

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

In the Matter of
Petition of Westelcom Network, Inc.
for Limited, Expedited Waiver
of Section 61.26(a)(6) of the Commission's Rules
WC Docket No. 15-69

ORDER

Adopted: April 21, 2017

Released: April 24, 2017

By the Commission:

TABLE OF CONTENTS

Para.
I. INTRODUCTION..... 1
II. BACKGROUND..... 2
A. The Competitive LEC Access Charge Rule and Previous Waiver Requests..... 2
B. The Westelcom Petition..... 15
III. DISCUSSION 24
IV. ORDERING CLAUSES..... 32

I. INTRODUCTION

1. In this Order, we grant a limited and temporary conditional waiver of section 61.26(a)(6)(ii) of the Commission's rules to allow Westelcom Network, Inc. (Westelcom) a meaningful opportunity to transition from the maximum rates that rural competitive local exchange carrier (Rural CLEC) may charge to the maximum rates that a competitive LEC that is not a Rural CLEC (non-Rural CLEC) may charge. As discussed below, we find that special circumstances present good cause for granting Westelcom such limited relief.

II. BACKGROUND

A. The Competitive LEC Access Charge Rule and Previous Waiver Requests

2. The Commission established its tariff rules governing competitive LEC interstate switched access charges in 2001.1 In the CLEC Access Reform Order, the Commission concluded that the access services market structure prevented competition from effectively disciplining prices.2 The Commission further concluded that certain competitive LECs used the tariff system to set access rates that were subject neither to negotiation nor to regulation, which otherwise could ensure the reasonableness of those rates. Those competitive LECs would then rely on their tariffs to demand payment from long distance carriers for access services that the long distance carriers likely would have declined to purchase

1 Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923 (2001) (CLEC Access Reform Order).

2 Id. at 9936, para. 32.

at the tariffed rate.³ To address this market failure, the Commission revised its rules to align tariffed competitive LEC access rates more closely with those of the incumbent LECs.

3. Rather than regulating the costs or revenues of competitive LECs, the *CLEC Access Charge Reform Order* established market-based safe harbor benchmarks above which competitive LECs are prohibited from tariffing their interstate switched access services.⁴ The benchmarks are based on rates for similar services provided by incumbent LECs,⁵ rather than an analysis of the competitive LECs' revenue, demand, and, perhaps, cost, as was applicable at the time to the interstate switched access service of all incumbent LECs.⁶ So long as tariffed rates remain at or below these benchmarks, such rates are considered presumptively just and reasonable.⁷ Under the Commission's rules, the generally-applicable benchmark is based on the rates for similar services tariffed by the particular incumbent LEC with which the competitive LEC competes, that is, the "competing ILEC."⁸

4. The Commission also created an exemption to this generally-applicable benchmark for carriers considered to be Rural CLECs, which are competitive LECs serving exclusively rural areas.⁹ The applicable benchmark for Rural CLECs is a standardized rural incumbent LEC rate – the rate listed in the National Exchange Carrier Association (NECA) tariff, assuming the highest rate band, except when the competitive LEC is competing against a rural incumbent LEC that is a rural telephone company as defined by Section 3(44) of the Communications Act of 1934, as amended (the Act).¹⁰

5. The Commission created this Rural CLEC exemption based on the presumed cost characteristics of the service territories and the relative ability of carriers to recover such costs.¹¹ A non-rural incumbent LEC has the ability to average its costs over a territory that includes locations in lower-cost urban areas while a carrier only serving rural areas lacks these lower-cost service opportunities.¹² This was not considered to be a subsidy to Rural CLECs but, instead, a recognition of the higher costs faced by exclusively-Rural CLECs (and the rural NECA companies whose rates serve as the Rural CLEC benchmark).¹³

6. At the time the *CLEC Access Charge Reform Order* was adopted, numerous competitive LECs had tariffed rates above the benchmarks that were established.¹⁴ Recognizing the need to allow such competitive LECs to adjust their business models, the Commission established a four-step, three year transition.¹⁵

³ *Id.* at 9924-25, para. 2.

⁴ *Id.* at 9925, para. 3. To the extent that competitive LECs seek to impose interstate switched access charges higher than these benchmarks, the Commission's rules permit such competitive LECs to do so by entering into negotiated arrangements.

⁵ *Id.* at 9941, para. 45; 47 CFR § 61.26.

⁶ *Id.* at 9939, para. 41.

⁷ *Id.* at 9938, para. 40.

⁸ 47 CFR § 61.26(c).

⁹ 47 CFR § 61.26(e).

¹⁰ 47 CFR §§ 61.26(e), 61.26(a)(4).

¹¹ *CLEC Access Reform Order*, 16 FCC Rcd at 9950-53, paras. 65-73.

¹² *Id.* at 9949-51, paras. 64-67.

¹³ *Id.* at 9951, para. 67.

¹⁴ *Id.* at 9942, para. 48.

