

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

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

ORDER

Adopted: June 26, 2017

Released: June 27, 2017

By the Commission:

I. INTRODUCTION

1. In this Order, we grant a petition filed by West Kentucky and Tennessee Telecommunications Cooperative (West Kentucky), a rate-of-return incumbent local exchange carrier (incumbent LEC) seeking waiver of certain intercarrier compensation (ICC) recovery rules allowing it to amend its recovery calculations, as modified by its recent filing. Consistent with precedent, we find that West Kentucky demonstrates good cause for a limited waiver of the Commission's rules to allow it to include additional revenues in its base period revenue (BPR) amounts used to calculate Eligible Recovery effective October 6, 2016.

II. BACKGROUND

2. In the USF/ICC Transformation Order, the Commission comprehensively reformed the ICC system to provide more predictability to regulated carriers. The Commission adopted bill-and-keep as the default methodology for all ICC charges, and established a transition path to move ICC charges to bill-and-keep. The Commission also adopted a recovery mechanism to partially mitigate revenue reductions that incumbent LECs would experience as a result of these ICC reform measures. The Commission designed the recovery mechanism and associated rules to recognize incumbent LEC reliance

1 Second Amended Petition of West Kentucky and Tennessee Telecommunications Cooperative for Limited Waiver of 47 CFR 51.917(b), WC Docket No. 10-90 et al. (filed Mar. 10, 2014) (West Kentucky Petition). See Letter from Patrick R. Halley, Counsel for West Kentucky, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90, at 2 (filed June 8, 2017) (requesting that its relief be effective October 6, 2016) (West Kentucky June 8, 2017 Ex Parte).

2 Connect America Fund; Developing a Unified Intercarrier Compensation Regime; Petitions for Waiver of Section 51.917 of the Commission's Rules, Order, 31 FCC Rcd 12021 (2016) (Emery Waiver Order). We discuss the Emery Waiver Order below.

3 See generally Connect America Fund et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 18026-28, paras. 970-71 (2011) (USF/ICC Transformation Order).

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

5 See USF/ICC Transformation Order, 26 FCC Rcd at 17956-87, paras. 847-904.

on ICC revenues, while limiting recovery in a reasonable manner consistent with the Commission's goals.⁶

3. For rate-of-return incumbent LECs (rate-of-return LECs), the recovery mechanism begins with calculating BPR. BPR is the sum of certain ICC intrastate switched access revenues and net reciprocal compensation revenues received by March 31, 2012, for services provided during Fiscal Year 2011 (FY 2011),⁷ and the projected revenue requirement for interstate switched access services provided during the 2011-12 tariff period.⁸ A carrier's BPR is then reduced by five percent initially and by an additional five percent in each year of the transition.⁹ The amount a rate-of-return LEC is entitled to recover in each year of the transition (Eligible Recovery) is equal to the adjusted BPR for the year in question less, for each relevant year of the ICC transition, the sum of: (1) projected intrastate switched access revenue; (2) projected interstate switched access revenue; and (3) projected net reciprocal compensation revenue.¹⁰

4. A rate-of-return LEC's BPR is calculated only one time, but is used during each step of the ICC recovery mechanism calculations for each year of the transition.¹¹ Rate-of-return LECs calculated their BPR once as part of their tariff filings in 2012, the first year of the ICC transition, so any inaccuracies in the BPR calculation carry forward to future recovery mechanism payments. In the *USF/ICC Transformation Order*, the Commission adopted rules designed to ensure that rate-of-return LECs' BPR calculations captured revenues for FY 2011 ICC services subject to the ICC rate transition, balanced by stringent standards to prevent parties from taking advantage of the recovery mechanism by inflating their BPR.¹² For example, the Commission permitted rate-of-return LECs to include minutes-of-use (MOUs) related to intrastate switched access service provided during FY 2011, but prohibited rate-of-return LECs from including in their BPR calculations intrastate MOUs for which "revenues were not recovered, for whatever reason."¹³ The Commission further specified that, in order to be included in a rate-of-return LEC's BPR, revenues associated with MOUs had to be collected by March 31, 2012.¹⁴

