

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

In the Matters of
Connect America Fund
Developing a Unified Intercarrier Compensation Regime
Petitions for Waiver of Section 51.917 of the Commission's Rules
WC Docket No. 10-90
CC Docket No. 01-92

ORDER

Adopted: October 17, 2016

Released: October 20, 2016

By the Commission:

I. INTRODUCTION

1. In this Order, we address a number of petitions filed by rate-of-return incumbent local exchange carriers (incumbent LECs) seeking waivers of certain intercarrier compensation (ICC) recovery rules to allow them to amend their recovery calculations. Specifically, Emery Telcom (Emery), Yukon-Waltz Telephone Company (Yukon-Waltz), Smart City Telecommunications LLC d/b/a Smart City Telecom (Smart City), Laurel Highland Telephone Company and Yukon-Waltz Telephone Company (Laurel Highland/Yukon-Waltz), and IAMO Telephone Company (IAMO) seek waivers permitting them to adjust the base period revenue (BPR) amounts used to calculate Eligible Recovery. For the reasons discussed below, we find that Emery demonstrated good cause for waiver of the Commission's Eligible Recovery rules to allow it to include additional revenues in its BPR calculations. The remaining petitioners, however, failed to present the special circumstances necessary to support the requested waivers. Accordingly, for the reasons discussed below, we conditionally grant the Emery petition and deny the others. Because Emery demonstrated good cause in its petition, we find that including such

1 Petition of Emery Telcom for a Limited Waiver of 47 C.F.R. 51.917, WC Docket No. 10-90 et al. (filed Oct. 26, 2012) (Emery Petition) and Letter from Mary J. Sisak, Counsel to Emery, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 et al. (filed May 14, 2013); Yukon-Waltz Telephone Company Petition for a Limited Waiver of 47 C.F.R. 51.917(b)(7)(ii), WC Docket No. 10-90 et al. (filed Jan. 11, 2013) (Yukon-Waltz Petition) and Letter from Rob Strait, Principal, Alexicon Telecommunications Consulting, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 et al. (filed May 17, 2013); Amended Petition of Smart City Telecom for a Limited Waiver of 47 C.F.R. 51.917(b)(7)(ii), WC Docket No. 10-90 et al. (filed Apr. 29, 2013) (Smart City Petition); Petition of Laurel Highland Telephone Company and Yukon-Waltz Telephone Company for Limited Waiver of 47 C.F.R. § 51.917(b)(4), WC Docket No. 10-90 et al. (filed Apr. 12, 2013) (Laurel Highland/Yukon-Waltz Petition) and Letter from Rob Strait, Principal, Alexicon Telecommunications Consulting to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 et al. (filed May 24, 2013); Petition of IAMO Telephone Company for a Limited Waiver of 47 C.F.R. § 51.917(b), WC Docket No. 10-90 et al. (filed Jul. 10, 2014) (IAMO Petition).

revenue in its BPR calculations conforms to the policies underlying the recovery mechanism adopted in the *USF/ICC Transformation Order*.²

2. In addition, we take this opportunity to address a recovery waiver issue recently raised and deferred by the Wireline Competition Bureau (Bureau) in the *Halo II Order*,³ and also arising under the Emery waiver addressed herein. Specifically, we consider whether certain incumbent LECs granted conditional waivers of the Eligible Recovery rules must impute certain Access Recovery Charges (ARCs) for prior tariff periods.⁴ We find that the only mechanism to provide these carriers with the additional recovery afforded in our waiver orders for prior periods is for us to waive the imputation rule set forth in section 51.917(f)(2) of the Commission's rules⁵ and allow these carriers to recover additional CAF ICC. Accordingly, we conclude that good cause exists to waive the imputation requirement in the Commission's rules for prior tariff periods.

II. BACKGROUND

3. *Cost and Average Schedule Companies.* The National Exchange Carrier Association (NECA) is responsible for developing interstate access tariffs for incumbent LECs that wish to participate in the NECA access charge tariff pooling process.⁶ Historically, carriers that participated in the NECA tariff pooling process recovered interstate costs from the pools as either cost companies or average schedule companies.⁷ Cost companies calculated the costs they incurred in providing interstate access by conducting individual cost studies.⁸ Rather than being compensated based on their own costs, average schedule companies received payments based on formulae developed by NECA and approved by the Commission.⁹ The formulae were designed to produce disbursements to an average schedule company, which for ratemaking purposes, constituted its interstate costs that simulate the disbursements that would be received by a cost company that is representative of average schedule companies.¹⁰

² See *Connect America Fund et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011) (*USF/ICC Transformation Order*) *aff'd sub nom.*, *In re: FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014).

³ See *Connect America Fund; Developing a Unified Intercarrier Compensation Regime; Petitions for Waiver of Section 51.917(b)(7) of the Commission's Rules*, Order, 30 FCC Rcd 6430, 6439, paras. 22-23 (WCB 2015) (*Halo II Order*).

