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

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In the Matter of	)	
	)	
Dickey Rural Telephone Cooperative, Dickey Rural Access, Inc., Polar Telecommunications, Inc., Red River Rural Telephone Association, Red River Telecom, Inc.	)	
	)	
And	)	
	)	
Citizens Telecommunications Company of North Dakota	)	CC Docket No. 96-45
	)	
Joint Petition for Waiver of the Definition of "Study Area" Contained in the Part 36, Appendix-Glossary of the Commission's Rules	)	
	)	
Petition for Waiver of Sections 61.41(c) and (d), 69.3(e)(11) and 69.605(c)	)	

ORDER

Adopted: September 12, 2002 **Released: September 13, 2002**

By the Deputy Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order, we grant a request from Dickey Rural Telephone Cooperative and Dickey Rural Access, Inc. (Dickey Rural), Polar Telecommunications, Inc. (Polar), Red River Rural Telephone Association and Red River Telecom, Inc. (Red River) (collectively, Acquiring Companies), and Citizens Telecommunications Company of North Dakota (Citizens) for a waiver of the study area boundary freeze codified in the Appendix-Glossary of Part 36 of the Commission's rules.[1] This waiver will permit Citizens to remove five exchanges comprising approximately 4,155 access lines from its North Dakota study area. This waiver also will permit Dickey Rural Telephone Cooperative (the parent company of Dickey Rural Access, Inc.), Polar and Red River Rural Telephone Association (the parent company of Red River Telecom, Inc.) to add approximately 2,492 access lines, 635 access lines, and 1,028 access

[1] *See* Citizens Telecommunications Company of North Dakota, Red River Rural Telephone Association and Red River Telecom, Inc., Polar Telecommunications, Inc. and, Dickey Rural Telephone Cooperative and Dickey Rural Access, Inc. Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix—Glossary of the Commission's Rules, Petition for Waiver of Section 61.41(c) and (d), Section 69.3(e)(11) and 69.605(c) of the Commission's Rules (filed April 5, 2002) (*Petition*). *See also* Letter from Mary J. Sisak, Attorney for Dickey Rural Telephone Cooperative, Dickey Rural Access, Inc., Red River Rural Telephone Association, Red River Telecom, Inc. and Polar Telecommunications, Inc. to Marlene H. Dortch, FCC (May 13, 2002) (*Petition Supplement*).

lines, respectively, to their existing North Dakota study areas.[2]

2. We also grant the request of Dickey Rural for a waiver of the Commission's price cap "all-or-nothing" rule in section 61.41(c) of the Commission's rules to permit Dickey Rural to operate under rate-of-return regulation after acquiring exchanges from Citizens that are subject to price-cap regulation. In addition, we grant the request of Polar and Red River for a waiver of section 69.605(c) of the Commission's rules to allow Polar and Red River to continue operating as average schedule companies after the acquisitions from Citizens. Finally, we grant the Acquiring Companies' request for a waiver of section 69.3(e)(11) of the Commission's rules so that the Acquiring Companies can include the exchanges they acquire from Citizens in the National Exchange Carrier Association (NECA) common line tariff upon acquisition of the exchanges.

II. STUDY AREA WAIVER

A. Background

3. *Study Area Boundaries*. A study area is a geographic segment of an incumbent local exchange carrier's (LEC's) telephone operations. Generally, a study area corresponds to an incumbent LEC's entire service territory within a state. Thus, incumbent LECs operating in more than one state typically have one study area for each state. The Commission froze all study area boundaries effective November 15, 1984, and an incumbent LEC must apply to the Commission for a waiver of the study area boundary freeze if it wishes to sell or purchase additional exchanges.[3]

4. *Transfer of Universal Service Support*. Section 54.305(a) of the Commission's rules provides that a carrier acquiring exchanges from an unaffiliated carrier shall receive the same per-line levels of high-cost universal service support for which the acquired exchanges were eligible prior to their transfer.[4] This limitation applies to high-cost loop support, local switching support and long term support (LTS). Section 54.305(a) is meant to discourage carriers from transferring exchanges merely to increase their share of high-cost universal service support.[5] For example, if a rural carrier purchases an exchange from a non-rural carrier that receives support based on the Commission's high-cost support mechanism for non-rural carriers, the loops of the acquired exchange shall receive the same per-line support as calculated under the non-rural mechanism, regardless of the support the rural carrier purchasing the

[2] Dickey Rural is acquiring the Gwinner and Lisbon exchanges, Polar is acquiring the Pembina exchange, and Red River is acquiring the Lisbon and Fairmount exchanges. A small number of customers located in Minnesota are served out of the Fairmount exchange being acquired by Red River and the Pembina exchange being acquired by Polar.

[3] *See MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board,* CC Docket Nos. 78-72, 80-286, Recommended Decision and Order, 49 Fed. Reg. 48325 (1984); Decision and Order, 50 Fed. Reg. 939 (1985); *see also Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board,* CC Docket No. 80-286, Notice of Proposed Rulemaking, 5 FCC Rcd 5974 (1990). *See also* 47 C.F.R. § 36 app.

[4] 47 C.F.R. § 54.305.

[5] *See Federal-State Joint Board on Universal Service,* CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 8942-43 (1997) (*First Report and Order*), as corrected by *Federal-State Joint Board on Universal Service,* Errata, CC Docket No. 96-45, FCC 97-157 (rel. June 4, 1997), *affirmed in part, reversed in part and remanded in part sub nom. Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999).

exchange may receive for any of its other exchanges.[6]

5. Notwithstanding the limitations provided in section 54.305(a), there are two circumstances under which rural carriers may receive additional high-cost support for acquired lines. First, the Commission recently amended section 54.305 to provide that a rural carrier may be eligible to receive additional high-cost loop support for new investments in acquired exchanges under the Commission's "safety valve" mechanism.[7] The total safety valve support available to all eligible carriers is limited to no more than five percent of rural incumbent LEC support available from the annual high-cost loop fund. Second, when the Commission established interstate common line support (ICLS) for rate-of-return carriers, it concluded that the limitations set forth in section 54.305(a) would not apply to such support.[8] Accordingly, an acquiring carrier is not limited to the amount of ICLS support that the selling carrier received.