5. *West Kentucky Petition*. West Kentucky seeks a waiver effective October 6, 2016 to include FY 2011 intrastate access revenues that were billed and collected after March 31, 2012 due to "a billing omission related to two intrastate access switched access rate elements"¹⁵ In April 2012, NECA began its data collection efforts to implement the ICC reforms and recovery mechanism adopted in the *USF/ICC Transformation Order*. In the course of this data collection effort, West Kentucky discovered that its FY 2011 intrastate switched access billings did not include Carrier Common Line/Non-Traffic Sensitive Revenue (CCL/NTSR) adjustments and Transport Interconnection Charges (TICs) beginning in January 2010.¹⁶ Once discovered, West Kentucky "quickly acted to rectify the issue

⁶ *See id.* at 17957, para. 849.

⁷ For the purposes of the recovery mechanism, FY 2011 is defined as Oct. 1, 2010 to Sept. 30, 2011. *See* 47 CFR § 51.903(e).

⁸ *See id.* § 51.917(b)(7); the 2011-12 tariff period was July 1, 2011, through June 30, 2012.

⁹ *See id.* § 51.917(b)(3).

¹⁰ *Id.* § 51.917(d). The demand projections that are part of these projected revenue calculations are "trued-up" after two years. *See id.* § 51.917(d)(1)(iii)(D).

¹¹ *See id.* § 51.917(d).

¹² *See generally USF/ICC Transformation Order*, 26 FCC Rcd at 17977-86, paras. 891-904 (describing the recovery mechanism for rate-of-return LECs).

¹³ *See id.* at 17982, para. 898.

¹⁴ 47 CFR § 51.917(b)(7).

¹⁵ *West Kentucky Petition* at 2; *West Kentucky June 8, 2017 Ex Parte* at 2.

¹⁶ *See id.* at 3.

and sent invoices to the carriers on May 22, 2012 and August 1, 2012”¹⁷ On October 6, 2016, the staff of the Kentucky Public Service Commission confirmed that West Kentucky was entitled to bill for the unbilled amounts, and West Kentucky correctly applied its tariff and Kentucky law.¹⁸ West Kentucky “reached a settlement agreement with most of the carriers it billed and has received payment of the settlement amount from these carriers.”¹⁹ In light of the Kentucky Commission Staff Letter, West Kentucky asks that it be permitted to include in its BPR calculations, effective October 6, 2016, CCL/NTSR charge adjustments and TICs collected after the March 31, 2012 deadline.²⁰

III. DISCUSSION

6. Generally, the Commission’s rules may be waived for “good cause shown.”²¹ 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.²² In making these determinations, the Commission may consider evidence of hardship, equity, and more effective implementation of overall policy on an individual basis.²³ We find that West Kentucky has established good cause for a limited waiver of the Commission’s recovery rules. Accordingly, we grant West Kentucky’s petition subject to certain conditions consistent with the public interest.

7. In the *USF/ICC Transformation Order*, the Commission explicitly contemplated that certain circumstances could justify adjustments to recovery baseline amounts, and described some situations where adjustments may be appropriate.²⁴ For example, the Commission anticipated that carriers might file requests for “waiver of our rules defining the Baseline to account for revenues billed for terminating switched access service or reciprocal compensation provided in FY 2011 but recovered after the March 31, 2012 cut-off as the result of the decision of a court or regulatory agency of competent jurisdiction.”²⁵

8. Subsequently, in applying the general waiver standard, the Commission has both granted and denied waiver requests of the BPR deadline depending on the specific facts presented.²⁶ For example, in August 2014, the Commission granted in part, subject to identified conditions, two petitions seeking waiver of certain recovery rules.²⁷ These waivers allowed the requesting carriers to include in their

¹⁷ *Id.* at 3-4.

¹⁸ Letter from Talina R Matthews, Executive Director, Kentucky Public Service Commission, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 (filed Oct. 6, 2016) (Kentucky Commission Staff Letter). While the Kentucky Commission Staff Letter is dated October 5, 2016, we use October 6, 2016 as the date of the letter because that was the date on which it was filed.

¹⁹ West Kentucky Petition at 4.

²⁰ *Id.*; West Kentucky June 8, 2017 Ex Parte at 2.

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

²² *Northeast Cellular*, 897 F.2d at 1166.