¹⁵ *Id.* at 9944-45, paras. 51-52.

7. In adopting the Rural CLEC exemption in 2001, the Commission relied on an assumption that only a “small number of carriers serving a tiny portion of the nation’s access lines” would be eligible for the exemption.¹⁶ As a result, the Commission’s definition of Rural CLEC is designed to ensure that beneficiaries of the rural exemption serve exclusively rural areas.¹⁷

8. For a competitive LEC to be a Rural CLEC under Section 61.26 of the Commission’s rules and, thus, be able to use the Rural CLEC benchmark, it must meet two criteria. Pursuant to Section 61.26(a)(6), it may not “serve (*i.e.*, terminate traffic to or originate traffic from) any end users located within either: (i) Any incorporated place of 50,000 inhabitants or more, based on the most recently available population statistics of the Census Bureau or (ii) An urbanized area, as defined by the Census Bureau.”¹⁸ In adopting this definition, the Commission strove for administrative simplicity and sought to base the definition on “objectively available information that does not require extensive calculation or analysis by either carriers or the Commission.”¹⁹ Use of Census Bureau data and definitions suits both purposes.²⁰ While the Commission established a transition period for CLECs whose rates were above the benchmark as of the effective date of the rules adopted by the *CLEC Access Charge Reform Order*, the Commission did not consider whether to establish such a transition for CLECs that may later lose the rural exemption based on newly-available Census data or changing definitions of urbanized areas.

9. While incorporated places are based on well-known and relatively-stable political boundaries, urbanized areas, by design, are not, and instead use collections of Census blocks that change over time.²¹ An “urbanized area” is one of two classifications that the Census Bureau uses for urban areas, the other being an “urban cluster.” Both urbanized areas and urban clusters have relatively-dense population characteristics with the primary distinction between them being that the former has at least 50,000 inhabitants.²²

10. Following each Census, the Census Bureau updates its procedures associating Census Blocks (and/or groups thereof) as urban areas through a notice-and-comment proceeding. Over the past 30 years, changes have pertained to, among other things, the development of software-based algorithms, use of GIS data, and the means of selecting starting points for the association of geographic areas.²³ A few to several months after adoption of new procedures (the process for each of the 2000 and 2010

¹⁶ *Id.* at 9951, para. 68.

¹⁷ *Id.* at 9954, para. 75 (basing carrier eligibility for the Rural CLEC exemption on the carrier’s entire service area); *Access Charge Reform, PrairieWave Telecommunications, Inc. Petition for Waiver of Sections 61.26(b) and (c), or in the Alternative, Section 61.26(a)(6) of the Commission’s Rules et al.*, Order, 23 FCC Rcd 2556, 2557, para. 4 (*PrairieWave*) (characterizing the Rural CLEC exemption).

¹⁸ 47 CFR § 61.26(a)(6).

¹⁹ *CLEC Access Reform Order*, 16 FCC Rcd at 9954, para. 75.

²⁰ *Id.* at 9954, paras. 75-76.

²¹ See Bureau of the Census, Urban Area Criteria for the 2010 Census, 76 Fed. Reg. 53030 (Aug. 24, 2011) (*Census Bureau 2010 Urban Area Criteria*). This includes analysis of Census Blocks in groupings. *Id.* at 53032-35.

²² *Id.* at 53030. The process of determining the boundaries of urbanized areas under the criteria used in recent Censuses is particularly complex because urbanized areas and urban clusters may not always be composed of contiguous densely-populated Census Blocks, sometimes including “jumps” and “hops” of relatively short distances over areas of lower density that are considered to be artifacts of urban planning and zoning which are included in the urbanized areas and urban clusters. *Id.* at 53032.

²³ The Census Bureau has made some sort of change to its methods of identifying urban areas with every Census since at least 1950. *Id.* at 53030-33 (describing the history of changes prior to the 2010 Census).

Census took one year), the Census Bureau publishes its new lists and maps of urbanized areas and urban clusters.²⁴

11. Since adoption of the *CLEC Access Charge Reform Order*, competitive LECs have requested expansion of the eligibility for the Rural CLEC exemption. In the *CLEC Access Reform Reconsideration Order*, the Commission denied requests to expand the definition to include competitive LECs competing with any price cap carrier even in urban areas and also to permit what would have amounted to partial eligibility for the rural exemption “to the extent that” a competitive LEC serves rural areas.²⁵ Both requests, the Commission concluded, would undermine the Commission’s intent in limiting the exemption.²⁶

