

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

In the Matter of
Connect America Fund
Allband Communications Cooperative
Petition for Waiver of Certain High-Cost
Universal Service Rules
WC Docket No. 10-90

ORDER AND ORDER ON REVIEW

Adopted: July 19, 2016

Released: July 20, 2016

By the Commission: Commissioners Clyburn and O’Rielly issuing separate statements.

I. INTRODUCTION

1. In this Order, the Federal Communications Commission (Commission) denies Allband Communications Cooperative’s (Allband or ACC) Petition for Further Waiver of section 54.302 of the Commission’s rules. Allband has consistently misapplied our cost allocation rules rendering its cost accounting unreliable. We are therefore unable to determine, at this time, what, if any, support in excess of the \$250 cap is justified and in the public interest. Accordingly, we deny Allband’s Further Waiver Request and require that Allband revise its cost accounting practices to be consistent with our rules. Once that has occurred, Allband may submit a new request for a waiver of the \$250 cap if its revised cost study incorporating correctly determined costs would result in a need for support in excess of \$250 per line.

2. In addition, we deny Allband’s Application for Review of the Wireline Competition Bureau’s (Bureau) July 25, 2012 waiver grant. Allband requested that the Commission extend its July 2012 waiver of the \$250 cap until 2026, rather than 2015, and waive the Commission’s benchmarking rule. Allband also made several legal challenges to both rules. We deny Allband’s legal challenges, consistent with the decision of the U.S. Court of Appeals for the Tenth Circuit (Tenth Circuit Court of Appeals). Further, because we eliminated the benchmarking rule in 2014, and Allband was never subject to any benchmark-related reductions in support, Allband’s requests related to it are moot.

1 Petition of Allband Communications Cooperative for Further Waiver of Part 54.302, WC Docket No. 10-90, et al. (filed Dec. 31, 2014) (Further Waiver Request).

2 Application for Review of Allband Communications Cooperative, WC Docket No. 10-90, et al. (filed Aug. 24, 2012) (Application for Review).

3 The term “benchmarking rule” refers to a mechanism adopted in the USF/ICC Transformation Order that placed overall limits on costs eligible for reimbursement through high-cost loop support (HCLS) and redistributing freed-up HCLS to carriers that stay within these limits to allow for new broadband investment. Connect America Fund et al., WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC 17663, 17741-47, paras. 210-26 (2011) (USF/ICC Transformation Order), aff’d sub nom In re: FCC 11-161, 753 F.3d 1015 (10th Cir. 2014).

4 Id. at 1.

5 In re FCC 11-161, 753 F.3d 1015, 1089-93 (10th Cir. 2014).

II. BACKGROUND

3. ACC is a rate-of-return incumbent local exchange carrier (ILEC). The company provides voice and broadband services in the Robbs Creek Exchange, which is located in the lower peninsula of Michigan.⁶ ACC was formed in 2003 as a non-profit member cooperative.⁷ In 2005, the Rural Utilities Service (RUS) announced loans to Allband totaling approximately \$8 million to purchase and construct facilities within ACC's study area.⁸ ACC currently serves 161 lines within the Robbs Creek Exchange, and in 2015, ACC received \$1,316,628 in high-cost support.⁹

4. In 2010, RUS awarded two grants to Allband through the American Recovery and Reinvestment Act (ARRA) for approximately \$9.7 million to construct facilities to provide high-speed broadband and Voice over Internet Protocol (VoIP) service in areas surrounding the Robbs Creek Exchange, outside of its study area.¹⁰ ACC provides high-speed broadband and VoIP services in the rural communities surrounding the Robbs Creek Exchange through its wholly owned subsidiary, Allband Multimedia LLC (AMM).¹¹ AMM has approximately 650 customers.¹²

5. In the *USF/ICC Transformation Order*, the Commission adopted section 54.302, establishing a presumptive per line cap of \$250 per month on total high-cost universal service support for all eligible telecommunications carriers, including ILECs, to be phased in over three years.¹³ The Commission concluded that support in excess of that amount should not be provided without further justification.¹⁴ The *USF/ICC Transformation Order* noted that “any carrier negatively affected by the universal service reforms . . . [may] file a petition for waiver that clearly demonstrates that good cause exists for exempting the carrier from some or all of those reforms, and that waiver is necessary and in the public interest to ensure that consumers in the area continue to receive voice service.”¹⁵

6. In 2012, the Bureau granted Allband a three-year waiver of section 54.302 so that Allband could receive the lesser of high-cost universal service support based on its actual costs or the

⁶ The Robbs Creek Exchange is an irregularly shaped 177-square-mile heavily forested area that includes portions of four counties – Alcona, Alpena, Oscoda and Montmorency – that, prior to Allband, were unserved.

⁷ See Allband Multimedia, History and Mission, <http://allband.org/history-and-mission/> (last visited July 19, 2016) (Allband History and Mission).

⁸ See Allband History and Mission.

⁹ See USAC, High Cost, Funding Disbursement Search Results, <http://www.usac.org/hc/tools/disbursements/default.aspx> (Study Area Code 310542, Year 2015).

¹⁰ See Allband History and Mission. Allband has received all of its grant money and completed its project.

¹¹ AMM provides both residential and commercial broadband and advertises speeds up to 100/50 Mbps for its residential services. See Allband Multimedia, <http://allband.org/pricing/> (last visited July 19, 2016).

¹² See Allband Celebrates 10 Years (Aug. 6, 2015), <http://allband.org/blog/allband-celebrates-10-years/>.

¹³ *USF/ICC Transformation Order*, 26 FCC Rcd at 17765, para. 274; 47 CFR § 54.302.

¹⁴ *USF/ICC Transformation Order*, 26 FCC Rcd at 17765, para. 274.