²³ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166.

²⁴ See *USF/ICC Transformation Order*, 26 FCC Rcd at 17982, n.1745.

²⁵ *Id.*

²⁶ See *Connect America Fund; Developing a Unified Intercarrier Compensation Regime; Petitions for Waiver of Section 51.917(b)(7) of the Commission’s Rules*, Order, 29 FCC Rcd 9958 (2014) (*Halo Order*); *Connect America Fund; Developing a Unified Intercarrier Compensation Regime; Petitions for Waiver of Section 51.917(b)(7) of the Commission’s Rules*, Order, 30 FCC Rcd 6430 (WCB 2015) (*Halo II Order*); *Connect America Fund; Developing a Unified Intercarrier Compensation Regime; Petitions for Waiver of Section 51.917 of the Commission’s Rules*, Order, 31 FCC Rcd 12021 (2016) (*Emery Waiver Order*).

²⁷ See generally *Halo Order*.

recovery calculations funds they were unable to collect from a carrier customer, Halo Wireless, Inc. (Halo), due to an access avoidance scheme and subsequent bankruptcy.²⁸ The Commission concluded that the unique combination of circumstances justified a waiver, but also adopted several conditions and compliance obligations to ensure that only the eligible revenues contemplated by the *USF/ICC Transformation Order*, in fact, were included in the carriers' revised BPRs.²⁹

9. In October 2016, the Commission addressed a number of petitions filed by rate-of-return incumbent LECs seeking similar waivers of certain ICC recovery rules so as to adjust the BPR amounts used to calculate Eligible Recovery.³⁰ The Commission granted the request of Emery Telecom (Emery) and denied the remainder of the petitions.³¹ Emery's petition concerned delayed billing of intrastate switched access MOUs because Emery had not received necessary call detail information.³² The Commission explained that Emery had discovered this error well prior to the March 31, 2012 deadline for revenue to be collected to be included in Emery's BPR and did not face dispute in collecting the resulting back-billed charges.³³ The remaining petitioners, by contrast, failed to present the special circumstances necessary to support the requested waivers.³⁴

10. In this case, we find special circumstances do exist to support the waiver as currently requested. First, West Kentucky diligently billed its customers for *all* of the intrastate access minutes that are here at issue, although it erroneously failed to charge for two discrete rate elements associated with some of those minutes.³⁵ Further, in the case of one of these rate elements (the CCL/NTSR adjustment), West Kentucky's error was in failing to make an annual true-up adjustment requiring manual intervention, not a billing error that was repeated on a monthly basis.³⁶

11. In addition, because the Commission has recognized that state regulatory commissions can play an important role in the consideration of a recovery waiver request, we find the conclusions of

²⁸ *Id.*

²⁹ *Id.* at 9964-66, paras. 18, 23. Prior to implementation of the relief granted in the *Halo Order*, each petitioner was required to certify that: (1) it terminated all intrastate access traffic sent to it by Halo during FY 2011 that it sought to add to its BPR calculations; (2) it billed Halo intrastate access charges for such traffic during FY 2011; (3) a court or regulatory agency of competent jurisdiction made a finding of liability regarding the compensation for such traffic; (4) it filed a timely claim in the Halo bankruptcy case requesting compensation for such traffic; and (5) it did not include in its BPR adjustment amounts any interest, late payment fees, collection fees, or attorney fees. *Id.* at 9959-60, para. 5. In addition, any BPR adjustment for a study area resulting from the *Halo Order* was not to exceed the intrastate access portion of a petitioner's bankruptcy claim for that study area. *Id.* at 9960, para. 5. *See also Halo II Order*, 30 FCC Rcd at 6433, para. 7.

³⁰ *Emery Waiver Order*.

³¹ *Id.* The *Emery Waiver Order* also addressed petitions filed by Yukon-Waltz Telephone Company (Yukon-Waltz), Smart City Telecommunications LLC d/b/a Smart City Telecom (Smart City), Laurel Highland Telephone Company and Yukon-Waltz Telephone Company (Laurel Highland/Yukon-Waltz), and IAMO Telephone Company (IAMO). *Id.* at 12021-22, para. 1.

³² *Id.* at 12025, para. 9.