12. The Commission has also ruled on three requests for waiver of the application of the definition of Rural CLEC since the *CLEC Access Reform Reconsideration Order*. The first two requests were handled in the same 2008 order – one from PrairieWave Telecommunications, Inc. (PrairieWave) and another, somewhat similar, request, from SouthEast Telephone, Inc. (SouthEast).²⁷ PrairieWave sought a waiver based on the fact that its non-rural market, Sioux Falls, South Dakota, was not in PrairieWave’s original business plan, but came to be served by PrairieWave as a result of an asset and customer-based acquisition after the Commission’s competitive LEC access charge rules were initially established. In its order addressing both the PrairieWave and SouthEast petitions, the Commission denied PrairieWave’s request for waiver due to a failure to demonstrate special circumstances. The Commission observed that acquisitions are common in the telecommunications industry and that PrairieWave was on notice at the time of the pertinent acquisition of the non-rural nature of the Sioux Falls operations,²⁸ and granting such a waiver would greatly increase the number of lines eligible for the rural exemption by bringing the entire previously non-rural Sioux Falls market under the rural exemption.²⁹ SouthEast sought to remain eligible for the rural exemption so long as 95 percent or more of its customers were located in rural areas.³⁰ The Commission denied SouthEast’s request primarily because SouthEast, like PrairieWave, presented no special circumstance – many Rural CLECs might desire to serve a limited number of non-rural customers.³¹ Granting SouthEast’s request, the Commission reasoned, would undermine the policy underlying the rural exemption.³²

13. The Commission also considered a waiver request from Northern Telephone & Data Corp. (NTD) that was premised on claims regarding NTD’s total cost of providing service.³³ The

²⁴ See, e.g., Press Release, U.S. Bureau of the Census, Growth in Urban Population Outpaces Rest of Nation, Census Bureau Reports (Mar. 26, 2012), available at https://www.census.gov/newsroom/releases/archives/2010_census/cb12-50.html (following *Census Bureau 2010 Urban Area Criteria*).

²⁵ *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd 9108, 9126-27, para. 36-37 (2004) (*CLEC Access Reform Reconsideration Order*).

²⁶ *CLEC Access Reform Order*, 16 FCC Rcd at 9126-27, para. 37.

²⁷ *PrairieWave*. In *PrairieWave*, the Commission also ruled on a petition by Cox Communications, Inc. for clarification of the *CLEC Access Reform Order*, the subject matter of which is not relevant to the Rural CLEC exemption. *PrairieWave*, 23 FCC Rcd at 2563-65, paras. 22-28.

²⁸ *Id.* at 2561, para. 15.

²⁹ *Id.* at 2561, para. 16.

³⁰ *Id.* at 2562, para. 17.

³¹ *Id.* at 2563, para. 21.

³² *Id.* at 2561, para. 16.

³³ *Petition of Northern Telephone & Data Corp. for Waiver of Section 61.26(b)(1) of the Commission’s Rules*, Order, 25 FCC Rcd 274 (WCB 2010).

Commission denied NTD's request because the Commission had already rejected cost-based regulation of competitive LEC access rates and, even if it were to consider such a request, NTD had failed to provide any evidence of its costs.³⁴

14. The Commission's 2011 *USF/ICC Transformation Order*³⁵ had a significant effect on competitive LECs' interstate and intrastate switched access rates as a result of their benchmarking obligations. As of December 29, 2011, the Commission required all LECs, incumbent and competitive, to cap most intercarrier compensation rates (interstate and intrastate, originating and terminating) at their then-current levels.³⁶ Thereafter, the Commission required carriers to reduce their termination (and for some carriers also transport) rates to bill-and-keep, by July 1, 2018 for price cap carriers and July 1, 2020 for rate-of-return carriers.³⁷ The Commission maintained competitive LECs' benchmarking obligations during the transition.³⁸ The Commission did not, however, require reductions of originating access charges and sought comment on how to address these rates long-term in a further notice of proposed rulemaking.³⁹

B. The Westelcom Petition

15. Westelcom is a competitive LEC operating in the Adirondack region of New York providing broadband Internet access services and other telecommunications services.⁴⁰ Westelcom states that it provides service almost exclusively over its wholly-owned fiber, a network in which it has invested over \$5 million since 2004.⁴¹ This network is used to provide service to, among others, a number of anchor institutions in the area, particularly hospitals and health care providers.⁴² Westelcom's submissions demonstrate that it is serving a geographically diverse customer base with relevant telecommunications traffic patterns consistent with typical CLEC operations.⁴³ The traffic balance between Westelcom's originating and terminating access is also consistent with typical CLEC operations and does not suggest that Westelcom is operating any arbitrage schemes to generate access revenues.⁴⁴

³⁴ *Id.* at 276-77, paras. 6-7. Further, the Commission has also considered a forbearance petition relating to the non-Rural CLEC benchmark (Sections 61.26(b), (c)) filed by OrbitCom, Inc. (OrbitCom). *Petition of OrbitCom, Inc. for Forbearance From CLEC Access Charge Rules*, Memorandum Opinion and Order, 23 FCC Rcd 13187 (2008). OrbitCom's one-page petition made appeared to make reference to cost-based arguments, but provided no evidence or explanation for how it met the statutory forbearance standard under Section 10(a) of the Act. *Id.*

³⁵ *Connect America Fund et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011) (*USF/ICC Transformation Order*).