6. *The Petition for Waivers*. On April 2, 2002, Citizens and the Acquiring Companies filed a joint petition for a waiver of the study area boundary freeze and other related waivers. On May 6, 2002, the Wireline Competition Bureau (Bureau) released a public notice seeking comment on the petition for waivers.[9]

7. A study area waiver would permit Citizens to alter the boundaries of its existing study area by removing five exchanges that it is transferring to the Acquiring Companies. The waiver would also permit the purchased exchanges to be added to the study areas of Dickey Rural (acquiring

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[6] Rural carriers receive high-cost loop support based on the extent to which their reported average cost per loop exceeds 115 percent of the nationwide average cost per loop. *See* 47 C.F.R. §§ 36.601-36.631. The mechanism for non-rural carriers directs support to carriers based on the forward-looking economic cost of operating a given exchange. *See* 47 C.F.R. § 54.309.

[7] *See* 47 C.F.R. § 54.305(b)-(f). *See also Federal-State Joint Board on Universal Service, Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers,* Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking in CC Docket No. 96-45, and Report and Order in CC Docket No. 00-256, 16 FCC Rcd 11244 at 11276-84 (2001) (*RTF Order*), as corrected by Errata, CC Docket Nos. 96-45, 00-256 (Acc. Pol. Div. rel. Jun. 1, 2001). The "safety valve" mechanism enables rural carriers acquiring access lines to receive additional high-cost loop support over a period of five years reflecting post-transaction investments made to enhance the infrastructure of and improve the service in acquired exchanges. Safety valve support provides up to 50 percent of any positive difference between a rural carrier's index year high-cost loop support expense adjustment for the acquired exchanges and subsequent year expense adjustments.

[8] *See also Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers in CC Docket No. 00-256, Federal-State Joint Board on Universal Service in CC Docket No. 96-45, Access Charge Reform for Incumbent Local Exchange Carriers Subject to Rate-of-Return Regulation in CC Docket No. 98-77, Prescribing the Authorized Rate of Return From Interstate Services of Local Exchange Carriers in CC Docket No. 98-166*, Second Report and Order and Further Notice of Proposed Rulemaking, Fifteenth Report and Order, Report and Order and, Report and Order, 16 FCC Rcd 19613, 19667-69 paras. 155-157 (2001) (*MAG Order/NPRM*), *recon. pending.*

[9] *See Dickey Rural Telephone Cooperative, Dickey Rural Access, Inc., Polar Telecommunications, Inc., Red River Rural Telephone Association, Red River Telecom, Inc., and Citizens Telecommunications Company of North Dakota Seek a Waiver of the Definition of "Study Area" Contained in Part 36 and Sections 61.41(c) and (d), 69.3(e)(11) and 69.605(c) of the Commission's Rules*, Public Notice, DA 02-1034 (rel. May 6, 2002) (*Notice*). Comments in support of the petition were filed by NECA and the National Telecommunications Cooperative Association (NTCA). *See* NECA Comments at 1. *See* NTCA Comments at 3.

approximately 2,492 access lines),[10] Polar (acquiring approximately 635 access lines),[11] and Red River Rural Telephone Association and Red River (acquiring approximately 1,028 access lines).[12]

8. The Acquiring Companies also submitted an *ex parte* letter on June 11, 2002 addressing, in part, its estimates of the initial ICLS that would be available to the Acquiring Companies as a result of acquiring lines from Citizens.[13] The *June 11 ex parte* states that, based on projected annual ICLS and access lines as of September 9, 2001, the initial ICLS support available to the Acquiring Companies is estimated as follows: (1) Dickey Rural will be eligible to receive annual ICLS of $150,056; (2) Polar Telecommunications, Inc. will be eligible to receive annual ICLS of $53,845; and (3) Red River Rural Telephone Association will be eligible to receive annual ICLS of $74,970.[14] According to the Acquiring Companies, the projected annual amounts reflect the ICLS impact if the companies were to be eligible for ICLS beginning July 1, 2002.[15] The Acquiring Companies also state that "the actual amounts received will be dispersed on a monthly basis and are dependent on the timing of the grant of the waiver request, closing of the acquisitions, and submission of updated line counts by the [A]cquiring [C]ompanies."[16]

9. Standards for Waiver. Generally, the Commission's rules may be waived for good cause shown.[17] As noted by the Court of Appeals for the D.C. Circuit, however, agency rules are presumed valid.[18] The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.[19] In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual

[10] Dickey Rural was created to purchase and operate Citizens' Gwinner and Lisbon exchanges. Dickey Rural will be added to the existing Dickey Rural Telephone Cooperative study area currently comprised of approximately 8800 access lines in North Dakota. *See* Petition at 2-4.

[11] Citizens' Pembina exchange will be added to Polar's study area. Polar's current study area is comprised of approximately 1,614 access lines in North Dakota. Polar is a wholly owned subsidiary of Polar Communications Mutual Aid Corporation d/b/a Polar Communications which has a separate study area. *See* Petition at 2, 4.

[12] Citizens' Wyndmere and Fairmount exchanges will be acquired by Red River. Red River, which is a wholly-owned subsidiary of Red River Rural Telephone Association, will add the exchanges to the approximate 1,745 lines it already serves within Red River Rural Telephone Association's North Dakota study area. The Red River Rural Telephone Association presently serves four exchanges in North Dakota and three exchanges in Minnesota out of its North Dakota study area. *See* Petition at 2,4.

[13] *See* Letter from Mary J. Sisak, Counsel for Dickey Rural Telephone Cooperative, Dickey Rural Access, Inc., Red River Rural Telephone Association, Red River Telecom, Inc., and Polar Telecommunications, Inc. to Marlene H. Dortch, FCC, dated June 11, 2002 at 2 (*June 11 ex parte*).

