistent with the public interest, (b) special circumstances warrant a deviation from the general rule, and (c) such deviation will serve the public interest.⁴² In making these determinations, the Commission may consider evidence of hardship, equity, and more effective implementation of overall policy on an individual basis.⁴³ For the reasons discussed below, we find that Petitioners have demonstrated good cause that justifies granting the requested waivers, and that doing so would be consistent with the public interest.

16. In the *Transformation Order*, the Commission explicitly contemplated that certain circumstances could justify adjustments to recovery baseline amounts, and described some situations where adjustments may be appropriate.⁴⁴ Specifically, the Commission noted that carriers may file requests for "waiver of our rules defining the Baseline to account for revenues billed for terminating switched access service or reciprocal compensation provided in FY 2011 but recovered after the March 31, 2012 cut-off as the result of the decision of a court or regulatory agency of competent jurisdiction."⁴⁵ The petitions we consider make similar, but not identical, requests to the requests described in this guidance. The guidance applies to requests to include revenue in a carrier's BPR that a carrier has recovered as a result of the order of a court or regulatory agency,⁴⁶ but here Petitioners have not recovered the revenues that they seek to include in their BPR and, as a result of Halo's bankruptcy protection, it is unlikely that they will. Accordingly, Petitioners' ability to fall within the four corners of that guidance is at best delayed, and is ultimately uncertain.

17. The ICC recovery mechanism adopted in the *Transformation Order* was designed, among other things, to provide predictability to incumbent LECs that had been receiving implicit ICC subsidies

³⁹ See TDS Telecom Petition Attach. E (listing Alabama – Docket No. 31682, Florida – Docket No. 110234, Georgia – Docket No. 34219, Kentucky – Docket No. 2011-00199, Michigan – Docket No. U-17018, Mississippi – Docket No. 2011-AD-223, Missouri – Docket No. TC-2011-0404, North Carolina – Docket No. P-55 Sub 1841, South Carolina – Docket No. 2011-304-C, Tennessee – Docket No. 11-00108, and Wisconsin – Docket No. 9495-TI-100).

⁴⁰ See Letter from Yaron Dori, Counsel to TDS Telecom, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 10-90 et al., Attach. at 1-3 (filed Dec. 20, 2012) (TDS Telecom Dec. 20, 2012 *Ex Parte* Notice) (listing Florida – Docket No. 110234, Georgia – Docket No. 34219, Mississippi – Docket No. 2011-AD-223, Missouri – Docket No. TC-2011-0404, North Carolina – Docket No. P-55 Sub 1841, South Carolina – Docket No. 2011-304-C, Tennessee – Docket No. 11-00108, and Wisconsin – Docket No. 9495-TI-100); see also Letter from Yaron Dori, Counsel to TDS Telecom, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 10-90 et al., at 1-2 (filed Apr. 24, 2014) (noting that on January 7, 2013, the Kentucky Public Service Commission found that Halo breached its interconnection agreement with AT&T and that Halo was liable for the payment of access charges).

⁴¹ 47 C.F.R. § 1.3; *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

⁴² *Northeast Cellular*, 897 F.2d at 1166.

⁴³ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166.

⁴⁴ See *Transformation Order*, 26 FCC Rcd at 17982, para. 898 n.1745.

⁴⁵ *Id.*

⁴⁶ See *id.*

and to mitigate marketplace disruption during the ICC reform transition.⁴⁷ The Commission squarely addressed and rejected Halo's arguments in the *Transformation Order*.⁴⁸ We believe it would be contrary to, and would impede effective implementation of, these policies if Halo's non-payment due to bankruptcy for services that were provided locked providers harmed by Halo's non-compliance into a lower BPR for the duration of the ICC rate transition.

18. We recognize that, at the time of the *Transformation Order*, numerous carrier billing disputes existed over whether certain types of traffic were subject to access charge compensation, and the Commission limited eligible recovery to specific types of revenues actually collected in an effort to reflect reasonable reliance on such revenues.⁴⁹ In considering waivers seeking to amend recovery amounts, it is necessary to balance the need to ensure accurate BPR calculations against the burdens associated with adjusting recovery amounts, including any potential burdens on end users and universal service funding.⁵⁰ Under these circumstances, we find that inclusion of the revenues associated with unpaid amounts billed to Halo in the BPR calculations, coupled with appropriate safeguards, would produce more accurate recovery calculations. For all these reasons, we believe that Petitioners should be permitted to include, in their BPR calculations, intrastate access revenues associated with traffic eligible for access charge compensation terminated during FY 2011.