¹⁵ *Id.* at 17839-40, paras. 539-40. Generally, the Commission's rules may be waived if good cause is shown. 47 CFR § 1.3. The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest. *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*). In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166. Waiver of the Commission's rules is appropriate if both (i) special circumstances warrant a deviation from the general rule and (ii) such deviation will serve the public interest. *Northeast Cellular*, 897 F.2d at 1166.

annualized total high-cost support that it received for the period January 1, 2012 through June 30, 2012.¹⁶ In granting the temporary waiver, the Bureau explained that “[w]hile a waiver is appropriate for a discrete period of years given the size and age of Allband’s operation [founded in 2003], it would be appropriate to reassess its financial condition to determine whether a waiver remains necessary in the future.”¹⁷ The Bureau added that “[w]e would be concerned if Allband’s support continues to be significantly greater than the Commission’s per-line limit as Allband’s operation matures.”¹⁸ The Bureau stated that if Allband determined that additional support above the \$250 cap was necessary after June 30, 2015, “Allband should file with the Bureau the financial and operational information necessary for the Bureau to determine what further relief is appropriate based on the specific circumstances present at that time.”¹⁹ On August 24, 2012, Allband filed an Application for Review that, among other things, requested a waiver grant for 15 years.²⁰

7. On December 31, 2014, Allband filed a petition for further waiver of section 54.302.²¹ Allband again asked that the Commission extend Allband’s current waiver until the end of 2026 so that Allband could repay its RUS loan and continue operations.²² The Bureau extended the July 25, 2012 waiver on an interim basis for six months and directed USAC to undertake factual inquiries on certain accounting issues which the Bureau identified as requiring further review.²³ On October 23, 2015, USAC submitted a memorandum on the results of its inquiry,²⁴ and Allband subsequently filed a response on

¹⁶ See *Allband Communications Cooperative Petition for Waiver of Certain High-Cost Universal Service Rules*, WC Docket No. 10-90, Order, 27 FCC Rcd 8310, 8315, para. 15 (WCB 2012) (*July 2012 Waiver*).

¹⁷ *Id.* at 8314, para. 13.

¹⁸ *Id.*

¹⁹ *Id.* at 8315, para. 16.

²⁰ See Application for Review at 1. Allband also made several legal challenges to the \$250 cap, and it requested a waiver of the benchmarking rule, which the Commission subsequently eliminated. See *infra* Section IV; see Application for Review at 1, 10-24. On July 11, 2013, Allband challenged certain aspects of the *USF/ICC Transformation Order* in the Tenth Circuit Court of Appeals, raising the same legal issues as presented in the Application for Review of the Bureau’s action on the waiver request. See Appellate Brief, *In re FCC 11-161*, 753 F.3d 1015 (2014) 2013 WL 3795849 *31-38 (Allband 10th Cir. Brief). On May 23, 2014, the Court denied all of Allband’s claims. *In re FCC 11-161*, 753 F.3d at 1089-93. On August 27, 2014, the Court denied Allband’s petition for rehearing en banc, see *In re FCC 11-161*, No. 11-9900, Order (10th Cir. Aug. 27, 2014) (en banc denial), and on May 4, 2015, the Supreme Court of the United States denied Allband’s petition for writ of certiorari. *Allband Communications Cooperative v. Federal Communications Commission*, 135 S.Ct. 2072 (2015).

²¹ See Further Waiver Request. Allband included its 2012 and 2013 audited financial statements in its Further Waiver Request. It subsequently submitted its 2014 audited financial statements. See Letter from Don L. Keskey, Counsel for Allband Communications Cooperative, to Marlene H. Dortch, Federal Communications Commission Secretary, Attach. B (filed May 18, 2015) (Allband May 2015 Letter).

²² See Further Waiver Request at 1. Allband states that it pays \$638,137.16 a year in principal and interest to pay off the loan and currently has approximately a \$4.8 million balance. Its loan term extends until 2026. See Petition of Allband Communications Cooperative for Waiver of Part 54.302, WC Docket No. 10-90, *et al.*, Appx. 2, Attach. 3 (filed Feb. 3, 2012).

²³ See *Allband Communications Cooperative Petition for Waiver of Certain High-Cost Universal Service Rules*, WC Docket No. 10-90, Order, 30 FCC Rcd 6955, 6995, 6957-59, para. 1, 6-13. (WCB 2015) (*June 2015 Interim Waiver*).

²⁴ See Sept. 23, 2015 Memorandum from Universal Service Administrative Company Internal Audit Division to Federal Communications Commission Wireline Competition Bureau, WC Docket No. 10-90 (filed Oct. 23, 2015) (USAC Memorandum).

November 12, 2015.²⁵ On December 7, 2015, the Bureau extended Allband's interim waiver an additional six months until June 30, 2016 or the date on which the Commission rules on Allband's Further Waiver Request, whichever is earlier.²⁶ For the period of time during which the waiver was extended, however, the Bureau made clear that "universal service support amounts may be adjusted retroactively if it is determined that Allband has received support amounts in the past to which it was not entitled."²⁷

III. DISCUSSION

8. Based on USAC's inquiry and our own review of the record, we find that Allband misallocated expenses to its regulated entity that were for nonregulated activities, rendering its cost accounting unreliable. Specifically, Allband consistently misallocated employee time for nonregulated activities to ACC, and it allocated an unrealistically high percentage of corporate operations expenses to ACC. Allband's response to USAC's inquiry confirms that it is not properly implementing our affiliate transactions rule. Further, Allband has claimed support for particular expenditures that are not necessary for the provision of supported services. Because we find that Allband's cost accounting is unreliable, we are unable to determine, at this time, what, if any, support in excess of the \$250 cap is warranted and in the public interest. Once Allband has revised its cost accounting practices to be consistent with our rules, Allband may submit a new request for waiver of the \$250 cap if necessary.

A. Misallocation of Employee Time

9. Incumbent carriers' accounting must comply with our cost allocation rules.²⁸ The purpose of the Commission's cost allocation rules is "to protect ratepayers from bearing the costs and risks of nonregulated activities. The rules are intended to deter unreasonable cost shifting both from cost misallocations of joint and common costs and from affiliate transactions."²⁹ Under these rules, costs are in the first instance directly assigned to either regulated activities or nonregulated activities. Common costs are to be allocated according to a hierarchy of principles.³⁰ To the extent costs cannot be allocated on direct or indirect cost causation principles, they are allocated based on a ratio of all expenses that are directly assigned or attributed to regulated and nonregulated activities.³¹

10. In its review, USAC found Allband's cost allocation "procedures and methodology" to be "reasonable and in accordance with the FCC's rules."³² However, "based on detailed testwork performed on ACC's employee timesheets and general ledger transactions," USAC was "unable to conclude that

²⁵ See Letter from Don L. Keskey, Counsel for Allband Communications Cooperative, to Marlene H. Dortch, Federal Communications Commission Secretary, WC Docket No. 10-90 *et al.* (filed Nov. 12, 2015) (Allband's Response to USAC).

