

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

In the Matter of)
)
Universal Service High-Cost Filing) WC Docket No. 08-71
Deadlines)
)
)
)

ORDER

Adopted: February 24, 2015

Released: February 24, 2015

By the Deputy Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order, we deny a petition filed by Virgin Islands Telephone Corp. d/b/a Innovative Telephone (Innovative) for a waiver of the National Exchange Carrier Association’s (NECA) rolling 24-month adjustment period.¹ Innovative has not shown good cause for a waiver of the NECA’s rolling 24-month adjustment period or that such a waiver is in the public interest.² Accordingly, we deny Innovative’s petition.

II. BACKGROUND

2. Under the Commission’s rules, the National Exchange Carrier Association (NECA) is required to “collect, process, and submit data for the Universal Service Fund (USF) HCLS program.”³ On July 31 of each year, eligible telecommunications carriers (ETCs) submit to NECA financial, loop, and cost-study data as of December 31st of the prior year.⁴ The data initially reported by ETCs is often based on estimates, which are then replaced by actual results as the information becomes available. Under NECA’s data reconciliation rules, ETCs have 24 months within which they must “true-up” cost data with actual numbers before the settlements window is considered closed for ETC-initiated revisions.⁵ Thus, at the end of each calendar month, the corresponding month two years prior closes for purposes of company-initiated data adjustments.⁶

¹ Virgin Islands Telephone Corp. d/b/a Innovative Telephone Petition for Waiver of the National Exchange Carrier Association Adjustment Period, WC Docket No. 08-71 (filed Dec. 19, 2011) (Innovative Petition).

² *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990). See also 47 C.F.R. § 1.925(b)(3)(i).

³ Comments of the National Exchange Carrier Association, WC Docket No. 08-71, at 4 (filed Jan. 23, 2012) (NECA Comments).

⁴ See *id.* at 4.

⁵ See *id.*

⁶ See *id.*

3. NECA compiles and analyzes the submitted data to determine the average cost per loop for each ETC as well as the national average cost per loop (NACPL).⁷ Each cost-company ETC's high cost loop support (HCLS) amount for the following year is based upon the relationship between the ETC's average cost per loop and the NACPL.⁸

4. Innovative, as an ETC, submitted its 2009 settlement data to NECA in July 2010.⁹ In November 2011, Innovative implemented a new physical facilities database that allowed the company to calculate more accurately the number of access lines and loops it had in service.¹⁰ Using this new database, Innovative determined that the 2009 loop count data submitted to NECA erroneously included loops that were related to non-switched wideband services.¹¹ Pursuant to NECA cost submission policies, an incumbent local exchange carrier (ILEC) is required to exclude all non-switched wideband services from its loop and access line count data submitted for USF data collection and NECA pooling purposes.¹² As a result of Innovative's error, its 2009 line count was overstated by 1,805 loops, which effectively lowered Innovative's average cost per loop and thereby reduced the amount of HCLS it would otherwise have received in 2011 by \$565,860.¹³ Pursuant to NECA's 24-month rolling window, corrections to Innovative's January 2011 to October 2011 HCLS calculations were no longer permitted.¹⁴ Innovative requests that the Commission grant a waiver and direct NECA to reopen the 24-month adjustment window and recalculate Innovative's 2011 HCLS support amount from January 2011 to October 2011 using corrected loop count data.¹⁵ According to Innovative, the accuracy of its 2011 high-cost loop

⁷ *See id.*

⁸ *See id.* at 3-4.

⁹ *See* Innovative Petition at 3.

¹⁰ *See id.* at 4.

¹¹ *See id.*

¹² *See* "Loop Count Guide for USF, Cost Study, and Cost Company Pool Reporting," NECA, Version 30 (Aug. 10, 2010), *available at* <http://www.mossadams.com/mossadams/media/Documents/webcasts%20and%20presentations/Telecom/NECA-Loop-Count-Guide.pdf>.

¹³ *See* Innovative Petition at 4-5; *see* Letter from Bennett L. Ross, Counsel to Virgin Islands Telephone Corp. d/b/a Innovative Telephone, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 08-71, at 1-2 (filed Sept. 11, 2014) (Innovative Ex Parte). Carriers eligible for HCLS are reimbursed 65 percent of the loop costs in excess of 115 percent of the NACPL but less than 150 percent of the NACPL, and 75 percent of loop costs in excess of 150 percent of the NACPL. To the extent a carrier experiences access line loss, for whatever reason, its cost per loop will rise because the total costs for the study area are divided by a smaller number. The fact that Innovative subsequently reported fewer lines for 2009 than originally would result in increased HCLS because Innovative's cost per loop would rise in relation to the NACPL. *See* 47 C.F.R. § 54.1310. The Commission's HCLS rules were formerly codified in Part 36, subpart F; in 2014, those rules were moved to Part 54, subpart M. *See also* *Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order, 29 FCC Rcd 15644, 15679-84, paras. 101-114 (rel. Dec. 18, 2014) (*December 2014 Connect America Order*).