³⁶ *Id.* at 17935, para. 801 and Fig. 9; 47 CFR §§ 51.907(a), 51.909(a).

³⁷ *USF/ICC Transformation Order* at 17935, para. 801 and Fig. 9; 47 CFR §§ 51.907(h), 51.909(j).

³⁸ *USF/ICC Transformation Order* at 17935, 17937, para. 801 and Fig. 9, para. 807; 47 CFR § 51.911. The Commission did, however, establish a separate benchmarking obligation regarding access stimulation, which is not relevant to Westelcom's Petition. *USF/ICC Transformation Order* at 17882, para. 679; 47 CFR § 61.26(g).

³⁹ *USF/ICC Transformation Order* at 18109-115, paras. 1297-1314.

⁴⁰ *Petition for Limited, Expedited Waiver by Westelcom Network, Inc. of Section 61.26(a)(6) of the Commission's Rules* at 3 (filed Feb. 23, 2015, updated Mar. 30, 2015) (Petition). All references to Westelcom's Petition are to the updated version.

⁴¹ Petition at 4.

⁴² *Id.* at 4-5.

⁴³ Petition, Attachment C at 6-16; Letter from Thomas Moorman, Counsel to Westelcom Network, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 15-69, at 2 (filed Feb. 1, 2017) (Westelcom Feb. 1, 2017 Ex Parte).

⁴⁴ Westelcom Feb. 1, 2017 Ex Parte at 2.

16. Westelcom's service area includes the City of Watertown and surrounding areas. Following the 2000 Census, the Watertown, New York urban area, then an urban cluster because it only had 46,434 inhabitants, was approximately 23.9 square miles.⁴⁵ Following the 2010 Census, based on the change of population size and distribution in Watertown area Census Blocks and/or changes to the Census Bureau's criteria,⁴⁶ the Watertown urban area expanded by more than 71 percent to approximately 40.9 square miles with 57,840 inhabitants, causing it to become an urbanized area.⁴⁷ At the same time, the population of the City of Watertown, itself, only grew by 1.2 percent.⁴⁸

17. The Watertown urban area includes the inhabited portions of the Fort Drum U.S. Army base.⁴⁹ The Census Bureau reports Fort Drum as having 12,955 inhabitants.⁵⁰ Without these inhabitants, the population of the Watertown urban area would be 44,885, well below the 50,000 threshold for classification as an urbanized area. Fort Drum, however, does not provide the business opportunity that a location with 12,955 inhabitants would ordinarily provide due to U.S. Army regulations. As Westelcom explains: "All switching for on-post or military barracks dial tone service is government owned. The army contracts with one national contractor to deliver trunks to all of the switches."⁵¹

18. Because Westelcom has customers in Watertown,⁵² the reclassification of the Watertown urban area as an urbanized area, rather than an urban cluster, disqualifies Westelcom from the Rural CLEC exemption. After learning of this development, Westelcom amended its tariff to reflect the non-Rural CLEC benchmark with regard to the competing incumbent LEC (Verizon New York Inc.). Westelcom subsequently filed its petition.

19. Westelcom's requested relief would apply to interstate and intrastate terminating switched access rates and to interstate originating switched access rates, the latter of which is not subject to the transition to bill-and-keep. The Rural CLEC benchmark for interstate originating end office interstate switched access service, including the information surcharge, is currently \$0.048813 per minute,⁵³ which is almost twelve times higher than Verizon's equivalent rate of \$0.004094 per minute for similar service.⁵⁴ For interstate terminating end office switched access service, the current Rural CLEC

⁴⁵ U.S. Census Bureau, 2010 Census Urban and Rural Classification and Urban Area Criteria, <https://www.census.gov/geo/reference/ua/urban-rural-2010.html> (specifically, Changes in Urbanized Areas From 2000 to 2010, <http://www2.census.gov/geo/docs/reference/ua/PopAreaChngeUA.xls>) (last visited Apr. 5, 2017) (*2000-2010 Urbanized Area Comparison*).

⁴⁶ See Petition, Attachment C at 118-19 (E-mail from Christopher J. Henrie, Geographic Standards and Criteria, Geography Division, U.S. Census Bureau, to Eileen Bodamer, Bodamer Consulting, LLC (Nov. 5, 2014, 11:34 EST)).

⁴⁷ *2000-2010 Urbanized Area Comparison*.

⁴⁸ U.S. Census Bureau, New York: 2010, Population and Housing Unit Counts at 22 (2012), available at <https://www.census.gov/prod/cen2010/cph-2-34.pdf>.

⁴⁹ Petition at 8-9, n. 31; Letter from Thomas Moorman, Counsel to Westelcom Network, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 15-69, at 2 (filed Oct. 26, 2016).

⁵⁰ U.S. Census Bureau, QuickFacts Fort Drum CDP, New York, <https://www.census.gov/quickfacts/table/PST045215/3626759.00> (last visited Apr. 5, 2017).