²⁶ See *Allband Communications Cooperative Petition for Waiver of Certain High-Cost Universal Service Rules*, WC Docket No. 10-90, Order, 30 FCC Rcd 14021, 14023, para. 8 (WCB 2015) (*Dec. 2015 Interim Waiver*).

²⁷ *Id.*; see *June 2015 Interim Waiver*, 30 FCC Rcd at 6959, para. 14 & n.31.

²⁸ 47 CFR Part 64.

²⁹ *Allocation of Costs Associated with Local Exchange Carrier Provision of Video Programming Services*, CC Docket No. 96-112, 11 FCC Rcd 17211, 17216, para. 9 (1996); see also *Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities*, CC Docket No. 86-111, Order on Reconsideration, 2 FCC Rcd. 6283, 6283, para. 1 (1987) (One of the chief goals of Part 64 of the Commission's rules is to "discourage carriers from subsidizing the costs of nonregulated services by shifting nonregulated costs to regulated activities. . .").

³⁰ See 47 CFR § 64.901.

³¹ 47 CFR § 64.901(b)(3)(iii). See also *Connect America Fund et al.*, WC Docket No. *et al.*, Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, 31 FCC Rcd 3087, 3220, para. 354 (2016) (*Rate of Return Reform Order*).

³² See USAC Memorandum at 1.

ACC's cost allocation practices were reliable or appropriate in adhering to FCC rules."³³ Thus, although Allband's established procedures facially comply with our rules, USAC could not find that Allband's implementation of those procedures comply with our rules.³⁴ USAC determined that "there were significant errors ACC made in the classification of the employees' time that was reported on timesheets and recorded in the general ledger."³⁵ Certain of these "significant errors" were repeated and based on an apparent misunderstanding of our rules, which we find renders all of Allband's cost allocations based on time unreliable and, as explained below, its overall cost accounting unreliable.³⁶

11. In one such error, USAC found that when outside plant employees performed jobs outside of the study area, Allband charged time the employees spent loading the trucks and traveling from the office to the job site and from the job site to the office to the regulated entity. In addition, when outside plant employees performed administrative work for jobs outside of the study area while in the office, that time was recorded for regulated activities.³⁷ Without explanation or support in its response to USAC, Allband asserts that the time is joint in nature, and therefore, it allocated a portion to regulated activities and a portion to nonregulated activities.³⁸ That is incorrect, as we find that these expenses *are not* joint in nature because they only were caused by Allband's activities outside the study area, which must be treated as nonregulated under our rules. Section 64.901(b)(2) requires that costs "be directly assigned to either regulated or nonregulated activities whenever possible."³⁹ Because costs associated with jobs outside of the study area can be directly assigned to nonregulated activities, Allband must expense the time employees spend loading the trucks, traveling from the office to the job site, and from the job site to the office as nonregulated.

12. In another example, USAC found that Allband allocated all of the employee morning meetings to the general and administrative expense account of the regulated entity.⁴⁰ We conclude that this practice demonstrates two separate accounting errors. First, in the morning meetings, Allband's employees discussed the day's activities for both regulated activities and nonregulated activities (both in and out of the study area).⁴¹ Accordingly, Allband was required to allocate a portion of the employees' time to the company that was providing voice and broadband services outside of Allband's incumbent service territory, AMM, which Allband does not dispute.⁴² Second, Allband claims that because the morning meetings addressed issues of a general nature, "ACC appropriately charged this time to the

³³ *See id.* at 1-2.

³⁴ We do not agree that ACC demonstrated it reasonably complied with the FCC's cost allocation rules. *See* Emergency Petition of Allband Communications Cooperative for Further Extension of its Waiver of the Part 54.302 Rule, WC Docket No. 10-90 et al., Exh. 1 at 5 (filed Jun. 29, 2016). Having written procedures that facially comply with our rules is one thing; implementing those procedures in a way that complies with our rules is another. USAC was unable to conclude that ACC has done the latter. *See* USAC Memorandum at 1-2.

³⁵ *See* USAC Memorandum at 1-2.

³⁶ We note that USAC calculated several error rate percentages as part of its inquiry. *See, e.g.*, USAC Memorandum at 2. We recognize, as Allband argues, that these rates were based on a non-random sample of transactions. *See, e.g.*, Allband Response at 3. However, we do not rely upon these error rates in reaching the conclusions herein.

³⁷ USAC Memorandum at 30.

³⁸ Allband's Response to USAC, Attach. 14 at 14. Allband states that "[t]he time as described is joint in nature and is assignable to both regulated and non-regulated operations," but provides no support for this assertion. *Id.*

³⁹ *See* 47 CFR § 64.901(b)(2).

⁴⁰ USAC Memorandum at 16.

⁴¹ *Id.* *See* Allband's Response to USAC, Attach. 6 at 6.

⁴² Allband's Response to USAC, Attach. 6 at 6 ("ACC asserts that reasonable portion of the meeting time should be assigned to non-regulated operations.").

general and administrative function.”⁴³ We find that other than the general manager, employee time for the morning meetings should be expensed in line with the employees’ normal job duties, not to the general and administrative account.⁴⁴ Section 32.6720 of the Commission’s rules defines general and administrative services to include such things as: formulating corporate policy and providing overall administration and management; developing and evaluating long-term courses of action; providing accounting and financial services; maintaining government and regulatory relations; performing personnel administration activities (e.g. Equal Employment Opportunity programs and personnel policy development); and procuring material and supplies.⁴⁵ Meetings to explain and discuss employee daily activities, while plausibly falling within those criteria as to the general manager, do not meet the requirements of general and administrative services as defined for account 6720 as to each of the other employees discussing and explaining their own individual activities.