¹⁴ *See* Innovative Petition at 5; Innovative Ex Parte at 2. As noted above, under NECA's data reconciliation policies, ETCs have 24 months within which they must "true-up" cost data with actual numbers before the settlements window is considered closed for ETC-initiated revisions. Because Innovative did not notify NECA of the error in its 2009 loop count data until November 2011, Innovative was unable to adjust or "true-up" Innovative's loop count data from January 2009 through October 2009 because the 24-month rolling adjustment window had already closed. The 24-month rolling adjustment window only permitted revisions to Innovative's November 2009 through December 2009 loop count data. *See* NECA Comments at 4.

¹⁵ *See* Innovative Petition at 10.

support is critical because, pursuant to section 54.312(a) of the Commission's rules, a price cap carrier's baseline support amount for frozen Connect America Fund (CAF) support is based on the carrier's total 2011 support as determined by the Universal Service Administrative Company (USAC) on January 31, 2012.¹⁶

5. Nearly three years after filing its petition, Innovative raised a new argument in support of its request for waiver, noting in an ex parte that, although NECA properly corrected Innovative's November and December 2011 loop count information, USAC failed to include this corrected loop-count data in Innovative's frozen support baseline amount as of January 31, 2012.¹⁷ Innovative now argues that because its November and December 2011 baseline support was computed using previously submitted loop counts, and did not reflect any correction by NECA, that resulted in Innovative's frozen CAF support being understated by \$113,172 annually.¹⁸ Innovative requests that the frozen support baseline be corrected to include amounts associated with the November and December 2011 revised loop-count data from the frozen support baseline, which, together with the revised January through October 2011 loop counts, would increase Innovative's annual frozen CAF support by \$679,032.¹⁹

III. DISCUSSION

6. We find that Innovative has not demonstrated good cause for a waiver.²⁰ A waiver is appropriate for more effective implementation of overall policy on an individual basis,²¹ and when special circumstances warrant a deviation from the Commission's rules to service the public interest.²² Innovative's mistake in filing incorrect loop count data prior to November 2011 resulted solely from Innovative's own actions.²³ In addition, we are not persuaded that Innovative will face "further strain" in its ability to provide quality service to its consumers absent waiver or recalculation of frozen CAF support in this circumstance,²⁴ and Innovative has not shown that the frozen support it is receiving is inadequate. Therefore, we deny Innovative's request for waiver.

¹⁶ See Innovative Ex Parte at 2.

¹⁷ See *id.* at 3-4.

¹⁸ See *id.*

¹⁹ See *id.* at 4.

²⁰ 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. "[D]eadlines can only be waived under 'unusual or compelling circumstances.'" *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-28 (D.C. Cir. 2008); *Northeast Cellular*, 897 F.2d at 1166.

²¹ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972); 47 C.F.R. § 1.3; see also 47 C.F.R. § 1.925(b)(3).

²² *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); see also 47 C.F.R. § 1.925(b)(3)(i).

²³ See Innovative Petition at 3-4.

²⁴ See *id.* at 8-9.

7. In its petition, Innovative asks that we direct NECA to waive the 24-month adjustment window and recalculate Innovative's HCLS support for January to October 2011.²⁵ Innovative admits that the 24-month filing window is not embodied in a Commission rule but argues that the Commission has the "power to direct NECA to reopen and readjust data for pool months which have already closed" for good cause.²⁶ Innovative has failed to show, however, that doing so in this case is in the public interest. Innovative, through its own negligence, filed incorrect loop count data for an extended period of time, which resulted in Innovative receiving less HCLS support than it otherwise would have received.²⁷ It is necessary to enforce strictly the 24-month window for correcting information so that there can be finality in the calculation of HCLS payments. If carriers were permitted to adjust their settlement data outside of the 24-month adjustment window, NECA would be required continually to adjust the NACPL.²⁸ "Under the cap, a funding increase for any carrier must be offset by funding decreases for others,"²⁹ so changes in the NACPL affect disbursements to other carriers. Moreover, re-opening the 24-month window would be inconsistent with the Commission's recent decision to enforce high-cost filing deadlines strictly and reduce support for late filings.³⁰ Therefore, we find that it is not in the public interest to grant Innovative's waiver request.³¹

8. In addition, we are not persuaded by Innovative's argument newly raised in 2014 that we should grant its waiver request to "ensure that accurate loop count data are used in calculating Innovative's [frozen] universal service support."³² Innovative notes that pursuant to section 54.312(a) of the Commission's rules, a price cap carrier's frozen CAF support is based on the carrier's total 2011 support as determined by USAC on January 31, 2012.³³ The *USF/ICC Transformation Order* stated that

²⁵ See *id.* at 6.