⁵¹ Petition at n.31, citing Army Regulation 25-13, Information Management, Telecommunications and Unified Capabilities (Mar. 25, 2013) at Section 3-5 and Appendix B-6, B-18, available at <http://www.apd.army.mil/Search/ePubsSearch/ePubsSearchForm.aspx?x=AR> (Pub. No. AR 25-13).

⁵² Petition at 8-10.

⁵³ National Exchange Carrier Association, Inc. Tariff No. 5 §§ 17.2.3(A), (B). By end office interstate switched access service, we refer to the sum of the end office switching and information surcharge rate elements.

⁵⁴ Verizon Telephone Companies Tariff F.C.C. No. 11 § 31.6.2(A). The \$0.004094 originating rate includes the originating shared end office trunk port charge.

benchmark is \$0.005000 per minute⁵⁵ while Verizon's rate for similar service is \$0.000700.⁵⁶ Pursuant to the Commission's rules adopted in the *USF/ICC Transformation Order*, these terminating interstate (and intrastate) switched access rates are scheduled to be reduced to bill-and-keep by July 1, 2018 and July 1, 2020, respectively.⁵⁷ Thus, regardless of whether we grant Westelcom's requested relief, Westelcom's terminating switched access rates are on a glidepath to bill-and-keep.

20. Westelcom asserts three public interest benefits that would result from granting its petition: (1) establishing a reasonable transition in intercarrier compensation rates as provided in the *USF/ICC Transformation Order*; (2) encouraging the deployment of fiber-based networks in its service area; and (3) meeting the need for advanced services to its customers.⁵⁸ Westelcom argues that the 96 percent reduction in interstate switched exchange access revenue arising from Westelcom losing the Rural CLEC exemption coupled with Westelcom's need for such revenue to continue deployment of advanced services constitute a special circumstance.⁵⁹ Acknowledging that it is theoretically possible for Westelcom to cease providing service in the Watertown urban area so as to remain eligible for the Rural CLEC exemption, Westelcom argues that such a change would be contrary to public policy given Westelcom's commitment to providing advanced services in the area, particularly to healthcare institutions.⁶⁰

21. AT&T and CenturyLink oppose Westelcom's petition. AT&T and CenturyLink both observe that the Commission intended the rural exemption to be narrow and administratively simple,⁶¹ that any relief provided to Westelcom would be a windfall,⁶² and that granting Westelcom's petition would invite "me-too" requests.⁶³ In addition, AT&T argues that Westelcom should have been on notice that each decennial Census may bring changes to the definition of urban areas, and, thus, urbanized areas.⁶⁴ Further, AT&T argues that Westelcom will receive the benefit of the phasedown provided in the *USF/ICC Transformation Order*, albeit the phasedown for non-rural carriers.⁶⁵

22. In its Reply, Westelcom argues that an immediate 96 percent reduction in its interstate access revenues (resulting from losing the rural competitive LEC exemption) is not consistent with a reasonable transition of intercarrier compensation revenue and that, rather than receiving a windfall, Westelcom has a demonstrated record of reinvesting its revenue to support the services that Westelcom provides.⁶⁶ Westelcom also states that the Census Bureau's process for determining the criteria for defining urban areas and the nature of the underlying data to which such criteria would apply were not predictable, at least insofar as they could have predicted the Watertown urban area becoming an

⁵⁵ National Exchange Carrier Association, Inc. Tariff No. 5 §§ 17.2.3(A), (B)

⁵⁶ Verizon Telephone Companies Tariff F.C.C. No. 11 § 31.6.2(A).

⁵⁷ *USF/ICC Transformation Order*, 26 FCC Rcd at 17935, para. 801 and Fig. 9; 47 CFR §§ 51.907(h), 51.909(j).

⁵⁸ Petition at 14.

⁵⁹ *Id.* at 15-16.

⁶⁰ *Id.* at 18-20.

⁶¹ AT&T Comments at 1-2; CenturyLink Reply at 1.

⁶² AT&T Comments at 4; CenturyLink Reply at 2-3.

⁶³ AT&T Comments at 6, CenturyLink Reply at 3.

⁶⁴ AT&T Comments at 2-3.

⁶⁵ *Id.* at 3-4.

