

**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 Regime)	CC Docket No. 01-92
)	
)	
Smart City Telecommunications LLC Petition for Waiver of Section 51.917 of the Commission's Rules)	

ORDER ON RECONSIDERATION

Adopted: May 17, 2018

Released: May 18, 2018

By the Commission:

I. INTRODUCTION

1. In this Order, we address the Petition for Reconsideration filed by Smart City Telecommunications LLC (Smart City) of the Commission's order denying its request for waiver of our rules governing base period revenue (BPR) amounts used to calculate Eligible Recovery for rate-of-return incumbent local exchange carriers (LECs).¹ Specifically, Smart City seeks reconsideration of its waiver request to include in its Fiscal Year 2011 (FY 2011) BPR amounts received after the March 31, 2012 cut-off from a "settlement of unpaid switched access charges."² Upon review of the record, we find that Smart City has failed to present any arguments warranting reconsideration.³ Accordingly, we deny Smart City's petition.

II. BACKGROUND

2. In the 2011 *USF/ICC Transformation Order*, the Commission reformed the intercarrier compensation (ICC) system to provide more predictability to regulated carriers, adopting a transition path to a bill-and-keep methodology.⁴ The Commission adopted a recovery mechanism to partially mitigate revenue reductions LECs would experience as a result of these ICC reform measures.⁵ The Commission's recovery mechanism recognizes carrier reliance on ICC revenues, while limiting the

¹ Petition for Reconsideration of Smart City Telecom, WC Docket No. 10-90, CC Docket No. 01-92 (filed Nov. 21, 2016) (Petition); see *Connect America Fund et al.*, WC Docket No. 10-90 et al., Order, 31 FCC Rcd 12021, 12028-29, paras. 1, 20-21 (2016) (*Waiver Denial Order*).

² Petition at 1; see Amended Petition of Smart City Telecommunications LLC, WC Docket No. 10-90, CC Docket No. 01-92, at 4 (filed Apr. 29, 2013) (Smart City Apr. 29, 2013 Waiver Request); *Waiver Denial Order*, 31 FCC Rcd at 12025, para. 11.

³ See 47 CFR § 1.106; 47 U.S.C. § 405(a).

⁴ See *Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17904, 17932, 18026-28, paras. 740, 798, 970-71 (2011) (*USF/ICC Transformation Order*), *aff'd sub nom.*, *In re: FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014); see also 47 CFR § 51.713 (bill-and-keep arrangements).

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

burdens recovery might impose on end-user customers and universal service contributors.⁶

3. For rate-of-return incumbent LECs, the recovery mechanism begins with calculating a company-specific BPR. The 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 FY 2011,⁷ and the projected revenue requirement for interstate switched access services provided during the 2011-12 tariff period.⁸ The BPR was reduced by five percent initially and is being reduced by an additional five percent in each year of the transition.⁹ The amount a rate-of-return incumbent 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 Rate-of-return incumbent LECs are then able to recover some or all of their Eligible Recovery from end user charges and, to the extent these charges are insufficient, carriers may recover the remainder from Connect America Fund (CAF) ICC support.¹¹

4. A rate-of-return incumbent LEC's BPR was included as part of the 2012 tariff filings, the first year of the transition, and is used as part of the ICC recovery mechanism calculation for each year of the transition.¹² Thus, the BPR is a critical input in calculating Eligible Recovery; any inaccuracies in the BPR calculation carry forward in future recovery mechanism payments. The BPR, in turn, has repercussions on the rates a rate-of-return incumbent LEC charges end users and on the amount of CAF ICC support the carrier receives.

5. In the *USF/ICC Transformation Order*, the Commission adopted rules designed to ensure that rate-of-return incumbent 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.¹³ To capture FY 2011 revenues for a rate-of-return LEC's BPR, the Commission required revenues to be collected by March 31, 2012, pursuant to section 51.917(b)(7).¹⁴

6. In adopting March 31, 2012 as the cut-off date by which revenues had to be collected to be included in a carrier's BPR calculation, the Commission provided for carriers to "request a waiver of our rules defining the [BPR] 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."¹⁵

⁶ See *id.* at 17957, 17985-86, paras. 849, 903.

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

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

⁹ See *id.* § 51.917(b)(3). Following the initial reduction, the BPR for each year is reduced by five percent of its value for the immediately preceding year.

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 *USF/ICC Transformation Order*, 26 FCC Rcd at 17987-96, paras. 905-23; 47 CFR § 51.917(e).

¹² See 47 CFR § 51.917(d).

¹³ See generally *USF/ICC Transformation Order*, 26 FCC Rcd at 17977-86, paras. 891-904 (describing the recovery mechanism for rate-of-return LECs).

¹⁴ 47 CFR § 51.917(b)(7); *USF/ICC Transformation Order*, 26 FCC Rcd at 17982, para. 898 & n.1745.