[14] This estimate is based on data provided by NECA to the Universal Service Administrative Company on April 18, 2002 and copied to NECA common line pool members. *Id.*

[15] *Id.*

[16] *Id.*

[17] 47 C.F.R. § 1.3.

[18] *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

[19] *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

basis.[20] Waiver of the Commission's rules is therefore appropriate only if special circumstances warrant a deviation from the general rule, and such deviation will serve the public interest. In evaluating petitions seeking a waiver of the rule freezing study area boundaries, the Commission traditionally has applied a three-prong standard: (1) the change in study area boundaries must not adversely affect the universal service fund; (2) no state commission having regulatory authority over the transferred exchanges opposes the transfer; and (3) the transfer must be in the public interest.[21]

10. In evaluating whether a study area boundary change will have an adverse impact on the universal service fund, we analyze whether a study area waiver will result in an annual aggregate shift in high-cost loop support in an amount equal to or greater than one percent of the total high-cost loop support fund for the year 2002.[22] The Commission began applying the one-percent guideline in 1995 to limit the potential adverse impact of exchange sales on the overall fund, also recognizing that, because of the indexed cap, an increase in the draw of any fund recipient necessarily reduces the amounts that other LECs receive from the fund.[23] After adoption of section 54.305(a) of the Commission's rules, however, the one-percent guideline, was not, in practice, a limitation because section 54.305(a) provides that a carrier purchasing exchanges from an unaffiliated carrier is permitted to receive only the same level of per-line high-cost support that the selling company was receiving for the exchanges prior to the transfer.[24] Accordingly, by definition, section 54.305(a) ensured that there would be no adverse impact on the universal service fund. Consistent with past precedent, we now apply the one-percent guideline to determine the impact on the universal service fund, in light of the adoption of "safety valve" support, which allows an acquiring carrier to receive support for new investments in acquired lines, and ICLS, which does not limit the amount of such support that a carrier can receive for acquired lines.[25]

B. Discussion

11. We find that good cause exists to waive the study area boundary freeze codified in the Appendix-Glossary of Part 36 of the Commission's rules to permit Citizens to alter the boundaries of its existing North Dakota study area to remove five exchanges that it is transferring to the Acquiring Companies. We also find that good cause exists to permit the Acquiring Companies to add these exchanges to their North Dakota study areas. For the reasons discussed below, we conclude that petitioners have satisfied the three-prong standard the Commission has applied to determine whether a waiver is warranted.

12. Because the proposed study area waiver will not result in a shift in high-cost support in

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[20] *WAIT Radio*, 418 F.2d at 1159; *Northeast Cellular*, 897 F.2d at 1166.

[21] *See, e.g., U S WEST Communications, Inc., and Eagle Telecommunications, Inc., Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary of the Commission's Rules,* AAD 94-27, Memorandum Opinion and Order, 10 FCC Rcd 1771, 1772 (1995) (*PTI/Eagle Order*).

[22] *See PTI/Eagle Order* at 1774, paras. 14-17. *See US WEST Communications, Inc., and Eagle Telecommunications, Inc., Joint Petition for Waiver of "Study Area" Contained in Part 36, Appendix-Glossary of the Commission's Rules, and Petition for Waiver of Section 61.41(c) of the Commission's Rules*, AAD 94-27, Memorandum Opinion and Order on Reconsideration, 12 FCC Rcd 4644 (1997).

[23] *See PTI/Eagle Order* at 1773, para. 13.

[24] *See* 47 C.F.R. § 54.305(a).

[25] *See supra* para. 5 (discussing "safety valve" support and ICLS).

an amount equal to or greater than one-percent of the total high-cost support fund, we conclude that the universal service fund will not be adversely affected. High cost loop support, local switching support, and LTS are limited by section 54.305(a) of the Commission's rules.[26] Accordingly, the Acquiring Companies are limited to the same per-line levels of support that Citizens was receiving prior to the transfer. In this instance, Citizens has not been eligible for high-cost support, and therefore the Acquiring Companies will not receive such support on the lines they acquire from Citizens.[27] Although the Acquiring Companies may be eligible for safety valve support for investments in the acquired lines, we have no reason to believe that this amount would realistically exceed one percent of the total high-cost support fund. In reaching this conclusion, we note that the proposed study area waiver involves the transfer of only approximately 4,155 access lines. Moreover, an individual rural carrier's safety valve support is capped at 50 percent of any positive difference between the amount of high-cost loop support that the rural carrier would qualify for in the index year for the acquired access lines and the support amounts that the carrier would qualify for in subsequent years.[28] The total amount of safety valve support available to rural carriers is also capped at five percent of annual high-cost loop support available to rural carriers in any particular year, thereby providing an additional limitation on the amount of safety valve support available to carriers.[29]

13. Likewise, we find that providing ICLS support to the Acquiring Companies will not result in more than a one-percent change in the total high-cost fund.[30] Dickey Rural, Polar and Red River estimate that they may be eligible to receive annual ICLS in the amounts of $150,056, $53,845 and $74,970, respectively, totaling $278,871.[31] The total high-cost fund for the year 2002 is projected to be $5.9 billion dollars, one percent of which would be $59 million dollars. We therefore conclude that the combined total amount of $278,871 that the Acquiring Companies estimate they will receive in ICLS, in addition to any amounts the Acquiring Companies may be eligible to receive in safety valve support, will not have an adverse impact on the universal service fund.[32]

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[26] *See* 47 C.F.R. § 54.305(a).

[27] *See* Universal Service Administrative Company, Federal Universal Service Support Mechanisms Fund Size Projections for the Fourth Quarter 2002 (rel. August 2, 2002).