⁴ A rate-of-return carrier recovers its Eligible Recovery first from a capped ARC assessed on end users and, if it is eligible, may elect to recover any remaining amounts from Connect America Fund ICC (CAF ICC) support. See 47 CFR § 51.917(e), (f).

⁵ *Id.* § 51.917(f)(2).

⁶ Carriers who decline to participate in the NECA access charge tariff pooling process must file their own interstate access tariffs.

⁷ See 47 CFR §§ 69.605(c), 69.606.

⁸ Cost companies performed studies of their costs in accordance with parts 32, 36, and 64 of the Commission's rules to determine their actual interstate costs. See *id.* pts. 32, 36, 64.

⁹ See *ALLTEL Corp. v FCC*, 838 F.2d 551, 553 (D.C. Cir. 1988).

¹⁰ 47 CFR § 69.606(a). Although the Commission permits qualifying incumbent LECs the option of receiving interstate compensation under average schedules, it does not require any carrier to receive compensation under such schedules. Thus, any average schedule company that believes it would be adversely affected by settlement amounts produced by an average schedule may opt out of the average schedule process entirely and become a cost company. See *National Exchange Carrier Association, Inc. Proposed Modifications to the 1998-99 Interstate Average Schedule Formulas*, 14 FCC Rcd 4049, 4053, para. 10 n.25 (CCB 1999). Once an average schedule company elects to become a cost company, however, it cannot switch back to average schedule status. *Nat'l Utilities, Inc. and Bettles Tel. Co., Petition for Waiver of Section 69.605(c) of the Commission's Rules*, Report and Order, 8 FCC Rcd 8723, para. 1 (CCB 1993).

4. *The USF/ICC Transformation Order.* In the *USF/ICC Transformation Order*, the Commission comprehensively reformed the ICC system to provide more predictability to regulated carriers.¹¹ 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.¹² The Commission also adopted a recovery mechanism to partially mitigate revenue reductions that incumbent LECs would experience as a result of these ICC reform measures.¹³ The Commission designed the recovery mechanism and associated rules to recognize carrier reliance on ICC revenues, while limiting recovery in a reasonable manner consistent with the Commission's goals.¹⁴ 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.¹⁵ Under the recovery mechanism, carriers participating in the NECA pooling process no longer recover their switched access costs in the manner described above. Rather, disbursements from the NECA pool are now based on calculations of recovery that each carrier is eligible for under the new recovery rules.¹⁶

5. For rate-of-return LECs, the recovery mechanism begins with calculating 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 Fiscal Year 2011 (FY 2011),¹⁷ and the projected revenue requirement for interstate switched access services provided during the 2011-12 tariff period.¹⁸ BPR is then reduced by five percent initially and by an additional five percent in each year of the transition.¹⁹ The amount a rate-of-return LEC is entitled to recover in each year of the transition (Eligible Recovery) 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.²⁰

6. 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.²¹ 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. In the *USF/ICC Transformation Order*, the Commission adopted rules designed to ensure that rate-of-return LECs' BPR calculations captured 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.²² For example, the Commission permitted rate-of-return LECs to include minutes-of-

¹¹ See generally *USF/ICC Transformation Order*, 26 FCC Rcd at 18026-28, paras. 970-71.

¹² See *id.* at 17904, 17932, paras. 740, 798; see also 47 CFR § 51.713.

¹³ See *id.* at 17956-87, paras. 847-904.

¹⁴ See *id.* at 17957, para. 849.

¹⁵ See *id.* at 17985-86, para. 903.

¹⁶ Pooling carriers not affiliated with price cap carriers continue to recover costs for special access and common line revenue requirements as they did prior to the *USF/ICC Transformation Order*.

¹⁷ For the purposes of the recovery mechanism, FY 2011 is defined as Oct. 1, 2010 to Sept. 30, 2011. See 47 CFR § 51.903(e).

¹⁸ See *id.* § 51.917(b)(7); the 2011-12 tariff period was July 1, 2011, through June 30, 2012.

¹⁹ See *id.* § 51.917(b)(3).

²⁰ *Id.* § 51.917(d). The demand projections that are part of these projected revenue calculations are "trued-up" after two years. See *id.* § 51.917(d)(1)(iii)(D).

²¹ See *id.* § 51.917(d).