19. Several commenters oppose the petitions. Sprint claims that it is unfair for USF contributors to be "forced to make [the Petitioners] whole by covering access invoices unpaid by Halo," and that granting the petitions "would either draw support away from other USF recipients or increase the size of the CAF recovery fund."⁵¹ NCTA argues that the Commission should reject the petitions because "the public interest would not be served by granting [the instant petitions,] as this might lead to hundreds of 'me too' petitions and would favor [the Petitioners] over similarly-situated competitive providers that also were harmed by Halo's bankruptcy."⁵²

20. We disagree with Sprint's claims that granting the requested waivers would "cover" access invoices unpaid by Halo. As previously discussed, our action in this Order does not compensate Petitioners for the unpaid access charges that are in dispute between Petitioners and Halo.⁵³ Instead, granting the waiver only will allow the Petitioners to add to their BPRs intrastate access amounts properly billed to Halo for service provided during FY 2011, thereby ensuring that Petitioners' BPR amounts will result in recovery mechanism payments reflecting actual intrastate access services Petitioners provided during FY 2011.

21. We also disagree with Sprint's arguments concerning the impact of relief on USF contributors. When the Commission adopted the *Transformation Order*, it planned for carriers being, and anticipated that carriers would be, able to include revenues from the provision of actual intrastate access service in calculating their BPRs. Correcting for the scheme perpetrated by Halo helps the Commission

⁴⁷ See *id.* at 17962, para. 858.

⁴⁸ See *id.* at 18042, para. 1006 (internal citations omitted).

⁴⁹ See *id.* at 17982, para. 898 & n.1745.

⁵⁰ As discussed above, the Commission specifically addressed the access avoidance scheme perpetrated by Halo and rejected Halo's claims concerning the compensation due. See *id.* at 18042, para. 1006; see also *supra* para. 13. In contrast, the Commission explicitly declined to address other pre-existing ICC disputes, such as the appropriate compensation for Voice over Internet Protocol traffic. See, e.g., *Transformation Order*, 26 FCC Rcd at 18003-09, paras. 937-45.

⁵¹ Comments of Sprint Nextel Corporation (Sprint), WC Docket No. 10-90 et al., at 2 (filed Oct. 1, 2012).

⁵² Comments of National Cable & Telecommunications Association (NCTA), WC Docket No. 10-90 et al., at 2 (filed Oct. 1, 2012).

⁵³ See *supra* para. 5.

ensure the accuracy of the recovery mechanism without increasing the size of the USF in unintended ways. But for the bankruptcy, Petitioners would fit squarely within the guidance provided in the *Transformation Order* that anticipated adjusting BPR pursuant to a decision by a court or regulatory agency order. Waiver is appropriate where, as here, the Commission's guidance to allow carriers to include in their BPRs intrastate access revenues that ultimately would have been collected from Halo pursuant to court or regulatory agency order would be frustrated by a strict application of our rules.

22. We also disagree with NCTA's allegation that granting these petitions would not serve the public interest. Granting these petitions will allow Petitioners' BPRs to reflect actual service provided during FY 2011 to terminate actual calls bound for Petitioners' customers.⁵⁴ The Commission created the ICC recovery mechanism for the specific purpose of providing a revenue stream to replace, in part, ICC revenue reductions resulting from the ICC reforms adopted in the *Transformation Order*. For rate-of-return LECs, the recovery mechanism operates by comparing pre-reform ICC revenues with ICC revenue for each year of the transition. It would not serve the public interest if the ICC recovery mechanism provides insufficient revenue to Petitioners because of the combined impact of Halo's access avoidance scheme and subsequent bankruptcy. We additionally reject NCTA's arguments that the relief granted here favors Petitioners over similarly situated competitive carriers.⁵⁵ As discussed above, this Order does not compensate Petitioners for their claims against Halo.⁵⁶ Such claims will proceed in the bankruptcy court, along with the claims of all other claimants, including competitive carriers. The *Transformation Order* treated incumbent and competitive carriers differently because of differences between such carriers.⁵⁷ This Order does not change those determinations.⁵⁸ In fact, this Order helps ensure that the recovery mechanism adopted for incumbent LECs in the *Transformation Order* works as intended.

23. We grant Petitioners' waiver requests subject to the following conditions designed to ensure that Petitioners' adjustments to their BPR calculations include only uncollected revenues billed to Halo for traffic terminated during FY 2011 that was eligible for intrastate access charge compensation. Prior to the implementation of the relief granted in this Order, each petitioner must, in order to receive such relief, certify under penalty of perjury the following:

- First, that it terminated all intrastate traffic sent to it by Halo for termination during FY 2011 that it seeks to add to its BPR calculations. This condition will limit BPR

⁵⁴ In response to the petitions, no commenters raised allegations that Petitioners were engaged in any access stimulation activities. Additionally, Petitioners were not party to tariff suspensions or other Commission actions designed to curtail incumbent LEC access stimulation activities as addressed in WC Docket No. 07-135. *See generally Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135, Notice of Proposed Rulemaking, 22 FCC Rcd 17989 (2007); *July 1, 2007 Annual Access Charge Tariff Filings*, Order, 22 FCC Rcd 11619 (Wireline Comp. Bur. 2007) (suspending certain tariffs).