[28] *See* 47 C.F.R. § 54.305(d). *See supra* note 7. The term "rural carrier" refers to an incumbent local exchange carrier that meets the definition of "rural telephone company" in section 3(37) of the Communications Act of 1934, as amended. *See* 47 U.S.C. § 153(37). Because each of the Acquiring Companies provide telephone exchange service to local exchange study areas with fewer than 100,000 access lines, they all meet the definition of "rural telephone company" in the Act.

[29] *See* 47 C.F.R. § 54.305(e).

[30] *See* 47 C.F.R. § 54.902.

[31] *See June 11 ex parte* at 2.

[32] We acknowledge in applying the one-percent rule to past study area waiver requests, we considered how much an acquiring company's universal service fund draw would increase as a result of a transaction. *See generally Eagle Order*. In the case of the Acquiring Companies, however, this analysis would not be useful. Because section 54.305 applies to high cost loop support, local switching support, and LTS, the Acquiring Companies are limited to the same per-line levels of support Citizens is receiving, and we have acknowledged that Citizens is not receiving support. As for safety valve support, we cannot predict or estimate how it will impact the Acquiring Companies' draw on the fund because safety valve support will not be calculable unless and until post-transaction investments are made. Similarly, while we have estimates for ICLS support, this is a new type of support which (continued....)

14. Second, the state commissions with regulatory authority over the transferred exchanges do not oppose the transfer. The North Dakota Public Service Commission issued a letter approving the transfer of the affected exchanges and indicating that it does not object to a grant of the study area waiver.[33] The Minnesota Public Utilities Commission issued orders approving the transfer of the Fairmount and Pembina exchanges to Red River and Polar, respectively, and indicating that it does not object to a grant of the study area waiver.[34]

15. Third, we conclude that the public interest is served by a waiver of the study area freeze rule to permit Citizens to remove the Gwinner, Lisbon, Pembina, Wyndmere and Fairmount exchanges from its North Dakota study area and to permit the Acquiring Companies to include the acquired exchanges in their North Dakota study areas. In the Petition, the Acquiring Companies indicate their desire to expand their operations by acquiring Citizens' exchanges. The Acquiring Companies state that, once acquired, the exchanges will be under local ownership and management enabling the Acquiring Companies to offer enhanced customer response time and service.[35] In contrast, as part of Citizens, the affected exchanges are not under local ownership and management.[36]

16. All three of the companies plan to offer advanced services, such as DSL, as well as an expanded list of vertical services. Red River, for example, noted its plan to offer voice mail, caller ID and selective call acceptance or rejection. Red River also stated its intention to expand its local calling area to include calls between Red River's existing Hankinson exchange and the Fairmount exchange.[37] Polar noted its intention to offer enhanced data services including frame relay and ATM, voice mail, call trace, preferred call forwarding, auto recall and callback, and selective call acceptance and rejection.[38] Finally, Dickey Rural stated that it will offer new services as supported by customer demand.[39] Based on these representations, we conclude that the Acquiring Companies have demonstrated that grant of this waiver request will serve the public interest.[40]

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has never been included in the universal service support fund. Thus, a showing of the before and after impact of the Acquiring Companies' potential draw of ICLS would have no significance.

[33] *See* Petition Supplement at 2 (Letter from Public Service Commission, State of North Dakota to Katherine Schroder, Chief, Telecommunications Access Policy Division (May 1, 2002)).

[34] *See* Petition Supplement at 2 (Minnesota Public Service Commission, *Request for Approval of the Transfer of the Minnesota Portion of the Fairmount Exchange from Citizens Telecommunications Company of North Dakota to Red River Telecom, Inc.*, Order, Docket No. P-6100/PA-02-393 (May 2, 2002); Minnesota Public Service Commission, *Request for Approval of the Transfer of the Minnesota Portion of the Pembina Exchange from Citizens Telecommunications Company of North Dakota to Polar Telecommunication, Inc.*, Order, Docket No. P-6101/PA-02-396 (May 2, 2002)).

[35] *See* Petition at 17.

[36] *Id.*

[37] Currently, calls between the Hankinson and Fairmount exchanges are long distance. *Id.*

[38] *Id.*

[39] *Id.*

[40] Pending Commission review of a study area waiver request and consistent with Part 36 of the Commission's rules, parties involved in the transfer of access lines are reminded to continue filing combined cost data for the (continued....)

17. We note that, as a result of this transaction, access lines in Dickey Rural's pre-acquisition study area boundary will be eligible for different amounts of high-cost support than the access lines being transferred from Citizens' study area. We therefore direct Dickey Rural, as part of its annual universal service data submissions, to file a schedule showing its methodology for excluding the costs associated with the acquired access lines from the costs associated with its pre-acquisition study areas.[41]

18. Finally, on May 11, 2001, the Commission adopted a Report and Order requiring incumbent LECs to freeze, on an interim basis, the Part 36 jurisdictional rules beginning July 1, 2001.[42] In the *Separations Freeze Order*, the Commission addressed how an incumbent LEC acquiring exchanges from another incumbent LEC shall recalculate their frozen separations factors.[43] Accordingly, Dickey Rural is required to recalculate its jurisdictional separations factors pursuant to the *Separations Freeze Order* and Commission rules.

III. PRICE CAP WAIVER

A. Background

19. Section 61.41(c)(2) of the Commission's rules provides that a non-price cap carrier that acquires access lines from a price cap carrier shall become subject to price cap regulation and must file price cap tariffs within a year.[44] Section 61.41(c)(3) of the Commission's rules provides that an average schedule company that acquires exchanges from a price cap company is permitted to retain its average schedule status.[45] Also, section 61.41(d) of the Commission's rules provides that LECs that become subject to price cap regulation are not permitted to withdraw from such regulation.[46]

20. In the *LEC Price Cap Reconsideration Order*, the Commission explained that section 61.41(c), the "all-or-nothing" rule, is intended to address two concerns regarding mergers and acquisitions involving price cap companies.[47] The first concern was that, in the absence of the rule, a LEC might

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subject study area with NECA. *See* 47 C.F.R. §§ 36.601-36.631. Such cost data is used by NECA to determine carrier eligibility for high-cost universal service support.