²² See generally *USF/ICC Transformation Order*, 26 FCC Rcd at 17977-86, paras. 891-904 (describing the recovery mechanism for rate-of-return LECs).

use (MOUs) related to intrastate switched access service provided during FY 2011, but prohibited rate-of-return LECs from including in BPR calculations intrastate MOUs for which “revenues were not recovered, for whatever reason.”²³ 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, 2012.²⁴

7. One of the elements that comprises the BPR for rate-of-return carriers is the 2011 Interstate Switched Access Revenue Requirement.²⁵ For companies participating in the 2011 NECA pooling process, the 2011 Interstate Switched Access Revenue Requirement was defined as the projected interstate switched access revenue requirement associated with the NECA tariff filing for the 2011-12 tariff year.²⁶ This projected interstate switched access revenue requirement was determined differently for cost and average schedule companies. The cost company revenue requirement was determined using the costs determined via cost studies.²⁷ The average schedule company revenue requirement, however, was determined based on the settlements received from the NECA pooling process using the average schedule formulas.²⁸ Thus, the decision to participate in the NECA pooling process as a cost or average schedule carrier affected a rate-of-return carrier’s 2011 Interstate Switched Access Revenue Requirement and hence, the BPR used in determining recovery amounts.

8. *Halo Orders.* In August 2014, the Commission granted in part, subject to identified conditions, two petitions seeking waiver of certain recovery rules.²⁹ These waivers allowed the requesting carriers to include in their recovery calculations funds they were unable to collect from a carrier customer, Halo Wireless, Inc. (Halo), due to an access avoidance scheme and subsequent bankruptcy.³⁰ The Commission concluded that the unique combination of circumstances justified a waiver, but also adopted several conditions and compliance obligations to ensure that only the eligible revenues contemplated by the *USF/ICC Transformation Order*, in fact, were included in the carriers’ revised BPRs.³¹ On June 24, 2015, the Bureau granted a number of additional waivers permitting carriers to include in their recovery calculations certain funds that they were unable to collect from Halo.³² The Bureau declined to address, however, whether three incumbent LECs -- Five Area Telephone Cooperative, Inc., West Plains Telecommunications, Inc. and Hill Country Telephone Cooperative, Inc. -- should receive a waiver of the imputation rule in section 51.917(f)(2) for prior tariff periods. The Bureau

²³ See *id.* at 17982, para. 898.

²⁴ 47 CFR § 51.917(b)(7).

²⁵ See *id.* § 51.917(b)(7)(i)

²⁶ *Id.* § 51.917(b)(1)(i).

²⁷ *Id.* § 51.917(b)(4).

²⁸ *Id.*

²⁹ See generally *Connect America Fund; Developing a Unified Intercarrier Compensation Regime; Petitions for Waiver of Section 51.917(b)(7) of the Commission's Rules*, Order, 29 FCC Rcd 9958 (2014) (*Halo Order*).

³⁰ *Id.*

³¹ *Id.* at 9964-66, paras. 18, 23. Prior to implementation of the relief granted in the *Halo Order*, each petitioner was required to certify that: (1) it terminated all intrastate access traffic sent to it by Halo during FY 2011 that it sought 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 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 fees. In addition, any BPR adjustment for a study area resulting from the *Halo Order* was not to exceed the intrastate access portion of a petitioner's bankruptcy claim for that study area. *Id.* at 9959-60, para. 5.

³² See generally *Halo II Order*, 30 FCC Rcd 6430.

explained that such waivers were not requested by the parties and presented a novel question of law requiring consideration by the full Commission.³³

9. *Emery Petition.* Emery requests that the Commission waive its Eligible Recovery rules to allow Emery to include FY 2011 intrastate access revenues that were not originally included in its BPR calculation.³⁴ Specifically, a significant portion of calls over several direct trunks failed to contain carrier identification information and, as a result, were not initially rated or billed by Emery's third party billing system.³⁵ According to Emery, "the traffic in question appeared as phantom traffic as the calls did not contain carrier identification information (CICs or OCNs) in the call detail records."³⁶ Once Emery became aware of this issue in October 2011, it immediately took steps to correct it and issued corrected invoices to the interexchange carriers for the additional intrastate access revenue amounts.³⁷ Emery promptly submitted invoices to the appropriate interexchange carriers in advance of the March 31, 2012 deadline.³⁸ The invoiced interexchange carriers did not dispute any of the charges and ultimately paid all of the invoiced amounts.³⁹ However, the corrected amounts were not received by Emery until after the March 31, 2012 deadline.⁴⁰ This traffic has been continuously billed and collected since its discovery in 2011.⁴¹ Emery asks the Commission that it be permitted to include in its BPR calculations the corrected FY 2011 intrastate access amounts collected after the March 31, 2012 deadline.

10. *Yukon-Waltz Petition.* Yukon-Waltz also seeks a waiver to include FY 2011 intrastate access revenues that were omitted from its initial recovery calculations due to a billing system error discovered in March 2012. The billing system error resulted in terminating minutes not being billed on a specific trunk group. Yukon-Waltz issued a corrected bill in April 2012 and received full payment in July 2012.⁴² The carrier seeks a waiver permitting it to include the corrected amounts in its BPR calculations.⁴³

11. *Smart City Petition.* Smart City requests that the Commission waive its Eligible Recovery rules to allow it to include a settlement amount in its BPR.⁴⁴ Smart City was engaged in a traffic dispute involving traffic type and billed rates for traffic terminated by Verizon Business to Smart City for the period August 1, 2010 through January 1, 2012.⁴⁵ Among other things, Verizon Business asserted that a portion of the billed minutes were VoIP traffic not subject to tariffed intrastate switched

³³ See *id.* at 6439, para. 23.

