

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

In the Matter of)	
)	
Federal-State Joint Board on Universal Service)	CC Docket No. 96-45
)	
El Paso County Telephone)	
)	
and)	
)	
Qwest Corporation)	
)	
Joint Petition for Waiver of the Definition of “Study Area” Contained in Part 36 of the Commission’s Rules)	

ORDER

Adopted: May 19, 2010

Released: May 19, 2010

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this order, we grant a joint request from El Paso County Telephone (El Paso) and Qwest Corporation (Qwest) (collectively, the Petitioners) for a waiver of the study area boundary freeze codified in the Appendix-Glossary of Part 36 of the Commission’s rules.¹ The study area waiver will permit Qwest to remove a territory from its Colorado study area and permit El Paso to add that territory to its existing Colorado study area, and will also permit El Paso to remove a territory from its Colorado study area and permit Qwest to add that territory to its existing Colorado study area.

II. STUDY AREA WAIVER

A. BACKGROUND

2. *Study Area.* A study area is a geographic segment of an incumbent local exchange carrier’s (LEC) telephone operations. The Commission froze all study area boundaries effective November 15, 1984.² The Commission took this action to prevent the establishment of high-cost exchanges within existing service territories as separate study areas merely to maximize universal service high-cost support.

¹ See 47 C.F.R. Part 36 App.; Qwest Corporation and El Paso County Telephone, Joint Petition for Waiver of the Definition of “Study Area” of the Appendix-Glossary of Part 36 of the Commission’s Rules, CC Docket No. 96-45 (filed Mar. 21, 2007) (Petition).

² 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, Decision and Order, 50 Fed. Reg. 939 (1985) (*Part 67 Order*); 47 C.F.R. Part 36 App.

A carrier must therefore apply to the Commission for a waiver of the study area boundary freeze if it wishes to acquire or transfer additional exchanges.³

3. *Universal Service Support.* Section 54.305(b) of the Commission's rules provides that a carrier acquiring exchanges from an unaffiliated carrier shall receive the same per-line levels of universal service high-cost support for which the acquired exchanges were eligible prior to their transfer.⁴ This rule is meant to discourage a carrier from acquiring an exchange merely to increase its share of universal service high-cost support.⁵

4. *The Petition for Waiver.* El Paso and Qwest filed a joint petition for a waiver of the study area boundary freeze on March 21, 2007.⁶ On June 19, 2007, the Wireline Competition Bureau (Bureau) released a public notice seeking comment on the petition.⁷ The Petitioners state that no transfer of assets is involved in the proposed transaction and the proposed transfer of service territories is in anticipation of future demand.⁸ The Petitioners state that a new development, called Banning Lewis Ranch, is under construction and approximately two-thirds of the development is within Qwest's Colorado Springs exchange service territory and approximately one-third is within El Paso's study area.⁹ The Petitioners further state that another development to be built, called Santa Fe Springs, is approximately two-thirds within El Paso's study area and approximately one-third within Qwest's Peyton exchange service territory.¹⁰ The Petitioners argue that it is mutually beneficial for El Paso to transfer to Qwest the El Paso portion of the Banning Lewis Ranch territory and for Qwest to transfer to El Paso the Qwest portion of the Santa Fe Springs territory.¹¹ The Petitioners state that the Colorado Public Utilities Commission (Colorado Commission) issued an order approving the transfer of the subject area.¹²

³ *Part 67 Order*, 50 Fed. Reg. at 939, para. 1.

⁴ 47 C.F.R. § 54.305(b). This rule applies to high-cost loop support and local switching support. A carrier's acquired exchanges may receive additional support pursuant to the Commission's "safety valve" mechanism. *See* 47 C.F.R. § 54.305(d)-(f). A carrier acquiring exchanges also may be eligible to receive interstate common line support, which is not subject to the limitations set forth in section 54.305(b). *See* 47 C.F.R. § 54.902.

⁵ *See Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 8942-43, para. 308 (1997) (subsequent history omitted).

⁶ Qwest operates, as an incumbent LEC, approximately 1,795,000 access lines in one study area in the state of Colorado. El Paso operates, as an incumbent LEC, approximately 4,020 access lines in one study area in Colorado. *See Universal Service Administrative Company, Federal Universal Service Support Mechanism, Fund Size Projection for the Second Quarter 2010*, Table HC05 (Jan. 29, 2010).

⁷ *See Comment Sought on the Petition of El Paso Telephone Company and Qwest Corporation to Waive the Study Area Boundary Freeze, as Codified in Part 36 of the Commission's Rules*, CC Docket No. 96-45, Public Notice, 22 FCC Rcd 11150 (Wireline Comp. Bur. 2007). No comments were filed.

⁸ *See* Petition at 1.

⁹ *Id.*

¹⁰ *Id.* at 2.

¹¹ *Id.* at 2. The physical boundaries of the territories subject to this transaction are specified in the appendix to the Petition.

¹² *See* Petition at 4 (attaching *Before the Public Utilities Commission of the State of Colorado, Joint Application of Qwest Corporation and El Paso County Telephone Company to Rearrange their Exchange Area Boundaries, Request for Review Concurrent with the Review of Each Applicant's Proposed Advice Letter Filings and to Change Each Provider's Designation as Provider of Last Resort, Decision Granting Application for Approval of Revised Exchange Area Maps, Review of Proposed Advice Letter and to Change Each Provider's Designation as Provider of Last Resort*, Decision No. C07-0093, Docket No. 06A-665T (Jan. 31, 2007) (Colorado Order)).