[41] *See* 47 C.F.R. § 36.611.

[42] *See generally Jurisdictional Separations and Referral to the Federal-State Joint Board*, Report and Order, CC Docket No. 80-286, 16 FCC Rcd 11382 (2001) (*Separations Freeze Order*). *See also* 47 C.F.R. § 36.3(c) and (d).

[43] *See Separations Freeze Order*, paras. 48-53.

[44] 47 C.F.R. § 61.41(c)(2). *See Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786 (*LEC Price Cap Order*), Erratum, 5 FCC Rcd 7664 (Com. Car. Bur. 1990), *modified on recon.*, Order on Reconsideration, 6 FCC Rcd 2637 (1991) (*LEC Price Cap Reconsideration Order*), *aff'd sub nom. National Rural Telecom Ass'n v. FCC*, 988 F.2d 174 (D.C. Cir. 1993), *petitions for further recon. dismissed*, 6 FCC Rcd 7482 (1991), *further modification on recon.*, *Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Supplements for Open Network Architecture, Policy and Rules Concerning Rates for Dominant Carriers*, Report and Order and Order on Further Reconsideration and Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 4524 (1991), *further recon.*, Memorandum Opinion and Order of Second Further Reconsideration, 7 FCC Rcd. 5235 (1992).

[45] 47 C.F.R. § 61.41(c)(3).

[46] 47 C.F.R. § 61.41(d).

[47] *See LEC Price Cap Reconsideration Order*, 6 FCC Rcd at 2706.

attempt to shift costs from its price cap affiliate to its non-price cap affiliate, allowing the non-price cap affiliate to charge higher rates to recover its increased revenue requirement, while increasing the earnings of the price cap affiliate. The second concern was that, absent the rule, a LEC might attempt to game the system by switching back and forth between rate-of-return regulation and price cap regulation.[48]

21. The Commission nonetheless recognized in the *LEC Price Cap Reconsideration Order* that narrow waivers of the price cap "all-or-nothing" rule might be justified if efficiencies created by the purchase and sale of exchanges outweigh the threat that the system might be subject to gaming.[49] The Commission stated that waivers of section 61.41(c) will be granted conditioned on the selling price cap company's downward adjustment to its price cap indices to reflect the sale of exchanges.[50] In addition, waivers of the all-or-nothing rule have been granted subject to the condition that the acquiring carrier obtains prior Commission approval if it seeks to elect price cap regulation.[51]

22. Dickey Rural seeks a waiver of section 61.41(c) because it desires to operate under rate-of-return regulation after Dickey Rural acquires price cap exchanges from Citizens.[52] Dickey Rural operates under rate-of-return regulation, while Citizens is subject to price cap regulation.[53] Absent a waiver of the all-or-nothing price cap rules, Dickey Rural would be subject to price cap regulation no later

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[48] *Id.*

[49] *Id.* at 2706, n. 207.

[50] *See Price Cap Performance Review for Local Exchange Carriers*, CC Docket No. 94-1, First Report and Order, 10 FCC Rcd 8961, 9104-06 (1995) (*LEC Price Cap Review Order*). The Price Cap Indices, which are the upper bounds for rates that comply with price cap regulation, are calculated pursuant to a formula specified in the Commission's rules for price cap carriers. *See* 47 C.F.R. § 61.45. The Commission explained that such an adjustment is needed to remove the effects of transferred exchanges from rates that have been based, in whole or in part, upon the inclusion of those exchanges in a carrier's price cap indices. *See LEC Price Cap Review Order*, 10 FCC Rcd at 9105-9106.

[51] *See, e.g., Rye Telephone Company, Inc. and U S WEST Communications, Inc., Joint Petition for Waiver of Definition of "Study Area" Contained in the Part 36 Appendix-Glossary of the Commission's Rules and Petition for Waiver of Section 61.41(c)(2) of the Commission's Rules*, CC Docket No. 96-45, Order, 15 FCC Rcd 18738, para. 17 (Acc. Pol. Div. 2000); *ALLTEL Corp. Petition for Waiver of Section 61.41 of the Commission's Rules and Application for Transfer of Control*, CCB/CPD No. 99-1, Memorandum Opinion and Order, 14 FCC Rcd. 14191, 14202 (1999) (*ALLTEL/Aliant Merger Order*).

[52] We note that Dickey Rural has also requested a waiver of section 61.41(d) of the Commission's rules, which provides that LECs that become subject to price cap regulation are not permitted to withdraw from such regulation. 47 C.F.R. §§ 61.41(d). Because Dickey Rural will not become subject to price cap regulation as a result of the instant transaction, a waiver of section 61.41(d) is unnecessary.

[53] *See* Petition at 4. The other Acquiring Companies, Polar and Red River, receive settlements from NECA on an average schedule basis and are therefore not subject to section 61.41(c) of the Commission's rules unless they later choose to become subject to price cap regulation. *See* Petition at 4-5. *See* 47 C.F.R. § 61.41(c)(3); *see also All West Communications, Inc., Carbon/Emery Telecom, Inc., Central Utah Telephone, Inc., Hanksville Telecom, Inc., Manti Telephone Co., Skyline Telecom, UBET Telecom, Inc., and Qwest Corp. Joint Petition for Waiver of the Definition of "Study Area" Contained in the Part 36 Appendix-Glossary of the Commission's Rules, Petition for Waiver of Sections 61.41(c), 61.41(d), and 69.3(e)(11)*, CC Docket No. 96-45, Order, 16 FCC Rcd 4697, 4705, para. 18 n.51 (Com. Car. Bur. 2001).

than one year after acquiring Citizens' price cap exchanges.[54] Dickey Rural claims that it is neither attempting to shift costs between price cap and non-price cap affiliates nor is it attempting to establish a large rate base by switching back and forth between rate-of-return regulation and price cap regulation.[55] NTCA and NECA support this waiver request.