13. We recognize that allocating costs between regulated and nonregulated activities requires carriers to exercise a certain amount of discretion.⁴⁶ For instance, Allband has discretion on the appropriate portion of the morning meeting time that Allband should allocate to nonregulated activities. Although different methodologies for such allocations may be permissible, we conclude it is unreasonable given the facts before us always to allocate 100 percent of the morning meetings to the regulated incumbent telephone company.

14. On the other hand, no discretion is warranted for the allocation of work time outside of the study area, travel time to such jobs, and administrative work related to such jobs. Allband must allocate those expenses to nonregulated activities because our cost allocation rules treat operations outside of an incumbent’s territory as nonregulated activities. In addition, Allband also must allocate time for the morning meetings in line with the employees’ normal job duties. Allband’s claim that activities outside the study area are “joint” leads us to conclude that these over-allocations to the regulated entity likely pervade all of Allband’s employees’ time allocations.⁴⁷ Because Allband uses its time allocations for payroll and uses the payroll to allocate all of its expenses between regulated and nonregulated activities,⁴⁸ this fundamental misunderstanding extends to all of Allband’s cost accounting.⁴⁹ We therefore cannot rely on its submitted cost studies to determine whether support in excess of the monthly \$250 cap per line is warranted.

⁴³ Allband’s Response to USAC, Attach. 6 at 6.

⁴⁴ USAC Memorandum at 16.

⁴⁵ 47 CFR § 32.6720.

⁴⁶ See *Rate of Return Reform Order*, 31 FCC Rcd 3220, para. 353 (under part 64, “carriers currently apply broad principles in making such allocations, and the lack of specificity in the rules gives carriers a degree of discretion in making these allocation decisions.”).

⁴⁷ See Allband’s Response to USAC, Attach. 6 at 14.

⁴⁸ See Allband May 15 Letter, Attach. C, Accounting for Affiliates and Regulated Operations.

⁴⁹ Allband argues that the misallocations related to time reporting do not have significant impact on ACC’s high-cost support. That argument misses the point: even if the particular examples USAC identified do not have a substantial effect on Allband’s overall high-cost support, they indicate a pervasive practice in time reporting that renders Allband’s cost accounting unreliable. In support of its claim, Allband directs us to Attachment 5 in its response to USAC. See Allband’s Response to USAC, Attach. 5. However, Attachment 5 references Attachment 6, but the cross references do not match. For instance, Attachment 5 references observations #23 and #47 on Attachment 6, but observations #23 and #47 do not exist on Attachment 6. See also *infra* section III.E.

B. Allband Allocated an Unrealistically High Percentage of Corporate Operations Expenses to Regulated Activities

1. Allband's Allocation of Employee Time for Corporate Operations

15. In 2014, Allband allocated 95 percent of employee time to the regulated entity.⁵⁰ Included in that allocation is executive time, of which Allband allocated 98 percent to the regulated entity.⁵¹ Allband attributes these high percentages to executive and management time spent dealing with regulatory and legal proceedings, which Allband claims only pertain to the regulated entity, i.e. the incumbent telephone company.⁵² We find it highly unlikely that Allband's executive and management employee time would be so heavily skewed to regulated operations when executive and management time includes such activities as "formulating corporate policy and in providing overall administration and management," "developing and evaluating long-term courses of action for the future operations of the company," and "performing personnel administration activities."⁵³ Again, in 2014 AMM had more almost four times the subscribers than ACC and was producing 68 percent of non-universal service fund (USF) revenues. Moreover, as stated above, in 2012 and 2013, Allband allocated virtually no corporate operations expenses at all to AMM,⁵⁴ which would have meant its executives, management, and employees were spending practically no time on AMM matters. Under these circumstances, we are skeptical that Allband's time allocations accurately reflect how time was actually spent by Allband executives and management.⁵⁵ Accordingly, we cannot find that Allband's cost accounting is reliable.

2. ACC's Overall Corporate Operations Expenses

16. In 2014, Allband allocated 92 percent of overall corporate operations expenses to the regulated entity ACC.⁵⁶ AMM has more than four times the number of subscribers, is growing, and by 2014 had become a significant revenue source for the company (\$509,387, or approximately 68 percent of non-high-cost revenue).⁵⁷ An allocation of 92 percent of corporate operations expenses to the regulated entity is implausible under these circumstances. Moreover, in 2012 and 2013, Allband allocated 100 percent and 99.9 percent of corporate operations expenses to the regulated entity, respectively.⁵⁸ These allocations are questionable because during these years Allband spent millions of dollars constructing a broadband network outside of its incumbent study area.⁵⁹ It is implausible that Allband had virtually no corporate operations expenses attributable to AMM during this process.

17. According to section 64.901(b)(3)(ii), costs that cannot be directly assigned or allocated based on direct analysis of the origin of the cost must be allocated "based upon an indirect, cost causative

⁵⁰ Allband's Response to USAC, Attach. 2 at 3.

⁵¹ See Allband May 15 Letter, Attach. C, Accounting for Affiliates and Regulated Operations.

⁵² Allband's Response to USAC, Attach. 2 at 3. See *infra* section III.B.3 regarding allocation of legal expenses.

⁵³ 47 CFR § 32.6720.

⁵⁴ See *supra* note 48.

⁵⁵ It is counterintuitive to assume that an executive would spend only 2 percent of his or her time on a part of the company that has grown to over 75 percent of the company's lines in the past few years. .

⁵⁶ Allband's Response to USAC, Attach. 2 at 1.

⁵⁷ See Allband May 2015 Letter, Attach. B at 16 (2014 Financial Statement).

⁵⁸ See Universal Service Fund Data: NECA Study Results, 2012 Report and 2013 Report, available at <https://www.fcc.gov/general/universal-service-fund-data-neca-study-results>, and Further Waiver Request, Appx. 2, Schedule 2 - 2012 Audited Financial Statement and Schedule 3 - 2013 Audited Financial Statements.