³³ *Id.* at 12027-28, para. 17.

³⁴ *Id.* at 12021, para. 1.

³⁵ Letter from John Kuykendall, Vice President, JSI, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90, Attachment at 2 (filed Aug. 12, 2016) (West Kentucky Aug. 12, 2016 Ex Parte); Letter from Patrick R. Halley, Counsel for West Kentucky, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90, at 5 (filed Mar. 27, 2017).

³⁶ West Kentucky Petition at 3, Letter from Trevor R. Bonnstetter, CEO, West Kentucky and Tennessee Telecommunications Cooperative, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90, Tab A-1 at 2-3 (filed Aug. 29, 2016) (pertinent tariff language).

the Kentucky Public Service Commission (Kentucky Commission) staff to be particularly helpful in considering whether West Kentucky's request is in the public interest, regarding the application of state law and intrastate tariffs.³⁷ In this case, West Kentucky submitted a letter from Kentucky Commission staff, reaching a number of notable conclusions. The letter confirms that “[West Kentucky:] 1) was entitled to bill for the CCL/NTSR and TIC rate elements; 2) correctly recovered the unbilled amounts from the carriers under its tariff and Kentucky law; 3) correctly applied the 2-year statute of limitations on unbilled service when recovering the unbilled amounts; 4) and otherwise act[ed] in accordance with Kentucky law.”³⁸

12. Kentucky Commission staff concluded that, based on the facts presented in West Kentucky's petition, both the substance and procedure used by West Kentucky in adjusting its billings was appropriate. As described by West Kentucky, settlements were used merely to facilitate collections and, at least in some cases, in recognition of Kentucky's statutory time bar on back-billing.³⁹ Kentucky Commission staff confirm such time bar and note that the Kentucky Commission encourages settlements of billing disputes.⁴⁰ There is no evidence of gaming, nor is there evidence of disputes regarding the charges represented by the collected revenue that West Kentucky seeks to include in its BPR.⁴¹

13. Under these unique circumstances – where West Kentucky exercised some diligence prior to March 31, 2012, where at least one of its errors involved a charge that appears to apply only in limited circumstances, and where the state commission has entered relevant findings into the record – we find that the need to ensure accurate BPR calculations outweighs the burdens associated with adjusting recovery amounts.⁴² In the particular circumstance of calculation of the BPR, inaccuracies carry forward into future recovery mechanism payments. It is in the public interest for such calculations to include FY 2011 revenues that a state commission has confirmed were billed and collected in conformance with Kentucky law and policy but would otherwise not be included in their BPR calculations. Not including such collected revenue in West Kentucky's BPR calculations would upset the certainty and predictability intended by the recovery mechanism.⁴³ Grant of the waiver request by West Kentucky will ensure that the recovery calculations result in a certain and predictable transition, as intended by the *USF/ICC Transformation Order*, and the letter from the staff of the Kentucky Commission gives us confidence that the revenue in question should properly be part of West Kentucky's BPR. We grant West Kentucky's proposal to limit the retroactive effect of its relief to October 6, 2016, the date of the Kentucky Commission Staff Letter, and adopt this limitation on the relief granted herein.⁴⁴

³⁷ *USF/ICC Transformation Order*, 26 FCC Rcd at 17982, para. 898 n. 1745. The *USF/ICC Transformation Order* specifies that requests for waiver of the March 31, 2012 collection deadline would be considered to the extent that a regulatory agency (or court) decision later required payment of charges for service provided in FY 2011. *Id.*

³⁸ Kentucky Commission Staff Letter at 2.

³⁹ West Kentucky Aug. 12, 2016 Ex Parte, Attachment at 3. See KY. REV. STAT. § 278.225.

⁴⁰ Kentucky Commission Staff Letter at 2.

⁴¹ See, e.g., West Kentucky Petition at 4; West Kentucky Aug. 12, 2016 Ex Parte, Attachment at 2-3; Letter from Patrick R. Halley, Counsel for West Kentucky, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90, at 2 (filed Sept. 14, 2016).

⁴² Cf. *Halo Order*, 29 FCC Rcd at 9964, para. 18.

⁴³ See *USF/ICC Transformation Order*, 26 FCC Rcd at 17956, 17962-63, paras. 847-48, 858.