⁶⁶ Westelcom Reply at 4-5.

urbanized area.⁶⁷ Westelcom further argues that the Commission should not be concerned about “me too” petitions similar to Westelcom’s due to the unique facts underlying its request.⁶⁸

23. On November 10, 2016, Westelcom filed a compromise proposal that would transition Westelcom’s rates to the non-Rural CLEC benchmark in a manner similar in length to that provided to competitive LECs whose interstate switched access rates exceeded the benchmark established in the *CLEC Access Charge Reform Order*.⁶⁹ Under its compromise proposal, Westelcom would assess the applicable originating and terminating NECA rates from the effective date of any Order (subject to the effective date of any implementing tariff filing by the Westelcom) through June 30, 2017. For the periods July 1, 2017 through June 30, 2018, July 1, 2018 through June 30, 2019, and July 1, 2019 through June 30, 2020, Westelcom would reduce its rates by 25 percent, 50 percent, and 75 percent of the difference between the then-current NECA rates and then then-current non-Rural CLEC rates. Commencing July 1, 2020, Westelcom would assess the then-current non-Rural CLEC rates.⁷⁰

III. DISCUSSION

24. Generally, the Commission’s rules may be waived under section 1.3 of the rules for “good cause shown.”⁷¹ 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.⁷² In making these determinations, the Commission may consider evidence of hardship, equity, and more effective implementation of overall policy on an individual basis.⁷³ For the reasons discussed below, we find that Westelcom has demonstrated good cause that justifies granting a limited and temporary waiver to the extent described herein, and that doing so would be consistent with the public interest.

25. Westelcom’s operations in the Watertown urbanized area present a special circumstance. Without the inclusion of Fort Drum in the Watertown urban area, the urban area would not have sufficient population to be an urbanized area, thereby allowing Westelcom to remain eligible for the Rural CLEC exemption. As discussed above and argued by Westelcom,⁷⁴ U.S. Army regulations prevent Westelcom from availing itself fully of the significant market opportunity that Fort Drum would otherwise seem to provide. Thus, from Westelcom’s perspective (that is, one that excludes Fort Drum), the Watertown urban area does not have sufficient population to qualify as an urbanized area. Further, the Commission established the rural exemption to “prevent rural competitive LECs with high loop costs from being tied

⁶⁷ *Id.* at 2-3.

⁶⁸ *Id.* at 8.

⁶⁹ Letter from Thomas Moorman, Counsel to Westelcom Network, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 15-69 (filed Nov. 10, 2016).

⁷⁰ Use of the then-current rates for determining Westelcom’s target rate means that as certain price cap (and NECA) rates lower as a result of reform, so to would the rates used to compute Westelcom’s target rate. For example, with regard to terminating end office switching, as of July 1, 2018, price cap carriers (such as Verizon) will have lowered their terminating end office switching rates to bill-and-keep while NECA will have lowered its terminating end office switching rate to \$0.002133 per minute. *See USF/ICC Transformation Order* at 17935, para. 801 and Fig. 9; 47 CFR §§ 51.907(h), 51.909(h). Accordingly, at the end of the transition period, Westelcom will be at bill-and-keep for terminating end office switching. Further, Westelcom’s tariff filings would be subject to the timing requirements of Section 61.26(c) of our rules, 47 CFR § 61.26(c).

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

⁷² *Northeast Cellular*, 897 F.2d at 1166.

⁷³ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166.

⁷⁴ Letter from Thomas Moorman, Counsel to Westelcom Network, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 15-69, at 2 (filed Oct. 26, 2016).

to a competing incumbent's access rate that reflects the incumbent's ability to subsidize high-cost, rural operations with more concentrated, low-cost urban operations.⁷⁵ Fort Drum appears to represent a significant lost opportunity for low-cost operations to subsidize high-cost operations – the sort of opportunity that urbanized areas presumably provide, which makes its inclusion in the Watertown urban area (so as to make the urban area an urbanized area) especially problematic for Westelcom and contrary to our underlying assumptions in establishing the Rural CLEC exemption. The Commission has reasoned that just as it is in the public interest for rural incumbent LECs to be able to tariff higher interstate switched access rates than non-rural incumbent LECs, it is also in the public interest for Rural CLECs to be able to tariff higher interstate switched access rates than non-Rural CLECs.⁷⁶ Thus, due to the characteristics of the Watertown urban area described above, strict compliance with definition of Rural CLEC would be inconsistent with the public interest as it would fail to account for the nature of the Watertown area. In light of this, deviation from the definition of Rural CLEC will serve the public interest.⁷⁷

26. We also find relevant that Westelcom is disqualified from the rural exemption pursuant to section 61.26(a)(6)(ii) of the rules (disqualification based on serving an urbanized area), rather than section 61.26(a)(6)(i) (disqualification based on serving an incorporated area). The process of relating Census Blocks for purposes of defining urban areas not only entails application of complex criteria that requires sophisticated computer software, but criteria that changes every ten years. Thus, while a carrier such as Westelcom might be able to predict when an incorporated place might be on a path to soon reach a population of 50,000 or more, it is far more difficult to predict how an urban area might be defined, therefore making business planning difficult. While it is true, as AT&T observes, that the possible changes to urban area geographic definitions may be foreseeable, this does not mean that dramatic changes, such as what occurred with the Watertown urban area, are necessarily foreseeable. This lack of predictability has a significant effect for a competitive LEC that once had, but then lost, the Rural CLEC exemption because, unlike competitive LECs whose tariffed rates exceeded the benchmarks in 2001, our rules do not provide a transition period to non-Rural CLEC benchmarks.⁷⁸ While this combination of circumstances alone may not be sufficient to justify waiver, here, the affected competitive LEC finds itself in the unusual position of being unable to make a credible attempt to win substantial business from the large enterprise (Fort Drum) whose inclusion in the defined urban area resulted in the area's reclassification as urbanized. Accordingly, the unpredictability of changes to definitions of urban areas (which may become urbanized areas as a result), the lack of available transition, and the impossibility of fully competing for the additional population's business makes full adherence with section 61.26(a)(6)(ii) a harsh result and support a conclusion that special circumstances warrant a deviation from our rules.