³⁴ See Emery Petition at 2.

³⁵ See *id.* at 2, 5; Letter from Mary J. Sisak, Counsel to Emery, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 et al., at 1 (filed Feb. 4, 2016) (Emery Feb. 4 *Ex Parte* Letter); Letter from Mary J. Sisak, Counsel to Emery, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 et al., at 1-2 (filed Apr. 20, 2016) (Emery Apr. 20 *Ex Parte* Letter).

³⁶ Emery Feb. 4 *Ex Parte* Letter at 1-2.

³⁷ See Emery Petition at 2, 5.

³⁸ See *id.* at 5.

³⁹ See *id.*; Emery Apr. 20 *Ex Parte* Letter at 2.

⁴⁰ See Emery Petition at 3.

⁴¹ Letter from Mary J. Sisak, Counsel to Emery, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 et al., at 1-2 (filed May 5, 2016) (Emery May 5 *Ex Parte* Letter).

⁴² See Yukon-Waltz Petition at 1.

⁴³ *Id.*

⁴⁴ See Smart City Petition at 4.

⁴⁵ See *id.* at 2-3.

access rates.⁴⁶ In December 2012, Verizon Business and Smart City reached a settlement agreement and Smart City received payment of the settlement amount it now seeks to include in its BPR.⁴⁷

12. *Laurel Highland/Yukon-Waltz Petition.* Laurel Highland/Yukon-Waltz seek to adjust their 2011 Interstate Switched Access Revenue Requirements to reflect the actual revenue requirements instead of the average schedule settlements received.⁴⁸ Effective October 1, 2011, the companies elected to base settlements with the NECA pools on their costs, instead of average schedule formulas.⁴⁹ Because the BPR includes a rate-of-return carrier's 2011 Interstate Switched Access Revenue Requirement, the companies are required to use average schedule settlements in the BPR calculation even though they converted to cost prior to the effective date of the new rules.⁵⁰ Laurel Highland/Yukon-Waltz contend that this result deprives them of the benefits of the conversion and will result in recovery amounts that are "unrealistically and unreasonably low."⁵¹ As a result, they seek a waiver of section 51.917(b)(4) in order to permit them to use their costs in determining the 2011 Interstate Switched Access Revenue Requirement used in the BPR calculation.⁵²

13. *IAMO Petition.* IAMO requests the Commission waive its Eligible Recovery rules to allow it to include the actual interstate revenue requirement rather than forecasted amount in its BPR calculation.⁵³ Under section 51.917(b)(1) of the Commission's rules, rate-of-return carriers are required to use the forecasted revenue requirement associated with the NECA 2011 annual interstate switched access tariff filing in determining their BPR.⁵⁴ Accordingly, IAMO's 2011 Interstate Switched Access Revenue Requirement was based on forecast information submitted to NECA in January 2011. IAMO maintains that the 2011 forecast understated its actual costs because it failed to reflect significant switching investments and other costs incurred in 2011, but not recorded on the Company's accounting records at the time the forecast was submitted.⁵⁵ IAMO now seeks to amend the cost amounts it used in calculating the BPR to reflect these additional costs.

III. DISCUSSION

A. Petitions for Waiver of ICC Recovery Rules

14. Generally, the Commission's rules may be waived for "good cause shown."⁵⁶ 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.⁵⁷ In making these determinations, the Commission may consider evidence of hardship, equity, and more effective implementation of overall

⁴⁶ *See id.*

⁴⁷ *See id.* at 3.

⁴⁸ *See* Laurel Highland/Yukon-Waltz Petition at 2.

⁴⁹ *See id.*

⁵⁰ *See* 47 CFR § 51.917(b)(7) (defining 2011 Rate-of-Return Carrier Base Period Revenue).

⁵¹ Laurel Highland/Yukon-Waltz Petition at 4.

⁵² *See id.* at 2; *see also* 47 CFR § 51.917(b)(4) (defining Revenue Requirement, including, specifically, the Revenue Requirement for an average schedule carrier).

⁵³ *See* IAMO Petition at 3.

⁵⁴ *See* 47 CFR § 51.917(b)(1)(i), (7).

⁵⁵ *See* IAMO Petition at 2-3.

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

⁵⁷ *Northeast Cellular*, 897 F.2d at 1166.

policy on an individual basis.⁵⁸ For the reasons discussed below, we find that Emery established good cause for a waiver of the Commission's recovery rules, but determine that the other petitioners failed to do so. Accordingly, we grant the Emery petition subject to certain conditions and we deny the remainder of the petitions consistent with the public interest.