B. Discussion

23. For the reasons discussed below, we find that good cause exists for us to waive section 61.41(c)(2) of the Commission's rules, and that it would be in the public interest to grant the waiver request of Dickey Rural.[56] As discussed previously, the courts have interpreted the Commission's rules to require a petitioner seeking a waiver of a Commission rule to demonstrate that special circumstances warrant a deviation from the general rule, and that such a deviation will serve the public interest.[57]

24. Because Dickey Rural is significantly smaller than any of the carriers subject to mandatory price caps, we find that special circumstances warrant a waiver of section 61.41(c)(2). In evaluating requests for waiver of section 61.41(c), the Bureau has taken into account the requesting company's preferences and, in particular, the preferences of small carriers.[58] In fact, the Commission traditionally has been sensitive to the unique administrative burdens imposed on small telephone companies by the application of its rules.[59] In the *LEC Price Cap Order*, the Commission decided that small telephone companies would not be required to operate under a regulatory regime that was designed largely on the basis of the historical performance of the largest LECs.[60] The Commission explained that small and mid-size LECs may have fewer opportunities than large companies to achieve cost savings and efficiencies and may be less productive than the Regional Bell Operating Companies (RBOCs) and GTE.[61] The Commission, therefore, limited the mandatory application of price cap regulation to the then-existing eight largest LECs – the seven RBOCs and GTE.

25. Dickey Rural is a small telephone company that has expressed a preference for operating

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[54] *See* Petition at 5. *See also* 47 C.F.R. § 61.41(c)(2). A Further Notice of Proposed Rulemaking is pending which, in part, seeks comment on a proposal from the Multi-Association Group (MAG) to remove the "all-or-nothing" rule. *See MAG Order/NPRM* at 19717-24.

[55] *See* Petition at 8-9.

[56] Although Dickey Rural seeks a waiver of section 61.41(c) in its entirety, we find that it is only necessary to grant a waiver of section 61.41(c)(2) of the Commission's rules which, absent a waiver, would require that Dickey Rural become subject to price cap regulation no later than one year after acquiring Citizens' price cap exchanges. Section 61.41(c)(1) applies to carriers that are subject to price cap regulation prior to an acquisition or merger and section 61.41(c)(3) applies to average schedule companies.

[57] *See supra* para. 9.

[58] *See, e.g., ALLTEL/Aliant Merger Order*, 14 FCC Rcd at 14204-05.

[59] *See, e.g., ALLTEL/Aliant Merger Order*, 14 FCC Rcd at 14204; *In the Matter of Minburn Telecommunications, Inc., Petition for Waiver of Sections 61.41(c) and (d) of the Commission's Rules*, CCB/CPD No. 99-16, Memorandum Opinion and Order, 14 FCC Rcd 14184, 14187 (Com. Car. Bur. 1999).

[60] *See LEC Price Cap Order*, 5 FCC Rcd at 6799-6801, 6818-19.

[61] *Id.*

under rate-of-return regulation.[62] This operation will be smaller than other carriers that have been granted waivers of the Commission's price cap rules.[63] Further, Dickey Rural is the type of small carrier that the Commission has previously found to be an inappropriate candidate for price cap regulation.[64] For these reasons, we find that Dickey has presented special circumstances to support its waiver request.

26. We also find that a waiver of section 61.41(c)(2) serves the public interest. We agree with Dickey Rural that cost-shifting between affiliates and gaming the system – the Commission's two primary concerns regarding price cap waivers – are not present with regard to Dickey Rural's acquisition of Citizens' exchanges.[65] The first concern, cost-shifting between affiliates, does not appear to be applicable here because the Dickey Rural affiliates are non-price cap affiliates and are not seeking to maintain separate affiliates under different systems of regulation.[66] Because the Dickey Rural affiliates will be rate-of-return affiliates, Dickey Rural will not have the opportunity to shift costs between price cap and rate-of-return affiliates. Second, to safeguard against possible gaming that could result from attempts to elect price-cap regulation at a later time, we will require Dickey Rural (and any of its affiliates) to seek prior Commission approval if it seeks to elect price cap regulation. At that time, we can make a determination if the transaction raises the concerns that we seek to address in section 61.41(c). We believe that requiring Dickey Rural to seek Commission approval before electing price cap regulation is sufficient to deter gaming in the future.

27. Finally, section 61.45 grants us discretion to require price cap carriers to make adjustments to their price cap indices to reflect cost changes resulting from rule waivers.[67] Accordingly, we will require Citizens to adjust its price cap indices to reflect the removal of the transferred access lines from its North Dakota study area.

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[62] *See* Petition at 6-8. After the proposed transaction, Dickey Rural Telephone Cooperative will serve approximately 11,292 access lines which is inclusive of the access lines of its subsidiaries Dickey Rural and Dickey Rural Communications. *See* Petition at 3-4.

[63] *See, e.g., CenturyTel of Northwest Arkansas, LLC et al., Joint Petition for Waiver of Definition of "Study Area" Contained in the Part 36 Appendix-Glossary of the Commission's Rules, Petition for Waiver of Sections 61.41(c) and 69.3(g)(2) of the Commission's Rules*, CC Docket No. 96-45, Memorandum Opinion and Order, 15 FCC Rcd 25437 (Acc. Pol. Div. 2000) (approving the conversion of 214,270 access lines from price cap to rate-of-return regulation); *ALLTEL/Aliant Merger Order* (approving the conversion of approximately 300,000 access lines from price cap to rate-of-return regulation); *In the Matter of ALLTEL Service Corporation, Petition for Waiver of Section 61.41 of the Commission's Rules*, Order, 8 FCC Rcd 7054 (Com. Car. Bur. 1993) (approving the conversion of approximately 285,000 access lines from price cap to rate-of-return regulation).