⁵⁹ According to recovery.gov, in 2012, Allband received \$3,452,109 in RUS grant money and in 2013, Allband received \$2,977,718 in RUS grant money. This information is no longer publicly available.

linkage to another cost category for which a direct assignment or allocation is available.”⁶⁰ Allband admits that it allocates 32 percent of its corporate operations expense based on “the directed reported hours of time spent by Allband’s management.”⁶¹ As explained above, we find Allband’s executive and management time allocations to be implausible; thus, we cannot rely upon the allocation of corporate expenses based on these time allocations.

3. Allband’s Accounting/Finance and Legal Expense Allocations

18. USAC also found that during the waiver period from 2012 to 2014, Allband allocated all accounting and finance expenses to the regulated entity.⁶² USAC determined that a portion of the expense should have been allocated to a nonregulated expense account for AMM.⁶³ Allband does not dispute USAC’s finding.⁶⁴ Furthermore, Allband allocated all of its legal expenses to the regulated company in 2014.⁶⁵ Because AMM was building a network outside of the incumbent territory and adding subscribers, we find it improbable that AMM generated no legal expense in 2014. These misallocations further render Allband’s cost accounting unreliable.

C. Compliance with the Affiliate Transactions Rule

19. Allband is subject to the FCC’s affiliate transactions rule, which requires, in relevant part, that services sold by a carrier to its affiliate shall be recorded at “no less than the higher of fair market value and fully distributed cost.”⁶⁶ Regarding its corporate operations, Allband stated that, “given that Allband Multimedia is essentially an extension of the Cooperative from both an administrative and infrastructure perspective, it requires minimal oversight on the part of management and has minimal impact on corporate operations.”⁶⁷ Allband’s statement indicates a misconception that corporate operations expenses should generally be allocated to the regulated entity, and that allocations to AMM should be based a marginal or incremental cost basis. This is not consistent with our rules; AMM needs to be treated as a separate entity that reimburses ACC for any services rendered at either fair market value or fully distributed costs, not marginal cost. Given that it appears based on the record before us that Allband has applied this incorrect theory of allocation to its expenses, the Commission cannot rely on Allband’s cost accounting to determine if a waiver is warranted.

D. Support for Improper Expenditures

20. Allband allocated to the regulated entity expenditures that are not necessary for the provision of supported services and may not be recovered through high-cost support.⁶⁸ For example, Allband’s corporate operations expenses included “community engagement” and associated “travel related requirements.”⁶⁹ Allband also expensed the cost of flying the general manager’s spouse to attend

⁶⁰ 47 CFR § 64.901(b)(3)(ii).

⁶¹ Allband’s Response to USAC, Attach. 2 at 3.

⁶² See USAC Memorandum at 22, 26, and Allband May 15 Letter, Attach. C, Accounting for Affiliates and Regulated Operations.

⁶³ USAC Memorandum at 23, 27.

⁶⁴ See Allband’s Response to USAC, Attach. 6 at 10, 11.

⁶⁵ See Allband May 15 Letter, Attach. C, Accounting for Affiliates and Regulated Operations.

⁶⁶ 47 CFR § 32.27(c); see also 47 CFR § 64.902 (requiring that carriers that separate their costs adhere to section 32.27).

⁶⁷ Allband’s Response to USAC, Attach. 2 at 3.

⁶⁸ See *All Universal Service High-Cost Support Recipients Are Reminded That Support Must Be Used for Its Intended Purpose*, WC Docket Nos. 10-90, 14-58, Public Notice, 30 FCC Rcd 11821, 11822 (2015) (*Impermissible Expenses Public Notice*).

⁶⁹ See Allband’s Response to USAC, Attach. 2, at 4.

oral arguments at the Tenth Circuit Court of Appeals,⁷⁰ and the cost of flying the spouse of a potential employee candidate to the area.⁷¹ Allband also claimed support for a \$1,000 college fund contribution for a relative of the general manager.⁷² The Commission has made clear that these types of expenses are not eligible for universal service support because they are not necessary to the maintenance, provision and upgrading of facilities and services.⁷³ We do not view expenses associated with family members of employees or prospective employees as appropriate for recovery from the universal service fund. Inclusion of these types of expenses in its cost studies casts further doubt on the reliability of Allband's cost accounting.

E. We Deny the Petition for Further Waiver

21. For the reasons discussed above, each independently, and even more so when taken together, we find that Allband's cost accounting is unreliable, and we are unable to determine, at this time, what, if any, support in excess of the \$250 cap is justified and in the public interest. Allband argues that the total impact of the errors identified by USAC on Allband's total universal service support is insignificant.⁷⁴ We disagree. Given the breadth of Allband's misallocations, particularly of employee time, and the fact that Allband used employee payroll as the basis for allocating its other expenses, it is impossible to determine the effect these misallocations have on Allband's claimed expenses and what Allband's costs would be if its accounting had been done correctly.⁷⁵ Accordingly, we deny Allband's Further Waiver Request because we cannot find good cause on this record to justify its requested relief.

22. Contrary to Allband's contention,⁷⁶ our decision herein is consistent with our universal service goals. We seek "to balance the various objectives of section 254(b) of the Act, including the objective of providing support that is sufficient but not excessive so as to not impose an excessive burden on consumers and businesses who ultimately pay to support the Fund."⁷⁷ As explained above, we cannot determine what, if any, support above the \$250 cap is justified and in the public interest. Under these

⁷⁰ See USAC Memorandum at 25. We note that one of Allband's claims in its brief to the Tenth Circuit Court of Appeals challenging the legality of the *USF/ICC Transformation Order* argued that the "Order's stated goal to reduce waste and inefficiency, or to conserve the USF budget . . . is not accomplished by punishing Allband" because there was "no evidence of waste or insufficiency attributable to Allband." See Allband 10th Cir. Brief at *36. Notwithstanding this argument before the Court, Allband expensed to the regulated company the cost to fly the general manager's spouse to the oral argument in Denver, CO. The general manager's spouse was not employed by ACC and was not performing any regulated activities on behalf of ACC. We find that expense wasteful and impermissible under our universal service rules. See Allband's Response to USAC, Attach. 6 at 11 ("Allband agrees that the expenses related to the spouses [*sic*] travel should be excluded from regulated accounts.").

⁷¹ See USAC Memorandum at 28.