15. In the *USF/ICC Transformation Order*, the Commission explained that BPR calculations "shall not include MOU [minutes-of-use] for which revenues were not recovered, for whatever reason."⁵⁹ The Commission explicitly contemplated, however, that certain circumstances could justify adjustments to recovery baseline amounts, and described some situations where adjustments may be appropriate.⁶⁰ For instance, 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."⁶¹ In so stating, the Commission described one particular factual situation that could support a waiver request, giving guidance as to the narrow set of circumstances that would constitute "good cause" for waiver of the BPR requirement. However, the *USF/ICC Transformation Order* does not suggest that the Commission intended to modify or limit the general availability of waivers under the good cause standard. It would be impossible for the Commission to anticipate all of the factual circumstances that might demonstrate good cause for waiver under our rules. Thus, in situations where the waiver standard is met and a grant does not undermine the policies underlying the Commission's rules, such as the Commission's intent in the *USF/ICC Transformation Order* to preclude carriers from gaming the system, the Commission retains the ability to grant a waiver of its rules. In the *Halo Orders*, the Commission granted waivers in one such special circumstance, and here we grant the Emery waiver petition under a similarly limited circumstance.⁶²

16. The ICC recovery mechanism adopted in the *USF/ICC Transformation Order* was designed, among other things, to provide predictability to incumbent LECs that had been receiving implicit ICC subsidies and to mitigate marketplace disruption during the ICC reform transition.⁶³ By limiting recovery to specific types of revenues actually collected, the Commission developed a system that would replace only those revenues that the incumbent LECs reasonably relied on to make informed investment decisions. In considering waiver requests seeking to amend recovery amounts, it is necessary to balance the need to ensure accurate BPR calculations to achieve the goals of the *USF/ICC Transformation Order* against the burdens associated with adjusting recovery amounts, including any potential burdens on end users and CAF-ICC funding.⁶⁴

17. Emery requests the inclusion of FY 2011 intrastate revenues that were left out of its original BPR calculations due to a billing system error. Emery discovered this billing error in October 2011 and quickly determined that the problem was due to a failure to properly pass carrier identification information to Emery.⁶⁵ The error was corrected in the system by November 1, 2011 and invoices for

⁵⁸ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166.

⁵⁹ *USF/ICC Transformation Order*, 26 FCC Rcd at 17982, para. 898.

⁶⁰ *See id.* at n.1745.

⁶¹ *Id.*

⁶² Thus, although the phrase "for whatever reason" indicated a desire to strictly apply the rules governing the calculation of baseline amounts, grant of these prior waivers is strong evidence that the Commission did not intend to preclude consideration of special circumstances.

⁶³ *See USF/ICC Transformation Order*, 26 FCC Rcd at 17962, para. 858.

⁶⁴ *See Halo Order*, 29 FCC Rcd at 9964, para. 18 (describing a balancing test used where a waiver request fell outside the specific circumstances described in the *USF/ICC Transformation Order*).

⁶⁵ Emery Feb. 4 *Ex Parte* Letter at 1-2 (explaining that "the traffic in question appeared as phantom traffic" as a result.)

historical periods were sent on December 28, 2011.⁶⁶ Although payment on these invoices was due on January 20, 2012, in some cases, payment was made after March 31, 2012 due to the internal review and administrative processes of the affected interexchange carriers.⁶⁷ Thus, the record indicates that all reasonable steps were taken to correct the billing error and collect all outstanding amounts prior to the March 31, 2012 deadline. Further, there is no evidence of any ICC disputes surrounding this traffic and the situation did not warrant any involvement by an agency or court.⁶⁸

18. Under these specific circumstances, we find that inclusion of the revenues at issue in Emery's BPRs is in the public interest. The problem triggering the billing error, i.e., the lack of carrier identification information, was beyond Emery's control and, once discovered, Emery diligently attempted to collect the invoiced amounts prior to March 31, 2012: sending bills and setting due dates months in advance of the deadline.⁶⁹ These considerations lead us to conclude that Emery reasonably relied on these revenues and accordingly, the inclusion of such amounts would produce recovery calculations for Emery that are consistent with the intent of the *USF/ICC Transformation Order*. Because inaccuracies in the BPR calculation carry forward into future recovery mechanism payments, it is important for such calculations to reflect revenues that were reasonably relied upon by the affected carrier. Recovery calculations that fail to include revenues that were reasonably relied upon by Emery would upset the certainty and predictability intended by the recovery mechanism.⁷⁰ Grant of the waiver request by Emery will ensure that the recovery calculations result in a certain and predictable transition, as intended by the *USF/ICC Transformation Order*.⁷¹ Accordingly, we grant this waiver request subject to the administrative implementation process described below. In contrast, the remaining petitioners fail to demonstrate the good cause necessary to justify a waiver for the various reasons described below.