²⁶ See *id.* at 5-6.

²⁷ See *id.* at 3-4.

²⁸ See NECA Comments at 5-6. NECA indicates that the 24-month adjustment window is the product of a contractual agreement between NECA and its member companies and has been in place since NECA began operations in the early 1980s. The 24-month window provides smaller companies with time following the end of a study period to finalize total company accounting data and conduct the necessary cost studies. See Letter from Richard A. Askoff, Executive Director – Regulatory & Government Relations, NECA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-29, at 3, 5-6 (filed Jan. 28, 2005).

²⁹ See *id.* at 5.

³⁰ See *December 2014 Connect America Order*, 29 FCC Rcd at 15689-92, paras. 127-136. While Innovative claims that various Commission and Bureau level orders provide the authority necessary to grant Innovative's request, see Innovative Petition at 3-4 n.18, we note that the Commission has never granted a waiver directing NECA to open its 24-month adjustment window. Moreover, the fact that the Commission could do so does not mean that such action is in the public interest in this case.

³¹ We note that the Commission has strictly enforced filing deadlines in other contexts. See, e.g., *Vanessa Cintron, Noble Ventures, Inc., On Request for Inspection of Records*, FOIA Control No. 2014-282, Memorandum Opinion and Order, 29 FCC Rcd 11583 (2014) (dismissing an application for review that was filed three days late and noting "[w]hile losing the right of appeal when a deadline is missed by a brief time 'may seem unduly harsh . . . short of exceptional circumstances (which are not present here), courts have generally respected statutory and regulatory deadlines"); *Totally Jesus Network, Inc. Application for a New NCE FM Station at Gold Beach, Oregon, et al.*, File No. BNPED-20071018AON, Memorandum Opinion and Order, 29 FCC Rcd 6414 (2014) (affirming a decision to dismiss an application for a new noncommercial FM station after the applicant experienced technical difficulties and filed nine days past the filing deadline).

³² See Innovative Ex Parte at 2.

³³ See *id.* at 3.

the Commission will “provide frozen high-cost support to such carriers equal to the amount of support each carrier *received* in 2011 in a given study area.”³⁴ Further, the Commission provided that “[f]rozen high-cost support amounts will be calculated by USAC and will be equal to the amount of support disbursed in 2011, without regard to prior period adjustments related to years other than 2011 and as determined by USAC on January 31, 2012.”³⁵ The Commission specifically defined a carrier’s frozen support baseline as that “received” and “disbursed” rather than “owed” or “accruing.” The Commission also made clear that frozen support was to be determined “without regard to prior period adjustments related to years other than 2011,” meaning that any prior period adjustments actually disbursed in 2011 are included in the frozen support baseline and any prior period adjustments disbursed after January 31, 2012 are excluded.³⁶ The language used by the Commission thus specifically excluded the adjustments requested by Innovative. For these same reasons, no waiver is warranted to adjust Innovative’s frozen support baseline amount to include support derived from the properly corrected November and December 2011 loop-count data that should have been paid but was not disbursed in calendar year 2011.

IV. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 5(c), 201, and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 155(c), 201, 254, sections 0.91, 0.291, 1.3 of the Commission’s rules, 47 C.F.R. §§ 0.91, 0.291, 1.3, that this Order IS ADOPTED.

10. IT IS FURTHER ORDERED that the petition for waiver of NECA’s rolling 24-month adjustment period, filed by Virgin Islands Telephone Corp. d/b/a Innovative Telephone, IS DENIED as described herein.

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

FEDERAL COMMUNICATIONS COMMISSION

Carol E. Matthey
Deputy Chief
Wireline Competition Bureau

³⁴ See *Connect America Fund et al.*, WC Docket Nos. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17715, para. 133 (2011) (*USF/ICC Transformation Order*) (emphasis added).

³⁵ *Id.* at 17715, para. 133, n.212.

³⁶ See *id.*; see also *Petitions for Waiver of Universal Service High-Cost Filing Deadlines, et al.*, WC Docket No. 08-71, Order, 28 FCC Rcd 14856, 14858 n.12 (Wireline Comp. Bur. 2013) (“Frozen support was calculated by USAC on January 31, 2012 based on the amount of support disbursed to carriers in 2011. Thus, any adjustments or true-ups made to 2011 support after January 31, 2012 do not affect price cap carriers and their rate-of-return affiliates’ frozen high-cost support.” (citations omitted)). We note that carriers serving 110 study areas are similarly situated to Innovative and received support for prior periods after the January 31, 2012 cutoff that was not included in the frozen baseline amounts. See Industry Analysis and Technology Division, Wireline Competition Bureau, *2014 Universal Service Monitoring Report*, “HC Disbursements - by Study Area.xlsx,” available at http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/Monitor/2014_MR_Supplementary_Material.zip.