⁷² See *id.* at 27.

⁷³ See *Impermissible Expenses Public Notice*.

⁷⁴ See Allband's Response to USAC at 6-7.

⁷⁵ Allband argues that USAC's calculations of error percentages are inaccurate. See Allband's Response to USAC at 3-5. However, given our determination that we cannot rely on Allband's cost accounting, we do not rely upon the percentages determined by USAC to deny the Further Waiver Request.

⁷⁶ See Further Waiver Request at 12-14; see also Application for Review at 18-21 (arguing that a per-line cap violates the Congress' goals, intent and objectives in enacting universal service).

⁷⁷ *USF/ICC Transformation Order*, 26 FCC Rcd at 17682, para. 57. See also *Fifth Order on Reconsideration*, 27 FCC Rcd at 14557-58, para. 22, and *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 620-21 (5th Cir. 2000) ("The agency's broad discretion to provide sufficient universal service funding includes the decision to impose cost controls to avoid excessive expenditures that will detract from universal service.").

circumstances, providing Allband with additional support above the cap would violate our obligations of fiscal responsibility and accountability with universal service funds.⁷⁸

F. Allband Must Bring its Cost Accounting Practices into Compliance with the Commission's Rules

23. We order Allband to revise its cost accounting practices to be consistent with our rules and submit information regarding its revised allocation of costs and associated revisions to its cost studies to USAC for review.⁷⁹ To facilitate USAC's review, we order Allband to provide detailed breakdowns by percentage of how each category of employee's time is allocated between regulated and nonregulated activities for at least a three-month period in such a way that USAC can determine if Allband's revised practices comply with our rules. Within three months of Allband's submission, we direct USAC to determine whether Allband's revised cost accounting practices adhere to our rules for cost allocation between regulated and nonregulated activities, and notify the Bureau.⁸⁰ At this time, Allband may submit a request for a waiver of the \$250 cap if its revised cost study incorporating correctly determined costs would result in support in excess of \$250 per line.

24. In the orders extending Allband's prior waiver on an interim basis, the Bureau stated that "universal service support amounts may be adjusted retroactively if it is determined that Allband has received support amounts in the past to which it was not entitled." Because we find Allband's cost accounting to be unreliable, we cannot conclude that Allband was entitled to support above the \$250 per line, per month cap from June 30, 2015 until the date of this Order. Therefore, once USAC has determined the appropriate allocation of costs between regulated and nonregulated activities, USAC shall apply the same methodology to Allband's costs during the interim waiver period from June 30, 2015 until the date of this Order to determine what Allband's support would have been if Allband had correctly allocated its costs.⁸¹ Once this determination has been made, we direct USAC to initiate through its regular procedures recovery actions for all HCLS and interstate common line support (ICLS) support in excess of the amounts of support Allband should have received from July 1, 2015 to the date of this Order.⁸²

25. We further order USAC to conduct an inquiry to examine Allband's cost allocations during the initial waiver period (2012-2015) to determine whether Allband was overcompensated by the Universal Service Fund during this time period.⁸³ If information and records (such as service call locations, customer service records and other detailed information sufficient to allocate properly employee time between regulated and nonregulated activities) for this earlier period are not made available for USAC to make this determination within three months of USAC requesting such records and

⁷⁸ *USF/ICC Transformation Order*, 26 FCC Rcd at 17670, para. 11.

⁷⁹ Given that Allband's practices have over-allocated expenses to the regulated entity, we expect that its revisions will decrease ACC's regulated costs.

⁸⁰ Actions taken by USAC in response to direction in this subsection F remain subject to review under our rules if needed. *See generally* 47 CFR Part 54, Subpart I.

⁸¹ If Allband is unable to provide the information and records necessary for USAC to make this determination within three months of USAC's approval of the revised cost methodology, USAC may utilize alternative methods to allocate costs between regulated and nonregulated activities as described in paragraph 25 herein.

⁸² Under the interim waiver, Allband received "the lesser of high-cost universal service support based on Allband's actual costs or the annualized total high-cost support that it received for the period January 1, 2012 through June 30, 2012." *June 2015 Interim Waiver*, 30 FCC Rcd at 6959, para. 14; *Dec. 2015 Interim Waiver*, 30 FCC Rcd at 14023, para. 8.

⁸³ We note that the burden is on Allband to "retain all records required to demonstrate to auditors that the support received was consistent with the universal service high-cost program rules" and that "[t]his documentation must be maintained for at least ten years." 47 CFR § 54.320(b).

information, USAC may utilize alternative methods to allocate costs between regulated and nonregulated activities, such as allocating costs based on the relative number of ACC lines compared to AMM lines.⁸⁴ USAC shall complete this inquiry within six months of the date USAC requests the relevant records and information and provide its findings to the Bureau. Once USAC has provided its findings, we expect those findings will be used to determine what Allband's support would have been if Allband had correctly allocated its costs during the initial waiver period and to determine whether to take any further appropriate actions, such as the recovery of HCLS and ICLS support in excess of the amounts of support that Allband should have received during this period.

26. The Commission is mindful of its obligation to preserve and advance universal service.⁸⁵ Consistent with Commission precedent, any determination into the appropriate amount of waiver support will take into account evidence presented by Allband regarding the impact of any support reductions on its ability to continue to serve areas where consumers have no alternatives.⁸⁶

27. If any of the provisions of this Order shall be held unenforceable by any court of competent jurisdiction, such unenforceability shall not render unenforceable the entire Order, but rather the entire Order shall be construed as if not containing the particular unenforceable section or sections, and the rights and obligations of Allband and USAC shall be construed and enforced accordingly.