⁵⁵ We similarly reject NCTA's argument that the potential for similarly situated carriers to file "me too" petitions is a basis for rejecting the waiver requests. The scope of Halo's scheme and the potential that other carriers that also have been harmed by Halo may seek similar relief in the future does not address whether it is reasonable or in the public interest to grant a waiver under these circumstances. Additionally, Petitioners note that there was a "bar date" of January 10, 2013 for filing claims in the Halo bankruptcy case. TDS Telecom Dec. 20, 2012 *Ex Parte* Notice at 2. As that date has passed, claims relying on our analysis here will be limited to those carriers that previously have pursued recovery of unpaid intrastate access charges from Halo and have a decision of liability from a court or state regulatory agency of competent jurisdiction.

⁵⁶ *See supra* para. 5.

⁵⁷ *See Transformation Order*, 26 FCC Rcd at 17964-67, paras. 862-66.

⁵⁸ For reasons discussed in detail in the *Transformation Order*, no explicit ICC recovery mechanism was provided for competitive carriers. Accordingly, the relief we grant in this Order, waiver of certain ICC recovery mechanism implementation rules, is not applicable to competitive carriers because the rules do not apply to them. *See id.* at 17965-67, paras. 864-66.

adjustments to reflect traffic for which compensable terminating access services were actually provided.

- Second, that it billed Halo intrastate access charges for such traffic during FY 2011 or before the close of the next regular billing cycle in Fiscal Year 2012 for the amounts to be added to BPR calculations. This condition is designed to limit BPR adjustments to those relating to revenue that Petitioners attempted to collect from Halo for provision of terminating access services during FY 2011.
- Third, that a court or state regulatory agency of competent jurisdiction has made a finding of liability regarding the compensation for such traffic.
- Fourth, that it filed a timely claim in the Halo bankruptcy case requesting compensation for such traffic, and any BPR adjustment for a study area resulting from this Order does not exceed the intrastate access portion of such petitioner's bankruptcy claim for that study area. These requirements are intended to prevent Petitioners from taking actions now to increase their BPR adjustments beyond the amounts of their claims in the Halo bankruptcy case.
- Fifth, that its BPR adjustment amounts do not include any interest, late payment fees, collection fees, or attorney fees, in order to ensure that BPR adjustments are limited to revenue associated with compensable traffic, and do not include other types of revenue. In addition, such certification must confirm that the revenues supporting the requested BPR adjustments are not already included in the BPR calculations.

IV. ADMINISTRATIVE IMPLEMENTATION OF RELIEF GRANTED

24. This section addresses how the amount of relief granted in this Order is to be determined and the process for payment by the Universal Service Administrative Company (USAC).⁵⁹ It is important to note at the outset that Petitioners are all rate-of-return LECs that have, to date, both recovered the maximum amount possible from ARCs⁶⁰ and received CAF ICC support in tariff years 2012, 2013, and 2014.⁶¹ Accordingly, any additional recovery mechanism revenue that Petitioners receive as a result of this Order for 2012, 2013, and 2014, and potentially for future tariff years, will come from CAF ICC support and not from ARCs.⁶²

25. Initially, Petitioners shall determine for each affected study area the amount of unpaid intrastate switched access revenues that were billed to Halo during FY 2011 for which a court or state regulatory agency of competent jurisdiction has determined liability and that are associated with the waiver requests. This number represents the amount billed to Halo that was uncollected by each petitioner for each affected study area for services during FY 2011 and is the starting point for

⁵⁹ USAC plays a critical role in the day-to-day administration of universal service support mechanisms. *See, e.g., Connect America Fund et al.*, WC Docket No. et al., Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 26 FCC Rcd 4554, 4595, para. 116 n.192.

⁶⁰ The ARC is the end-user charge component of the ICC recovery mechanism adopted in the *Transformation Order*. Incumbent LECs are authorized to charge ARCs, subject to annual caps and to an overall rate ceiling, in order to partially mitigate the effect of reduced intercarrier revenues on carriers. *See Transformation Order*, 26 FCC Rcd at 17677, para. 36, 17957, para. 849; *see also* 47 C.F.R. §§ 51.915(e), 51.917(e).

⁶¹ *See, e.g.,* John Staurulakis, Inc. Transmittal No. 165, Tariff F.C.C. No. 1, TDS Telecom Companies, Description and Justification and Cost Support Documents (filed June 18, 2012). TDS Telecom's subsidiaries file under the same tariff, and the TDS Telecom tariff is filed by John Staurulakis, Inc.