[64] *See LEC Price Cap Order*, para. 6 (limiting mandatory price cap participation to the eight largest LECs at that time – the seven Bell Operating Companies and GTE).

[65] *See* Petition at 8.

[66] *Id.* at 4.

[67] *See* 47 C.F.R. § 61.45(d).

IV. AVERAGE SCHEDULE WAIVER

A. Background

28. Incumbent LECs that participate in NECA pools collect access charges from interexchange carriers at the rates contained in the tariffs filed by NECA.[68] Each pool participant receives settlements from the pools to recover the cost of providing service plus a pro-rata share of the pool's earnings.[69] NECA pool participants' interstate access charge settlements are determined either on the basis of cost studies or average schedule formulas. Cost companies are LECs that receive compensation for interstate telecommunications services based on their actual interstate investment and expenses, calculated from detailed cost studies. Average schedule companies are those incumbent LECs that receive compensation for use of their interstate common carrier services on the basis of formulas that are designed to simulate the disbursements that would be received by a cost company that is representative of average schedule companies.[70] In electing average schedule status, average schedule companies are able to avoid the administrative and financial burdens of performing interstate cost studies.

29. Section 69.605(c) of the Commission's rules provides, in pertinent part, that "a telephone company that was participating in average schedule settlements on December 1, 1982, shall be deemed to be an average schedule company."[71] The definition of "average schedule company" includes existing average schedule incumbent LECs, but does not allow the creation of new average schedule companies or the conversion of cost-based carriers to average schedule status without a waiver of the Commission's rules.[72] The definition was designed to limit the use of average schedule formulas to companies that operated as average schedule companies prior to adoption of the rule or that are able to demonstrate compelling circumstances sufficient to warrant a special exception.[73] Accordingly, absent a waiver of section 69.605(c), an average schedule company acquiring additional lines would be required to convert to operation as a cost-based company.[74] Our actions on Polar's and Red River's request, therefore, are guided by the principle that incumbent LECs settle on a cost basis whenever possible without undue hardship.

30. The Bureau, however, has granted waivers to certain small carriers that lacked the resources to operate on a cost-study basis.[75] Polar and Red River have requested a waiver of section

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[68] *See* 47 C.F.R. § 69.601.

[69] *See* 47 C.F.R. §§ 69.601-69.612.

[70] *See* 47 C.F.R. § 69.606(a).

[71] 47 C.F.R. § 69.605(c).

[72] An incumbent LEC may convert from an average schedule company to a cost company, but a carrier must obtain a waiver of section 69.605(c) to change from a cost company to an average schedule company. *See* 47 C.F.R. § 69.605(c).

[73] *See Petition of Waiver Filed by Heartland Telecommunications Company of Iowa and Hickory Tech Corporation*, AAD No. 96-94, Memorandum Opinion and Order, 14 FCC Rcd 13661 at 13662, para. 3 (1999).

[74] *Id.* para. 7.

[75] *See BPS Telephone Co. Petition for Waiver of Section 69.605(c) of the Commission's Rules*, AAD No. 95-67, Memorandum Opinion and Order on Reconsideration, 12 FCC Rcd 13820, 13824 (Acc. Aud. Div. 1997) (*BPS*). *See, e.g., Dumont Telephone Company, Inc. and Universal Communications, Inc., Request for Extraordinary* (continued....)

69.605(c) of the Commission's rules in order to continue operating as average schedule companies following the proposed transaction.[76] Polar and Red River argue that a waiver permitting them to retain their average schedule status is justified due to their small size and the saved time, effort and funds that will be realized by their not having to perform cost studies.[77] Polar and Red River also argue that an average schedule waiver will not result in unintended effects on interstate revenue requirements or in administrative burdens on the Commission or NECA.[78] NTCA and NECA support this waiver request.

B. Discussion

31. We are persuaded that good cause exists for us to grant Polar's and Red River's request for a waiver of section 69.605(c). The Commission has permitted smaller carriers to elect to receive interstate compensation from average schedules as a way to avoid imposing the burdens and costs associated with performing cost separations studies needed to determine access charges. The high cost of completing cost studies relative to the small size of Polar and Red River, establishes the special circumstances that warrant granting their request for a waiver of section 69.605(c) of the Commission's rules. We have previously granted waivers of section 69.605(c) to similarly sized carriers.[79] We agree with Polar and Red River that they fall within the range of other average schedule companies that the Bureau has found did not have sufficient resources or expertise to justify conversion of their average schedule status to cost-based settlements.[80] We therefore find that Polar's and Red River's requested waiver of section 69.605(c) of the Commission rules is in the public interest and should be granted.

V. WAIVER OF SECTION 69.3(E)(11)

A. Background

32. Under section 69.3 of the Commission's rules, annual access tariffs, including the tariffs filed by NECA on behalf of companies that participate in NECA's access tariffs, go into effect on July 1

(Continued from previous page)
Relief, AAD 96-94, Memorandum Opinion and Order, 13 FCC Rcd 17821 (Acc. Saf. Div. 1998) (waiver granted to Dumont Telephone Company, Inc. and Universal Communications, Inc., which had approximately 1,544 access lines); *Petitions for Waiver Filed by Accent Communications, et al.*, AAD No. 95-124, Memorandum Opinion and Order, 11 FCC Rcd 11,513 (Acc. Aud. Div. 1996) (waiver granted to Mobridge Telecommunications Company, which had approximately 2,400 access lines); *National Utilities, Inc. and Bettles Telephone Co., Inc. Petition for Waiver of Section 69.605(c) of the Commission's Rules*, Report and Order, 8 FCC Rcd 8723 (Comm. Car. Bur. 1993) (waiver granted for National Utilities, which had 2,350 access lines, and Bettles, which had 50 access lines); *Newcastle Telephone Co. Petition for Waiver of Section 69.605(c)*, AAD No. 90-18, Memorandum Opinion and Order, 7 FCC Rcd 2081 (Com. Car. Bur. 1992) (waiver granted for small company with 1550 access lines, two exchanges).