19. Yukon-Waltz also seeks to include late-collected revenues in its BPR calculations but under different circumstances. The record indicates that this carrier did not discover its billing omissions until March 2012.⁷² Although the Yukon-Waltz made efforts to correct these errors once discovered, such efforts were made after March 31, 2012.⁷³ Yukon Waltz fails to provide any explanation as to why it failed to discover a billing omission relevant to its "largest carrier" for access services rendered during FY 2011 until March 2012.⁷⁴ Due to the lack of diligence in discovering this billing error in the normal course, we cannot find the good cause necessary to support Yukon-Waltz's waiver request. Further, based on when the error was discovered, Yukon-Waltz could not have expected or reasonably relied upon the inclusion of these revenues in its BPR calculations. Under these circumstances, we cannot find that the waiver request of this petitioner is consistent with the intent of the *USF/ICC Transformation Order* and the public interest. Accordingly, we deny the waiver petition of Yukon-Waltz to include late-collected revenues in its recovery calculations.

20. Smart City requests a waiver to include late-collected settlement revenues from disputed traffic in its BPR. Smart City and Verizon Business were engaged in an ongoing dispute over whether

⁶⁶ See Emery Petition at 3; Emery Reply Comments, WC Docket No. 10-90 et al, at 2 (filed Dec. 21, 2012).

⁶⁷ *Id.* at 3, 5.

⁶⁸ See *id.* at 3, 5 (stating that carriers affected by the billing error did not dispute the charges paid the invoices);

⁶⁹ See Emery Reply at 2.

⁷⁰ See *USF/ICC Transformation Order*, 26 FCC Rcd at 17956, 17962-63, paras. 847-48, 858.

⁷¹ *Id.*

⁷² Specifically, Yukon-Waltz discovered its billing system error in March 2012, issued a corrected bill in April 2012, and received payment in July 2012. Yukon-Waltz Petition at 1.

⁷³ See *id.*

⁷⁴ *Id.*

some portion of the access traffic billed by Smart City to Verizon Business was VoIP traffic.⁷⁵ Verizon Business disputed the application of access charges to VoIP traffic.⁷⁶ In turn, Smart City requested call detail from Verizon Business to support its claim that the traffic at issue was VoIP, but such call detail was never provided.⁷⁷ At the time of the *USF/ICC 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.⁷⁸ This case involves a factual dispute over whether the type of traffic at issue, VoIP traffic, was compensable and if so, what compensation applied. Although Smart City was able to settle the matter with Verizon Business after release of the *USF/ICC Transformation Order*, the petitioner has not produced a court or commission order establishing the amount that should have been included in its BPR as having been reasonably relied upon. Accordingly, granting the relief would be inconsistent with the requirements and intent of the *USF/ICC Transformation Order*.

21. Moreover, an order from a court or commission serves the important purpose of evaluating the relevant facts and establishing liability in the case of disputed charges. As discussed above, a decision by an agency or court protects against parties gaming the system through negotiation of settlements for longstanding ICC disputes. In this case, there was an ICC dispute and no order establishing liability for the disputed amounts. Smart City has not presented evidence of any special circumstances that would support a departure from this policy decision, especially since the Commission specifically acknowledged disputes concerning VoIP traffic at the time it adopted the recovery rules⁷⁹ and explicitly declined to address preexisting law surrounding this traffic.⁸⁰ Accordingly, we deny Smart City's petition for waiver.

22. Laurel Highland/Yukon-Waltz's waiver petition sought to adjust their BPR to reflect actual revenue requirements instead of the projected average schedule settlements for tariff year 2011-12, which was the time period established in the *USF/ICC Transformation Order*.⁸¹ We recognize that the timing of the election made by these carriers to convert from average schedule settlements to cost was not beneficial to them; however, these carriers either were, or should have been well aware that the Commission was considering comprehensive reform, and that such reform could affect ICC and related revenues.⁸² The fact that these carriers would receive more recovery using actual revenue requirements as compared to average schedule settlements does not constitute a special circumstance that would warrant a deviation from the general rule. We see no facts that would distinguish these carriers from other rate-of-return carriers that could have made more profitable elections had they been able to better predict regulatory developments. Accordingly, we deny the Laurel Highland/Yukon-Waltz petition for waiver.

⁷⁵ See Smart City Petition at 2-3; Letter from John Kuykendall, Vice President, JSI, for Smart City, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90 et al., at 1-2 & Attach. (filed Apr. 21, 2015) (detailing claims by Verizon concerning the disputed traffic) (JSI *Ex Parte* Letter).

⁷⁶ Smart City Petition at 3; JSI *Ex Parte* Letter at 1.

⁷⁷ Smart City Petition at 3; JSI *Ex Parte* Letter at 1 & Attach.