G. We Deny Allband's Emergency Waiver Petition

28. On June 29, 2016, Allband filed an emergency petition for further extension of its waiver of section 54.302 of the Commission's Rules.⁸⁷ We reviewed the Emergency Waiver and find that Allband has not raised any new arguments that warrant grant of the requested relief. Allband did not provide any new information that leads us to conclude its cost accounting is reliable. Allband's main arguments are that ACC demonstrated that it reasonably complied with the FCC's cost allocation rules, and USAC's findings relied on highly exaggerated error rates.⁸⁸ We do not find these arguments persuasive. As explained more fully above, we do not agree that ACC demonstrated it reasonably complied with the FCC's cost allocation rules. Having written procedures that facially comply with our rules is one thing; properly implementing those procedures in a way that complies with our rules is another. USAC was unable to conclude that ACC has done the latter.⁸⁹ And in any event, USAC's specific conclusions on this point are not binding, as the purpose of the USAC investigation was to undertake factual inquiries to assist the Commission in making its determination. Furthermore, as noted above, we are not relying upon USAC's error rates in making our conclusion that Allband's cost accounting is unreliable.⁹⁰ Finally, based on the record before us, we cannot assess the merits of Allband's argument that denial of the waiver will have severe financial impact. To evaluate fully the

⁸⁴ We find it reasonable under the circumstances presented here to permit USAC to directly assign costs to nonregulated activities based on the relative number of AMM lines, consistent with the overarching principle in Part 64 to allocate costs to the extent possible based on cost causation. As a general matter, one would expect that the company with the greater number of customers (AMM) is generating more customer inquiries, more trouble tickets, and more billing activity than the company with the smaller number of customers (ACC).

⁸⁵ See 47 U.S.C. § 254(b)(2).

⁸⁶ The Commission considers whether reductions in support will put consumers at risk of losing voice and broadband service, or would result in consumers paying rates that are not reasonably comparable to urban rates. See *USF/ICC Transformation Order*, 26 FCC Rcd at 17840, para. 540; *Connect America Fund et al.*, WC Docket No. 10-90 et al., Fifth Order on Reconsideration, 27 FCC Rcd 14549, 14557, para. 21 (2012).

⁸⁷ See Emergency Petition.

⁸⁸ Emergency Petition, Exh. 1 at 5.

⁸⁹ See USAC Memorandum at 1-2.

⁹⁰ See, e.g., Allband Response at 3.

company's situation would require a more detailed submission regarding all expenses to determine whether the company has taken all reasonable efforts to reduce operating expenses during this period.

IV. WE DENY ALLBAND'S APPLICATION FOR REVIEW OF THE JULY 2012 WAIVER

29. In its Application for Review of the Bureau's July 2012 grant of a three-year waiver, Allband requested that its waiver of the \$250 cap be extended to 2026 and that it receive a waiver of the benchmarking rule for the same period of time.⁹¹ Allband also made several legal challenges to both the \$250 cap and the benchmarking rule.⁹² We hereby deny the Application for Review.

30. In support of extending its waiver request beyond three years, Allband argued that by 2015 it could neither reduce expenses to meet the \$250 cap nor increase penetration sufficiently to reduce funding requirements.⁹³ These arguments are not persuasive. Circumstances can vary substantially over a few years. For example, since the Bureau granted Allband a waiver in 2012, Allband is now earning substantial revenues through AMM that it was not earning in 2012.⁹⁴ A waiver of section 54.302 is only in the public interest to the extent that a carrier's costs exceed the \$250 per line per month. Because carrier expenses and revenue are subject to change, particularly as carriers deploy more broadband, a frequent review to ensure that a waiver is still necessary is warranted. For this same reason, Allband's argument that an extension beyond three years will save both Allband and the Commission resources is unpersuasive.⁹⁵

31. Further, the Bureau was correct to dismiss as moot Allband's waiver request of the benchmarking rule.⁹⁶ We note that Allband was never subject to any reductions in support as a result of the benchmarking rule. In addition, the Commission eliminated the benchmarking rule in the *Seventh Order on Reconsideration*.⁹⁷ Thus, Allband suffered no harm from the benchmarking rule in the past nor will it in the future.

32. Finally, we deny Allband's legal arguments.⁹⁸ As discussed above, Allband's legal challenges to the benchmarking rule are moot. We deny Allband's legal claims regarding the \$250 cap consistent with the Tenth Circuit Court of Appeals decision rejecting these same arguments.⁹⁹ We also

⁹¹ See Application for Review at 1.

⁹² See *id.* at 10-24.

⁹³ See *id.* at 4-8.

⁹⁴ See Allband May 2015 Letter, Attach. B at 16 (2014 Financial Statement reporting \$503,387 in Internet Revenue for AMM), and Further Waiver Request, Appx. 2, Schedule 2 at 15 (2012 Audited Financial Statement reporting \$65,507 in Internet revenue for AMM). In the *USF/ICC Transformation Order*, the Commission made clear that it would conduct "a rigorous, thorough and searching review comparable to a total company earnings review" including "revenues derived from unregulated and unsupported services as well." *USF/ICC Transformation Order*, 26 FCC Rcd at 17840, para. 540 (footnote omitted).

⁹⁵ Application for Review at 8-9.

⁹⁶ See *id.* at 23-24.

⁹⁷ *Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order, Declaratory Ruling, Order, Memorandum Opinion and Order, Seventh Order on Reconsideration, and Further Notice of Proposed Rulemaking, 29 FCC Rcd 7051, 7095-99, paras. 127-37 (2014).

⁹⁸ See Application for Review at 10-24. In sum, Allband argued that the \$250 cap violated the Constitution, the FCC's statutory and jurisdictional authority, the Administrative Procedure Act, and would effect a breach of contract.

⁹⁹ See *In re FCC 11-161*, 753 F.3d at 1089-93. Insofar as the Tenth Circuit partially relied, in some of its analysis, on the possibility of waiver in rejecting Allband's arguments, our denial of additional relief here does not undermine those findings. See, e.g., *id.* at 1091-93. In particular, as before, Allband remains free to seek a waiver to the extent

(continued....)

note, as the Commission did in the *Sixth Order on Reconsideration* upholding the \$250 cap, that section 254 of the Communications Act of 1934 “does not create any entitlement or expectation that ETCs will receive any particular level of support or even any support at all.”¹⁰⁰ In fact, “there is no statutory provision or Commission rule that provides companies with a vested right to continued receipt of support at current levels, and [the Commission is] not aware of any other, independent source of law that gives particular companies an entitlement to ongoing USF support.”¹⁰¹

V. CONCLUSION

33. For the reasons explained above, we find that Allband’s cost accounting is unreliable, and we are therefore unable to determine, at this time, what, if any, support in excess of the \$250 cap is justified and in the public interest. We therefore deny Allband’s Further Waiver Request and order Allband to bring its practices into compliance with our rules. Once Allband has revised its cost accounting practices to be consistent with our rules, Allband may submit a new request for waiver of the \$250 cap if its revised cost study incorporating correctly determined costs would result in support in excess of \$250 per line. Finally, we deny Allband’s Application for Review of the July 2012 Waiver Order.