[76] *See* Petition at 9.

[77] *See generally* Petition at 10-13.

[78] *See* Petition at 12.

[79] *See BPS*, 12 FCC Rcd at 13824. *See supra* note 75. Polar is adding approximately 635 access lines to its existing 1,614 access lines. Red River is adding approximately 1,028 access lines to its existing 1,745 access lines.

[80] *See* Petition at 12.

of each year.[81] To minimize the complexity of administering NECA's common line pool and Long Term and Transitional Support (LTS) program, any change in NECA common line tariff participation and LTS resulting from a merger or acquisition of telephone properties is effective on the next annual access tariff filing effective date following the merger or acquisition.[82] Because the next annual access tariff filing effective date is not until July 1, 2003,[83] the Acquiring Companies would be required to file their own interstate tariffs for the acquired access lines until July 1, 2003. In order to avoid the burdens associated with filing their own tariffs, the Acquiring Companies have requested a waiver of section 69.3(e)(11) of the Commission's rules to enable the acquired access lines to participate in the NECA carrier common line tariff upon the date of the closing of the transaction.[84] The Acquiring Companies also indicate that the inclusion of the small number of access lines they are acquiring from Citizens in the NECA carrier common line tariffs would represent a minimal increase in NECA common line pool participation and would not unduly increase the complexity of administering the LTS program.[85] NECA, in its comments, "affirms that the proposed addition of lines to the common line pool will not significantly impact common line pool revenue requirements and will not impose any undue administrative burdens on NECA."[86] NTCA also supports this waiver request.

B. Discussion

33. We find that the Acquiring Companies have demonstrated that special circumstances warrant a deviation from section 69.3(e)(11) of our rules and that it would be in the public interest to grant the Acquiring Companies' waiver request. According to NECA, "the proposed addition of lines to the common line pool will not significantly impact common line pool revenue requirements and will not impose any undue administrative burdens on NECA."[87] Based on NECA's representation in its comments, we conclude that the inclusion of the acquired access lines in the NECA carrier common line tariff represent a minimal increase in NECA common line pool participation. Also, we believe that it would be administratively burdensome for the Acquiring Companies to develop and file their own interstate tariffs until July 1, 2003 for a relatively small number of access lines. Consequently, we find that the Acquiring Companies present special circumstances to justify a waiver of section 69.3(e)(11). Moreover, we believe that a waiver of section 69.3(e)(11) will be in the public interest because the Acquiring Companies will be able to devote additional resources to providing improved telecommunications services to the affected rural areas that, absent the waiver, may otherwise be utilized on tariff filings. We, therefore, conclude that good cause exists to grant a waiver of section 69.3(e)(11) to the Acquiring Companies.

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[81] *See* 47 C.F.R. § 69.3(a).

[82] 47 C.F.R. § 69.3(e)(11). *See Amendment of Part 69 of the Commission's Rules Relating to the Common Line Pool Status of Local Exchange Carriers Involved in Mergers or Acquisitions*, CC Docket No. 89-2, Report and Order, 5 FCC Rcd 231, 248 (1989).

[83] *See* 47 C.F.R. § 69.3(a).

[84] *See* Petition at 13-14.

[85] *Id.* at 13-14.

[86] *See* NECA Comments to Notice at 4, filed June 5, 2002.

[87] *Id.*

VI. ORDERING CLAUSES

34. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 5(c), 201, 202 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 155(c), 201, 202, and 254 and sections 0.91, 0.291, and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 1.3, that the petition for waiver of the study area boundary freeze as codified in Part 36, Appendix-Glossary, of the Commission's rules, filed by Dickey Rural Telephone Cooperative and Dickey Rural Access, Inc., Polar Telecommunications, Inc., Red River Rural Telephone Association and Red River Telecom, Inc. and Citizens Telecommunications Company of North Dakota on April 5, 2002, IS GRANTED, as described herein.

35. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 5(c), 201, and 202 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 155(c), 201, and 202, and sections 0.91, 0.291, and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 1.3, that the petition for waiver of section 61.41(c) of the Commission's rules, 47 C.F.R. § 61.41(c), filed by Dickey Rural Telephone Cooperative and Dickey Rural Access, Inc., IS GRANTED, to the extent described herein.

36. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 5(c), 201, and 202 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 155(c), 201, and 202, and sections 0.91, 0.291, and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 1.3, that the petition for waiver of section 69.605(c) of the Commission's rules, 47 C.F.R. § 69.605(c), filed by Polar Telecommunications, Inc. and Red River Rural Telephone Association and Red River Telecom, Inc., IS GRANTED, as described herein.

37. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 5(c), 201, and 202 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 155(c), 201, and 202, and sections 0.91, 0.291, and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 1.3, that the petition for waiver of section 69.3(e)(11) of the Commission's rules, 47 C.F.R. § 69.3(e)(11), filed by Dickey Rural Telephone Cooperative and Dickey Rural Access, Inc., Polar Telecommunications, Inc., and Red River Rural Telephone Association and Red River Telecom, Inc., IS GRANTED, as described herein.

38. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 5(c), 201, and 202 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 155(c), 201, and 202, and sections 0.91, 0.291, and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 1.3, that Dickey Rural Telephone Cooperative and Dickey Rural Access, Inc., SHALL SUBMIT, as part of their annual universal service data submissions to the fund administrator, a schedule showing the methodology for excluding costs associated with the acquired access lines from costs associated with their pre-acquisition study areas.

39. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 5(c), 201, and 202 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 155(c), 201, and 202, and sections 0.91, 0.291, 1.3, and 61.43 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 1.3, and 61.43, that Citizens Telecommunications Company of North Dakota SHALL ADJUST its price cap indices in its annual price cap filing to reflect cost changes resulting from this transaction, consistent with this Order.

FEDERAL COMMUNICATIONS COMMISSION

Carol E. Mattey
Deputy Chief
Wireline Competition Bureau