⁷⁸ *Halo Order*, 29 FCC Rcd at 9964, para. 18 (citing the *USF/ICC Transformation Order*, 26 FCC Rcd at 17982, para. 898 & n. 1745).

⁷⁹ See *USF/ICC Transformation Order*, 26 FCC Rcd at 1800-05, paras. 937-39 (discussing the widespread uncertainty and disagreement regarding ICC for VoIP traffic).

⁸⁰ See *id.* at 18008-09, para. 945.

⁸¹ Laurel Highland/Yukon-Waltz Petition at 2.

⁸² See generally, *Connect America Fund et al.*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 26 FCC Rcd 4554 (2011).

23. Finally, IAMO seeks to add revenue to its BPR to reflect the actual interstate switched access revenue requirement rather than a forecasted amount that the company understated. The nature of a forecast is that it is an estimate of an amount that may under- or over-state the actual amount expended, which the Commission recognized when it required the interstate switched access revenue requirement to be based on a forecasted amount. It is likely that, consistent with the nature of forecasts, other carriers are similarly situated in that their actual amounts exceed the forecasted amounts for any number of reasons. IAMO fails to present any special circumstances that would distinguish its situation from the range of potential outcomes that was contemplated in the *USF/ICC Transformation Order*. As discussed above, the recovery mechanism, including the decision to base recovery on forecasts, was designed to recognize carrier reliance on ICC revenues while limiting recovery in a reasonable manner. Accordingly, IAMO has not demonstrated good cause for a waiver and we deny its petition.⁸³

B. Waiver of the Imputation Requirement for Prior Periods

24. In the *Halo II Order*, the Bureau granted in part, subject to identified conditions, eight petitions seeking waiver of the intercarrier compensation recovery rules permitting carriers to include in their recovery calculations certain funds that they were unable to collect from a carrier customer due to an access charge avoidance scheme and the carrier customer's subsequent bankruptcy. If the specified conditions are met, the waiver permits these carriers to include in their BPR calculations revenues associated with unpaid amounts billed to Halo. The majority of the carriers granted a waiver in *Halo II* recovered the maximum amount possible from ARCs in the period preceding the waiver grant; however, Five Area, West Plains and Hill Country did not because their ARC rates were limited by the amount of Eligible Recovery they were entitled to receive. Had the revised revenues been included in determining the collected revenue used in the Eligible Recovery calculation for tariff periods since 2012, these carriers would have been required in one or more tariff years to either: (1) charge a higher ARC than it did previously; or (2) impute the higher ARC charge in its Eligible Recovery calculations consistent with section 51.917(f)(2) of the Commission's rules.⁸⁴

25. As discussed above, 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.⁸⁵ The Commission already determined that the facts surrounding the access avoidance scheme and subsequent bankruptcy of the carrier customer Halo presented the special circumstances necessary to support a waiver of the Commission's recovery rules.⁸⁶ Five Area, West Plains and Hill Country could not have charged a higher ARC than they did because they are precluded from assessing a higher tariffed ARC rate retroactively for these prior periods.⁸⁷ Because the carriers cannot charge a higher ARC retroactively, absent a waiver, they would be required to impute a higher ARC charge in their revised calculations for prior periods. Strict compliance with the imputation requirement in these circumstances, however, would essentially deny these carriers some portion of the recovery amount that the *Halo II* waiver was intended to provide.

⁸³ To the extent that IAMO believes that this decision prevents the carrier from earning a reasonable return on investment, it may seek additional support via the "Total Cost and Earnings Review" process. See *USF/ICC Transformation Order*, 26 FCC Rcd at 17996-18002, paras. 924-32.

⁸⁴ See 47 CFR § 51.917(f)(2).

⁸⁵ See *supra* para. 14.

⁸⁶ See *Halo Order*, 29 FCC Rcd at 9964-66, paras. 18, 23; *Halo II Order*, 30 FCC Rcd at 6430, para. 1.

⁸⁷ The portion of a rate-of-return LEC'S Eligible Recovery that the carrier could recover through an ARC charge was constrained by three inter-related conditions: (1) the residential ARC could not exceed a maximum amount specified in section 51.917(e)(6)(i); (2) the residential ARC could not cause the residential rate ceiling to exceed \$30 per month, section 51.915(b)(12); and (3) the residential ARC could not increase more than \$0.50 in any year, section 51.917(e)(6)(vi).

26. Thus, the only mechanism by which to fully effectuate *Halo II* and provide these carriers with the total amount of revised recovery they are entitled to for prior periods is for us to waive the imputation rule set forth in section 51.917(f)(2).⁸⁸ Doing so will allow these carriers to recover additional CAF ICC from the Universal Service Administrative Company (USAC) equal to the additional Eligible Recovery that would have been recovered through higher ARC rates if the relevant revenues had been included in the calculation of each year's Eligible Recovery. Under these unique circumstances, waiver of the imputation requirement is consistent with the public interest and recovery of these amounts from CAF ICC rather than ARC charges should not have any measurable impact on the overall Connect America Fund. Accordingly, we waive the imputation requirement contained in section 51.917(f)(2) of the Commission's rules to the extent necessary to effectuate this result.