5. Standard for Waiver. In evaluating petitions seeking a waiver of the rule freezing study area boundaries, the Commission applies a three-part standard: (1) the change in study area boundaries must not adversely affect the universal service fund; (2) the state commission having regulatory authority over the transferred exchanges does not object to the transfer; and (3) the transfer must be in the public interest.¹³ In evaluating whether a study area boundary change will have an adverse impact on the universal service fund, the Commission analyzes whether a study area waiver will result in an annual aggregate shift in an amount equal to or greater than one percent of high-cost support in the most recent calendar year.¹⁴

B. Discussion

6. For the reasons discussed below, we conclude that the Petitioners have satisfied the three-part standard that the Commission applies to determine whether a waiver is warranted. We therefore 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 the Petitioners to exchange territories as described above.¹⁵

7. Impact on the Universal Service Fund. We conclude that the universal service fund will not be adversely affected by granting this study area waiver. Section 54.305(b) of the Commission's rules limits high-cost loop support and local switching support for the acquired exchanges to the same per-line support levels for which the exchanges were eligible prior to their transfer.¹⁶ Consistent with the Commission's finding in the *Skyline Order*, however, section 54.305(b) of the Commission's rules does not apply in this instance because the modifications to the Qwest and El Paso study areas in Colorado do not involve transfers of facilities or customers between the parties.¹⁷ While the territories subject to this transaction are not bound by section 54.305(b), we find that any increases in universal service support as a result of these transfers of territories will not have an adverse effect on the universal service fund.¹⁸ We

¹³ See, e.g., *US 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, para. 5 (1995) (*PTI/Eagle Order*).

¹⁴ See *id.* at 1774, paras. 14-17; see also *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).

¹⁵ Generally, the Commission's rules may be waived for good cause shown. 47 C.F.R. § 1.3. The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest. *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*). In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166. Waiver of the Commission's rules is appropriate only if both (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest. *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008), *Northeast Cellular*, 897 F.2d at 1166.

¹⁶ 47 C.F.R. § 54.305(b).

¹⁷ See Petition at 5; *M&L Enterprises, Inc., d/b/a Skyline Telephone Company, Petition for Waiver of Sections 36.611, 36.612, and 69.2 (hh) of the Commission's Rules*, CC Docket No. 96-45, Order, 19 FCC Rcd 6761, 6767, para. 16 (2004) (*Skyline Order*). Because the per-line support limitation in section 54.305(b) does not apply to these transfers, El Paso will be eligible, as a rural carrier, to receive universal service high-cost support based on the average cost per loop of all of its lines. See generally 47 C.F.R. Part 36, Subpart F.

¹⁸ The Petitioners state that the level of support cannot be estimated until it is known how many residences are going to be built because the portion of the study area transferred from El Paso to Qwest is not slated for development for another three years and it is not clear when there will be any development on the land transferred from Qwest to El Paso. See Petition at 3. Applying our standard for quantifying potential adverse affects on high-cost support, one

(continued....)

find that the circumstances in the instant petition meet our existing framework and precedents for granting such a waiver.¹⁹

8. *Position of State Commission.* The Colorado Commission previously issued an order approving the transfers.²⁰ Thus, we find that the state commission with regulatory authority over the transferred area does not oppose the transfer.

9. *Public Interest Analysis.* We are persuaded that the public interest is served by grant of the proposed waiver of the study area freeze rule to permit Qwest and El Paso to exchange the subject territories as described.²¹ Waiver of the freeze will allow Qwest to become the incumbent LEC for the Banning Lewis Ranch development in its entirety, and will allow El Paso to become the incumbent LEC for the Santa Fe Springs development in its entirety, thereby eliminating the potential for confusion among the residents of each development if telecommunications services to these developments were to be bifurcated between two incumbent LECs. Further, each carrier, as the incumbent LEC for its respective development, will be able to provide telecommunications services more efficiently than if their services were provided to smaller geographic areas within each development.

III. ORDERING CLAUSES

10. 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 joint petition for waiver of the study area boundary freeze as codified in Part 36, Appendix-Glossary, of the Commission's rules, filed by El Paso Telephone and Qwest Corporation on March 21, 2007, IS GRANTED.

11. IT IS FURTHER ORDERED, pursuant to section 1.102(b)(1) of the Commission's rules, 47 C.F.R. § 1.102(b)(1), that this order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Sharon E. Gillett
Chief
Wireline Competition Bureau

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percent of current high-cost support is approximately \$49 million. *See supra* para. 5. We find it highly unlikely that any increases in high-cost support, as a result of this transaction, could approach \$49 million. We find it more likely, due to the sizes of the proposed developments, that potential universal service support would only be a small fraction of one-percent of current high-cost support. *See* Universal Service Administrative Company, Federal Universal Service Support Mechanism, Fund Size Projection for the Second Quarter 2010, Table HC02 (Jan. 29, 2010) (projecting total annual high-cost support of approximately \$4.9 billion).

¹⁹ *See, e.g., Skyline Order*, 19 FCC Rcd 6761; *Qwest Corporation, Pine Telephone Systems, Inc., Oregon Telephone Corporation, Qwest Corporation, Pine Telephone, Inc., Joint Petition for Waivers of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary of the Commission's Rules*, CC Docket No. 96-45, Order, 24 FCC Rcd 4986 (Wireline Comp. Bur. 2009).

²⁰ *See supra* note 12.

²¹ *See* Petition at Appendix.