⁴⁴ West Kentucky June 8, 2017 Ex Parte at 2.

IV. ADMINISTRATIVE IMPLEMENTATION OF RELIEF GRANTED

14. This section addresses how the amount of relief granted in this Order is to be determined and the process for payment by (USAC).⁴⁵ Because West Kentucky is a rate-of-return ILEC and it was already charging the maximum Access Recovery Charge (ARC) in tariff year 2016, any additional recovery mechanism revenue that West Kentucky receives as a result of this Order for tariff year 2016 will come from CAF-ICC support and not from ARCs.⁴⁶

15. Initially, West Kentucky shall determine for each affected study area the amount of FY 2011 revenues that are associated with its waiver request. This number represents for each affected study area the increase that West Kentucky may make in its BPR calculations. For tariff year 2016, West Kentucky shall include a prorated amount of this increase to the appropriate collected revenue amount to reflect the portion of tariff year 2016 represented by the period of October 6, 2016 through June 30, 2017 in its 2016 tariff support materials. For future tariff years, West Kentucky shall include the full amount of the increase in its tariff support materials.

16. In addition, West Kentucky shall file with the Commission and certify to the accuracy of the collected revenue amounts.⁴⁷ For the specific purpose of implementing the relief granted in this Order, West Kentucky shall submit to USAC and the Kentucky Public Service Commission and the Tennessee Regulatory Authority revised data that was filed pursuant to section 54.304(d) of the Commission's rules.⁴⁸ West Kentucky should note the FCC number of this Order as authority for the request and include supporting documentation for the calculations. An officer of West Kentucky must certify, under penalty of perjury, that the requested amount is calculated in a manner consistent with the requirements of this Order.

17. To effectuate the relief granted by this waiver, West Kentucky shall file with the Commission in the Electronic Tariff Filing System corrected Tariff Review Plan (TRP) worksheets with amended Eligible Recovery amounts, as well as the required certifications. West Kentucky shall also file a notice of its corrected TRP filing in the Electronic Comment Filing System (ECFS) in WC Docket No. 10-90, and must e-mail a copy of the notice to Richard Kwiatkowski, Pricing Policy Division, Wireline Competition Bureau, at Richard.Kwiatkowski@fcc.gov. The Commission has delegated authority to the Bureau to determine and carry out appropriate procedures to resolve objections.⁴⁹ If a state commission or other interested person objects to the revised data, it shall file its objection in WC Docket No. 10-90 within 21 days of the filing of the West Kentucky's notice in ECFS. If objections are filed, the Wireline Competition Bureau (Bureau) will release a Public Notice in WC Docket No. 10-90 directing USAC to withhold payment while the Bureau resolves objections.⁵⁰ Once the Bureau has considered any objections that might be filed, the Bureau will direct USAC to issue payment as described by the Bureau. If no Public Notice regarding objections to West Kentucky's ECFS notice is released in WC Docket No. 10-90 within 45 days of such notice, USAC shall proceed to process the West Kentucky's request and issue payment.

⁴⁵ USAC plays a critical role in the day-to-day administration of universal service support mechanisms. *See, e.g., Connect America Fund et al.*, WC Docket No. et al., Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 26 FCC Rcd 4554, 4595, para. 116 n.192.

⁴⁶ *See* 47 CFR § 51.917(e).

⁴⁷ Grantees are prohibited from including interest, late payment fees, collection fees, or attorney's fees in their claims.

⁴⁸ 47 CFR § 54.304(d).

⁴⁹ *See USF/ICC Transformation Order* at 9967, para. 27.

⁵⁰ *Id.*

V. ORDERING CLAUSES

18. Accordingly, IT IS ORDERED that, pursuant to sections 1, 4(i) and (j), 201-202, 251, and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and (j), 201-202, 251, and 254, and section 1.3 of the Commission’s rules, 47 CFR § 1.3, the petition of West Kentucky is GRANTED, subject to the conditions and limitations set forth in this order.

19. IT IS FURTHER ORDERED that the Universal Service Administrative Company SHALL MAKE PAYMENTS in accordance with the requirements of paragraphs 16 and 17 of this Order.

20. 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