27. While there is good cause for granting Westelcom's requested relief, there are countervailing considerations supporting providing limited and temporary relief. Under its precedent regarding the Rural CLEC exemption, the Commission has been reluctant to allow exceptions to the requirement that a rural competitive LEC be exclusively rural based on objective and publicly-available criteria. In so doing, the Commission has continued to rely on objective and publicly-available information regarding which geographic areas are rural and which are not.⁷⁹ The facts supporting our

⁷⁵ See *CLEC Access Reform Reconsideration Order*, 19 FCC Rcd at 9125-26, para. 35.

⁷⁶ *CLEC Access Reform Order*, 16 FCC Rcd at 9951, para. 67.

⁷⁷ For this reason, we do not believe that the partial relief we are granting to Westelcom would create an unjustified "windfall" to Westelcom, as CenturyLink asserts (CenturyLink Reply at 2-3).

⁷⁸ While AT&T is correct that Westelcom would still have the benefit of the remaining transition to bill-and-keep for terminating switched access rates (AT&T Comments at 3-4), we believe that what remains of such transition is not sufficiently significant in the instant case.

⁷⁹ See *CLEC Access Reform Order*, 16 FCC Rcd at 9954, paras. 75-76; *CLEC Access Reform Reconsideration Order*, 19 FCC Rcd at 9126, para. 37; *Prairiewave*, 23 FCC Rcd at 2561, para. 4.

long-standing policy of maintaining the Rural CLEC exemption as narrow and administratively simple continue to hold true. We continue to seek to maintain the Rural CLEC exemption as narrowly as possible and in an administratively-simple manner.

28. Further, while we commend Westelcom for its demonstrated commitment to providing broadband service to anchor institutions in rural areas, we do not believe that the use of incremental revenue from granting Westelcom's petition to provide such service necessarily provides public interest support for a full grant of Westelcom's petition. We agree with AT&T that the Rural CLEC exemption is not the appropriate means for pursuing such a goal. Instead, the Commission has sought to provide explicit subsidies where such services cannot be provided at rates that are both compensatory to the carrier and affordable to the end user.⁸⁰ The Rural CLEC exemption was not and is not intended to be a broadband deployment program but, instead, an exemption recognizing that the appropriate incumbent LEC on which to base benchmarks for presumptively reasonable rates may be a rural incumbent LEC (using the NECA tariff) rather than the non-rural incumbent LEC that has lower-cost urban locations in its service territory over which to average its costs.⁸¹

29. In light of the above considerations, we conclude that we should not grant Westelcom the permanent waiver it initially sought, and instead take the more modest approach of providing Westelcom a limited and temporary conditional waiver of section 61.26(a)(6)(ii) on a transitional basis that has an effect similar to what Westelcom proposed on November 10, 2016. To the extent that Westelcom's service in the Watertown, New York urbanized area disqualifies Westelcom from the Rural CLEC exemption, consistent with Westelcom's compromise proposal, we provide Westelcom a temporary and limited waiver of Section 61.26(e) through June 30, 2020, subject to Westelcom's interstate originating and terminating switched access rates not exceeding the benchmarks set forth below. This limited and temporary conditional waiver will have the effect of providing Westelcom with the opportunity for a four-step, three-year transition between the benchmark applicable to Rural CLECs pursuant to Section 61.26(e) and the benchmark applicable to non-Rural CLECs⁸² pursuant to Section 61.26(c), as follows:

⁸⁰ For example, a primary purpose of the intercarrier compensation reforms in the USF/ICC Transformation Order was reducing subsidies from switched access charges and replacing them with explicit support mechanisms in fulfillment of the Commission's mandate under Section 254(e) of the Act. *USF/ICC Transformation Order*, 26 FCC Rcd at 17904-05, 17909, paras. 736-39, 747; 47 U.S.C. § 254(e). Similarly, in the context of rural health care, the Commission established an explicit universal service fund high-cost program pertaining to broadband service used by health care providers. *Rural Health Care Support Mechanism*, Report and Order, 27 FCC Rcd 16678, 16680-83, paras. 1-10 (2012).

⁸¹ *CLEC Access Reform Order*, 16 FCC Rcd at 9950-51, paras. 66-67.