VI. ORDERING CLAUSES

34. Accordingly, IT IS ORDERED, pursuant to the authority contained in sections 4(i), 4(j), 5(c)(5), 254, 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 155, 254, 405, and sections 1.104, and 1.115(g) of the Commission’s rules, 47 CFR §§ 1.104, 1.115(g), the Application for Review of Allband Communications Cooperative IS DENIED.

35. IT IS FURTHER ORDERED, that the Further Waiver Request and Emergency Petition for waiver filed by Allband Communications Cooperative IS DENIED as described herein.

36. IS FURTHER ORDERED, that Allband shall revise its cost accounting practices to be consistent with our rules and submit those revised practices to USAC.

37. IT IS FURTHER ORDERED, that USAC shall review Allband’s revised cost accounting practices, conduct all inquiries as described herein, and recover any support for the interim waiver period as described herein.

(Continued from previous page) _____

actually justified on the merits. Our findings here simply are that certain requested relief is not justified on the merits on this record.

¹⁰⁰ *Connect America Fund High-Cost Support*, WC Docket Nos. 10-90, 05-337, Sixth Order on Reconsideration and Memorandum Report and Order, 28 FCC Rcd 2572, 2588, para. 41 (2013); *USF/ICC Transformation Order*, 26 FCC Rcd at 17745, para. 221 (citing *Rural Cellular Assoc. v. FCC*, 588 F.3d 1095, 1103 (D.C. Cir. 2009) (quoting *Alenco*, 201 F.3d at 621)) (“Section 254 does not mandate the receipt of support by any particular carrier. Rather, as the Commission has indicated and the courts have agreed, the ‘purpose of universal service is to benefit the customer, not the carrier.’”).

¹⁰¹ *USF/ICC Transformation Order*, 26 FCC Rcd at 17771, para. 293. See also *Members of the Peanut Quota Holders Assoc. v. United States*, 421 F.3d 1323, 1335 (Fed. Cir. 2005) (“The government is free to create programs that convey benefits in the form of property, but, unless the statute itself or surrounding circumstances indicate that such conveyances are intended to be irrevocable, the government does not forfeit its right to withdraw those benefits or qualify them as it chooses.”).

38. IT IS FURTHER ORDERED that, pursuant to section 1.102(b)(1) of the Commission's rules, 47 CFR § 1.102(b)(1), this Order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

**STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN**

Re: *Allband Communications Cooperative Petition for Waiver of Certain High-Cost Universal Service Rules, Connect America Fund, WC Docket No. 10-90.*

America needs affordable, ubiquitous broadband. To get there, we have to spend our precious universal service dollars and of course, we should always spend them wisely. When we ask consumers to contribute their hard-earned cash to help build broadband networks, they need to be assured that their money is used responsibly. The FCC is a steward of that capital, and we must be vigilant against waste, fraud, and abuse, regardless of whether the offender is an individual or a company, or whether that money comes from the Lifeline, E-rate, rural health care, or high-cost program.

The universal service high-cost program was established to build and support networks in places where the business case cannot be made for deployment. But, a company has the obligation to use that support only for regulated activities, even if it is a provider of more than just regulated services. It is expected to allocate costs between regulated and unregulated activities—with universal service support provided only to reimburse regulated costs. Companies that abuse this trust by allocating excess costs into the regulated bucket artificially increase the amount of universal service support they receive. Allband did just that.

Certainly, cost allocation can be a difficult endeavor. But, the universal service fund should never be used as a company's private checking account to cover personal expenses such as college fund contributions for family members or flights for an employee's spouse to attend court cases. Nor should the universal service fund pay for almost all corporate operations expenses for the company when the unregulated side of the company is four times the size of the regulated side. These are particularly egregious actions and I fully support denying Allband's waiver requests and referring this case to the Commission's Enforcement Bureau.

And, this Order properly directs USAC to determine what that support should have been for the period in question. Once that work is complete, I would support quick action to get excess dollars out of Allband's hands and back into the universal service fund, where it can be put to use by those who will work to build out affordable, ubiquitous broadband.

**STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY**

Re: *Allband Communications Cooperative Petition for Waiver of Certain High-Cost Universal Service Rules, Connect America Fund, WC Docket No. 10-90.*

When a universal service funding recipient seeks a waiver of Commission rules to obtain additional support, the company must be prepared to demonstrate that there is good cause to grant the request. That includes providing complete and accurate documentation to support its request. Then, the Commission has the responsibility, on behalf of all businesses and consumers that pay into the universal service fund, to conduct a thorough review to ensure that the amount of support we provide is necessary and appropriate.

If it comes to the Commission's attention that the amount of support provided may not be fully justified, the Commission must examine the facts and make appropriate adjustments consistent with our rules. At the same time, absent any indication of intentional wrongdoing, the Commission should not be unnecessarily hasty in recouping support provided pursuant to a previously granted waiver if it is unsure whether some amount of additional support would have been appropriate. This is particularly important in instances where consumers could lose access to voice service in areas where there are no other providers, as could be the case in this instance. It would be odd indeed for the same Commission that just voted extra "protections" for consumers switching voice service during tech transitions to turn a blind eye to the plight of consumers that could lose service altogether.

Therefore, I am pleased that my colleagues agreed to defer any claw back of support until a determination can be made about what amount of support should have been provided. To be clear, I have no difficulty recouping the full amount of funding provided under the waiver—to the extent that the facts and circumstances justify that step. The company will also have the opportunity to seek a new waiver once it revises its documentation consistent with our rules. I urge the company, USAC, and the Commission to work expeditiously to resolve these outstanding questions.