¹⁵ *USF/ICC Transformation Order*, 26 FCC Rcd at 17982, para. 898 n.1745 (citing 47 CFR § 1.3); *id.* ("The adjusted [BPR] will not include settlements regarding charges after the March 31, 2012 cut-off, and any carrier requesting such modification to its [BPR] shall, in addition to otherwise satisfying the waiver criteria, have the burden of demonstrating that the revenues are not already included in its [BPR], including providing a certification

7. On March 27, 2013, Smart City filed a petition seeking a waiver of the Eligible Recovery rules to include in its BPR the revenue it received as a result of a settlement agreement it reached with Verizon Business (Verizon), amounts which were collected after the March 31, 2012 cut-off.¹⁶ In its waiver request, Smart City alleged that Verizon disputed amounts for traffic terminated by Smart City, “asserting a portion of the billed minutes were [voice-over-Internet protocol (VoIP)] traffic and therefore not subject to tariffed intrastate access rates for switched access service.”¹⁷ As support, Smart City submitted a table purporting to show the “disputed amounts billed and received.”¹⁸ Smart City also sought “[t]o the extent necessary. . . waiver of the provision that waivers of this nature are a result of the ‘decision of a court or regulatory agency of competent jurisdiction.’”¹⁹ Because Smart City could not produce a decision of a state court or regulatory agency finding in favor of Smart City during the pendency of the waiver request, Commission staff requested that Smart City provide “details behind the traffic information underlying the switched access billing disputes” described in Smart City’s initial waiver request.²⁰ Smart City failed to provide evidence in support of its claim, but instead claimed that it twice requested call detail records for the relevant period from Verizon, but that Verizon failed to respond to either request.²¹ At no point prior to release of the *Waiver Denial Order* did Smart City request that the Commission ask Verizon for copies of the call detail records.²²

8. In the *Waiver Denial Order*, the Commission found that Smart City did not present evidence of special circumstances that would warrant waiver of the Eligible Recovery rules and denied the waiver request.²³ The Commission reasoned that Smart City’s waiver request involved a “factual dispute over whether the type of traffic at issue, VoIP traffic, was compensable and, if so, what compensation applied;” because Smart City failed to produce a court or commission order establishing Verizon’s liability for the settlement, it had not established that the amount at issue is the amount on which Smart City should have reasonably relied.²⁴ The Commission emphasized that a decision by an agency or court protects against parties gaming the system.²⁵

9. On November 21, 2016, Smart City filed a petition for reconsideration of the *Waiver Denial Order*. First, Smart City takes issue with the Commission’s characterization of Smart City’s

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to the Commission to that effect. Any request for such a waiver also should include a copy of the decision requiring payment of the disputed intercarrier compensation. Any such waiver would be subject to the Commission’s traditional ‘good cause’ waiver standard. . . .”); see 47 CFR § 1.3.

¹⁶ Petition of Smart City Telecommunications LLC d/b/a Smart City Telecom for Limited Waiver of 47 C.F.R. 51.917(b), WC Docket No. 10-90 et al. (filed Mar. 27, 2013) (Smart City Mar. 27, 2013 Waiver Request). Smart City amended its petition for waiver on April 29, 2013. See Smart City Apr. 29, 2013 Waiver Request.

¹⁷ Smart City Apr. 29, 2013 Waiver Request at 3.

¹⁸ *Id.* at 4 & Exh. I.

¹⁹ *Id.* at 5 n.9 (citing *USF/ICC Transformation Order*, 26 FCC Rcd at 17982, para. 898 n.1745).

²⁰ Letter from to John Kykendall, Vice President, JSI on behalf of Smart City, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 et al., at 1 (filed Apr. 21, 2015) (Smart City Apr. 21, 2015 Letter).

²¹ Petition at 2; Smart City Apr. 21, 2015 Letter at 1; *id.*, Attach. (attaching email correspondence with Verizon); see also *Wavier Denial Order*, 31 FCC Rcd at 12029, para. 20.

²² See Smart City Apr. 29, 2013 Waiver Request; Smart City Apr. 21, 2015 Letter; Smart City Mar. 27, 2013 Waiver Request.

²³ See *Waiver Denial Order*, 31 FCC Rcd at 12028-29, para. 20.

²⁴ *Id.* at 12029, para. 20.

²⁵ *Id.* at 12029, para. 21.

dispute with Verizon as a factual dispute.²⁶ Then it argues that reconsideration is warranted because the Commission should have made a factual inquiry into the traffic at issue which would have resolved the dispute.²⁷ Specifically, Smart City argues that denial of its waiver request was “arbitrary and capricious” because the Commission could “confirm[] that the disputed traffic actually was not VoIP” by asking Verizon directly to produce call detail records for the traffic billed.²⁸ Third, Smart City argues that the “Commission’s refusal to consider a settlement agreement in the absence of a court or commission order is irrational and unsound public policy” and is “arbitrary and capricious, because it would penalize Smart City for resolving this dispute promptly and at minimal cost to its ratepayers” rather than through a fully litigated resolution.²⁹ No oppositions to Smart City’s petition for reconsideration were filed.³⁰

III. LEGAL STANDARDS

10. Generally, the Commission’s rules may be waived for good cause shown.³¹ The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.³² In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.³³ Waiver of the Commission’s rules is appropriate if both special circumstances warrant a deviation from the general rule, and such deviation will serve the public interest.³⁴ In the *USF/ICC Transformation Order*, the Commission described one particular factual situation that could support “good cause” for waiver of the March 31, 2012 cut-off, namely, the result of the decision of a court or regulatory agency of competent jurisdiction.³⁵ The Commission indicated that any such waiver request should include a copy of the decision requiring payment of the disputed intercarrier compensation.³⁶ The Commission also specified that it would apply the Commission’s traditional waiver standard to any such request.³⁷

11. The Commission may act on petitions requesting reconsideration of an order granting or denying a request for waiver of the Commission’s rules.³⁸ Generally, petitions for reconsideration that do

²⁶ See Petition at 2-3.