⁸² The benchmark applicable to a non-Rural CLEC will be determined based on the applicable benchmark as if Westelcom were not granted a limited and temporary conditional waiver. Thus, for example, to the extent that Westelcom is competing against Verizon New York Inc. in Watertown, the pertinent "competing ILEC" rates for determining the non-Rural CLEC benchmark pursuant to Section 61.26(c) would be those of Verizon New York Inc.

Effective Date	Applicable Conditional Benchmark ⁸³
Effective Date of This Order	Rural CLEC benchmark
July 1, 2017 ⁸⁴	Rural CLEC benchmark less 25% of difference between the Rural CLEC benchmark and the non-Rural CLEC benchmark
July 1, 2018	Rural CLEC benchmark less 50% of difference between the Rural CLEC benchmark and the non-Rural CLEC benchmark
July 1, 2019	Rural CLEC benchmark less 75% of difference between the Rural CLEC benchmark and the non-Rural CLEC benchmark
July 1, 2020	(none – waiver ends)

30. By taking this approach, we prevent an immediate 96% reduction in interstate switched access revenue for Westelcom, which we agree in these unique circumstances would be contrary to the public interest. Consistent with an orderly transition, we establish an interim period between the effective date of this order and July 1, 2017 in which Westelcom’s benchmark shall be the full Rural CLEC benchmark as a matter of administrative convenience and fairness. Both the Rural CLEC and non-Rural CLEC benchmarks tend to change only once per tariff year – on the effective date of the annual access tariff filing, which is on or around July 1 of each year. Linking the transition to the annual filing is the most administratively simple implementation option since that is when the rates of incumbent LECs are modified each year and when the competitive LECs must reassess its benchmark. Further, we believe that providing Westelcom with a period of full relief before the transition begins, as opposed to lengthening the first step of the relief, best balances the equities in light of Westelcom not having an abbreviated period in which to adjust its business plans in late 2015.

31. These benchmarks shall apply throughout Westelcom’s service territory. Because Westelcom’s currently-tariffed intrastate switched access rates are lower than the relief for the period prior to three years after the effective date of this order,⁸⁵ Westelcom will, of course have to revise its tariff to avail itself of the relief granted herein. To the extent that Westelcom becomes ineligible for the Rural CLEC exemption for reasons unrelated to providing service to end users located in the Watertown urbanized area, the relief granted in this order will cease to be relevant because eligibility for the Rural CLEC exemption is determined on a carrier basis. Thus, for example, should Westelcom begin providing

⁸³ All references to the conditional benchmark are to the conditional benchmark levels as of the pertinent effective date. Thus, for example, Westelcom’s conditional benchmark as of July 1, 2018 shall be the Rural CLEC benchmark as of July 1, 2018 (e.g., \$0.002133 per minute for end office switching) less 50% of the difference between Rural CLEC benchmark and the non-Rural CLEC benchmark as of July 1, 2018 (e.g., bill-and-keep for end office switching).

⁸⁴ Westelcom’s deadline for amending its tariff to comply with the July 1, 2017, July 1, 2018, July 1, 2019, and July 1, 2020 effective dates shall be July 16, 2017, July 16, 2018, July 16, 2019, and July 16, 2020, respectively, due to the recognized need for competitive LECs to await the effective date of an amendment to rates pertinent to their benchmark. See 47 CFR 61.26(c) (“If an ILEC to which a CLEC benchmarks its rates, pursuant to this section, lowers the rate to which a CLEC benchmarks, the CLEC must revise its rates to the lower level within 15 days of the effective date of the lowered ILEC rate”). During this maximum 15-day period between the pertinent July 1 and when Westelcom’s complying tariff revision becomes effective, the benchmark applicable to Westelcom will remain that of the immediately preceding period, which will allow Westelcom’s tariffed rates to remain compliant with our rules during the periods between July 1 and Westelcom’s compliance filing in 2017, 2018, 2019, and 2020.

⁸⁵ Westelcom’s tariffed interstate switched access rates are currently set at the applicable non-Rural CLEC benchmark.

service to end users located in an urbanized area other than Watertown in two years, the non-Rural CLEC benchmark would then apply throughout Westelcom's service territory.⁸⁶ To the extent that Westelcom's tariffed rates comply with the relief granted herein, such rates will be afforded the same legal treatment as all other rates tariffed in conformance with Section 61.26 of our rules, creating payment obligations for interexchange carriers.

IV. ORDERING CLAUSES

32. Accordingly, IT IS ORDERED that, pursuant to sections 1, 4(i) and (j), 201-202, and 251 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and (j), 201-202, and 251, and section 1.3 of the Commission's rules, 47 CFR § 1.3, the petition of Westelcom is GRANTED in part and DENIED in part, as discussed herein.

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

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁸⁶ We note that it is unnecessary to address the contingency of future changes to the Watertown urbanized area, either by definition or population. The next adjustment to the definition of the Watertown urbanized area would not take place until after the 2020 Census, long past the point at which the relief that we grant in this order expires.