27. Similarly, Emery, to whom we grant a waiver in this Order, had ARC rates that were limited by the amount of Eligible Recovery it was entitled to receive. Like the other carriers, it cannot retroactively assess a higher ARC rate for prior periods and, absent a waiver, would be required to impute a higher ARC charge as part of its revised calculations. Failure to waive the imputation requirement here would deny Emery the full relief afforded by the waiver allowing it to amend its BPR calculations because it would be denied some portion of its corrected recovery amounts.⁸⁹ Accordingly, we find that Emery also presents the special circumstances necessary to support a waiver of the Commission's imputation rule.⁹⁰

IV. ADMINISTRATIVE IMPLEMENTATION OF RELIEF GRANTED

28. This section addresses how the amount of relief granted in this Order is to be determined and the process for payment by (USAC).⁹¹ It is important to note at the outset that the grantees are all rate-of-return LECs. Emery, Five Area, West Plains and Hill Country could have charged higher ARCs in one or more tariff years had their respective BPRs reflected the relief granted in this order and *Halo II*. Accordingly, any additional recovery mechanism revenue that the grantees receive as a result of this Order for 2012, 2013, and 2014 will come from CAF-ICC support and not from ARCs.⁹²

29. Initially, each grantee shall determine for each affected study area the amount of FY 2011 revenues that are associated with its waiver request. This number represents for each affected study area the increase that the Petitioner may make for that particular study area in its BPR calculations. Each Petitioner shall include this increase to the appropriate collected revenue amount shown in its 2012 and subsequent year tariff support materials.⁹³

⁸⁸ 47 CFR § 51.917(f)(2).

⁸⁹ As with the *Halo II* carriers, recovery of these amounts through CAF ICC should not have any measurable impact on the overall Connect America Fund.

⁹⁰ Emery also sought a waiver of section 51.917(e)(6)(vi) to increase its residential ARC more than \$0.50 per year as a means to minimize the impact of a grant of its waiver request on the CAF ICC. Emery May 5 *Ex Parte* Letter at 2. In adopting section 51.917(e)(6)(vi), the Commission concluded that residential customers should not be burdened with a greater than \$0.50 increase in the ARC per year. We continue to agree with that policy and thus decline this aspect of Emery's waiver request and choose to treat Emery in the same manner as we have treated other carriers in similar circumstances.

⁹¹ 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.

⁹² See 47 CFR § 51.917(e).

⁹³ For tariff years prior to 2016, Emery, Five Area, West Plains and Hill Country shall use the ARCs they charged in the relevant tariff period when calculating the revised CAF-ICC support for those periods. For 2016, they shall use the ARC rates filed in the 2016 annual tariff filing through the beginning of the third month after the effective date

(continued...)

30. In addition, each grantee is required to file with the Commission and certify to the accuracy of the collected revenue amounts.⁹⁴ For the specific purpose of implementing the relief granted in this Order, each grantee 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.⁹⁵ Each grantee 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.

31. To effectuate the relief granted by this waiver, each grantee 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 grantee 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 commission 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 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.⁹⁶ If such a Public Notice is not released in the relevant docket within 45 days of a grantee's request, USAC shall proceed to process the grantee's request and issue payment. The Commission has delegated authority to the Bureau to determine and carry out appropriate procedures to resolve objections.⁹⁷

V. ORDERING CLAUSES

32. 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 of Emery Telcom is GRANTED in part and DENIED in part as discussed herein, and the petitions of Yukon-Waltz Telephone Company, Smart City Telecommunications LLC d/b/a Smart City Telecom, Laurel Highland Telephone Company and Yukon-Waltz Telephone Company, and IAMO Telephone Company are DENIED.

33. IT IS FURTHER ORDERED that the imputation requirement in section 51.917(f)(2) is WAIVED for Emery Telcom, Five Area Telephone Cooperative, Inc., West Plains Telecommunications, Inc. and Hill Country Telephone Cooperative, Inc. as specified herein.

34. IT IS FURTHER ORDERED that the Universal Service Administrative Company SHALL MAKE PAYMENTS in accordance with the requirements of paragraphs 30 and 31 of this Order.

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of this order, when the imputation waiver will expire. This gives the carriers time to file revised tariffs reflecting the new ARC rates.

⁹⁴ Grantees are prohibited from including interest, late payment fees, collection fees, or attorney's fees in their claims.

⁹⁵ 47 CFR § 54.304(d).

⁹⁶ See *USF/ICC Transformation Order* at 9967, para. 27.

⁹⁷ *Id.*

35. 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