⁶² *See* 47 C.F.R. § 51.917(e). We note that we do not address in this Order how a LEC seeking similar relief to that granted herein, but that collected all of its 2012 and 2013 Eligible Recovery through ARC revenue and had remaining "ARC headroom" in 2012 and 2013, would recover any additional BPR amounts.

determining the amount recoverable pursuant to these waivers. To derive a representative collected revenue amount for the amounts billed to Halo, each petitioner shall adjust the billed amount by the uncollectible factor used for the initial BPR determination for the relevant study area. The lesser of the adjusted amount or the petitioner's claim amount in the Halo bankruptcy case for each affected study area is the increase that the petitioner may make for that particular study area in its BPR calculations. Each petitioner shall include this increase to the intrastate collected revenue amount shown in its 2012 and subsequent year tariff support materials.⁶³

26. In addition, Petitioners are required to file with the Commission—and certify to the accuracy of—the different categories of charges (e.g., intrastate access, interstate access, interest, late payment fees, collection fees, attorney's fees) and amounts for each category included in their Halo bankruptcy case claims.⁶⁴ For the specific purpose of implementing the relief granted in this Order, each petitioner shall submit to USAC and the relevant state commission revised data that was filed pursuant to section 54.304(d) of the Commission's rules.⁶⁵ Each petitioner should note the FCC number of this Order as authority for the request and include supporting documentation for the calculations. An officer of the company must certify, under penalty of perjury, that the requested amount is calculated in a manner consistent with the requirements of this Order.

27. To effectuate the relief granted by this waiver, Petitioners shall file with the Commission in the Electronic Tariff Filing System corrected Tariff Review Plan (TRP) worksheets with amended Eligible Recovery amounts, as well as the required certifications. Each petitioner shall also file a notice of its corrected TRP filing in the Electronic Comment Filing System (ECFS) in WC Docket No. 10-90, and must e-mail a copy of the notice to Richard Kwiatkowski, Pricing Policy Division, Wireline Competition Bureau, at Richard.Kwiatkowski@fcc.gov. If a state PUC or other interested person objects to the revised data, it shall file its objection in WC Docket No. 10-90 within 21 days of the filing of the notice in ECFS. The Commission's Wireline Competition Bureau (Bureau) will release a Public Notice in WC Docket No. 10-90 directing USAC to withhold payment while the Bureau resolves objections. If such a Public Notice is not released in the relevant docket within 45 days of a petitioner's request, USAC shall proceed to process the petitioner's request and issue payment. We delegate authority to the Bureau to determine and carry out appropriate procedures to resolve objections.

V. ORDERING CLAUSES

28. Accordingly, IT IS ORDERED that, pursuant to sections 1, 4(i) and (j), 201-202, 251, and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and (j), 201-202, 251, and 254, and section 1.3 of the Commission's rules, 47 C.F.R. § 1.3, the Petition for Limited Waiver filed on August 9, 2012, by TDS Telecommunications Corp., and the Petition for Limited Waiver filed jointly on November 19, 2012, by Cimarron Telephone Company, Cross Telephone Company, and the Pottawatomie Telephone Company ARE GRANTED to the extent specified herein, and are otherwise DENIED.

29. IT IS FURTHER ORDERED that the Universal Service Administrative Company SHALL MAKE PAYMENTS in accordance with the requirements of paragraphs 26 and 27 of this Order.

⁶³ If there is a subsequent court or state regulatory agency decision regarding the amount of damages for which Halo is liable, the petitioner must notify the Commission and provide a copy of such decision within 30 days. If appropriate, the Petitioner would need to adjust its BPR calculations accordingly within the requirements found in paragraphs 24-27 of this Order.

⁶⁴ As discussed above, Petitioners are prohibited from including interest, late payment fees, collection fees, or attorney's fees in their claims under this condition. *See supra* para. 5.

⁶⁵ 47 C.F.R. § 54.304(d).

30. IT IS FURTHER ORDERED that pursuant to section 1.103 of the Commission's rules, 47 C.F.R. § 1.103, this Order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

**JOINT STATEMENT OF
COMMISSIONERS MIGNON L. CLYBURN AND MICHAEL O'RIELLY**

Re: *Connect America Fund, WC Docket No. 10-90, Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92; Petitions for Waiver of Section 51.917(b)(7) of the Commission's Rules.*

We support the item because it contains necessary safeguards to ensure a court or regulatory agency of competent jurisdiction has made a finding of liability before a carrier receives any additional Connect America Fund support. Doing so is consistent with the goals of intercarrier compensation reform to provide a path away from the legacy subsidies as well as an important safeguard for consumers who contribute to the universal service fund. We appreciate the willingness of the Chairman to ensure that these safeguards are in place before granting a waiver.