²⁷ See *id.* at 5-6; see also Smart City Apr. 29, 2013 Waiver Request at 5.

²⁸ Petition at 2-3.

²⁹ *Id.* at 3-6.

³⁰ See 47 CFR § 1.106(g); Petition for Reconsideration of Action in Rulemaking Proceeding, 81 Fed. Reg. 94296 (Dec. 23, 2016); *Petition for Reconsideration of Action in Rulemaking Proceeding*, WC Docket No. 10-90, CC Docket No. 01-92, Public Notice, Report No. 3062 (Dec. 13, 2016), https://apps.fcc.gov/edocs_public/attachmatch/DOC-342553A1.pdf.

³¹ 47 CFR § 1.3.

³² *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

³³ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166.

³⁴ *Northeast Cellular*, 897 F.2d at 1166

³⁵ See *USF/ICC Transformation Order*, 26 FCC Rcd at 17982, para. 898 n.1745; see also *Waiver Denial Order*, 31 FCC Rcd at 12027, para. 15. The Commission did not intend footnote 1745 of the *USF/ICC Transformation Order* to modify or limit the general availability of waivers under the good cause standard. The Commission retains the ability to grant a waiver of its rules where the waiver standard is met and a grant does not undermine the policies underlying the Commission’s rules. See *Waiver Denial Order*, 31 FCC Rcd at 12027, para. 15 (citing *USF/ICC Transformation Order*, 26 FCC Rcd at 17982, para. 898 n.1745).

³⁶ See *USF/ICC Transformation Order*, 26 FCC Rcd at 17982, para. 898 n.1745.

³⁷ *Id.*

³⁸ 47 CFR §§ 1.106 (petitions for reconsideration in non-rulemaking proceedings); 1.106(p) (listing examples of petitions for reconsideration of a Commission action that plainly do not warrant consideration by the Commission); see, e.g., *Connect America Fund et al.; Rural Broadband Experiments*, WC Docket Nos. 10-90, 14-259, Memorandum Opinion and Order and Order on Reconsideration, 31 FCC Rcd 10091, 10091, 10097-98, paras. 1, 15-

not warrant consideration by the Commission include those that “[r]ely on arguments that have been considered and rejected by the Commission within the same proceeding”³⁹ and those that “rely on facts or arguments not previously presented to the Commission.”⁴⁰ The Commission may consider facts or arguments not previously presented if they: (1) “relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters to the Commission;” or (2) were “unknown to petitioner until after. . .[their]. . .last opportunity to present them to the Commission, and. . .could not through the exercise of ordinary diligence have learned of the facts or arguments in question prior to such opportunity;”⁴¹ or (3) “consideration of the facts or arguments relied on is required in the public interest.”⁴²

IV. DISCUSSION

12. We find Smart City’s arguments on reconsideration to be procedurally and substantively flawed. First, we reject Smart City’s assertion that in the *Waiver Denial Order* the Commission erred by conflating a factual dispute “over how much, if any, billed traffic was VoIP” and a separate legal dispute “over what, if any, compensation was payable for VoIP traffic.”⁴³ Regardless of whether Smart City’s dispute with Verizon included a legal component, it indisputably involved fundamental questions of fact—the amount and nature of the traffic at issue.⁴⁴ Smart City failure to present evidence sufficient for the Commission to answer those questions meant that the Commission did not have occasion to reach any related legal questions.⁴⁵

13. Second, we reject Smart City’s new argument on reconsideration that the Commission should have confirmed the facts underlying its dispute with Verizon by requesting call detail records directly from Verizon and that the failure to do so justifies reconsideration.⁴⁶ As the applicant seeking waiver of the Eligible Recovery rules, Smart City had the burden to plead specific facts and circumstances that would justify its request for a waiver of our rules.⁴⁷ Moreover, our rules disfavor consideration of new arguments on reconsideration which have not previously been presented to the Commission.⁴⁸ Smart City fails to offer any explanation of why we should do so here.

14. Smart City’s argument that the Commission was better situated than Smart City to get

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16 (2016) (considering and denying three challenges to a Wireline Competition Bureau order to deny certain requests for waiver of the Commission’s rules).

³⁹ 47 CFR § 1.106(p)(3); see *Application of Razorcake/Gorskey Press, Inc. For a New LPFM Station at Pasadena, California*, File No. BNPL-20131114AXZ, Order on Reconsideration, 32 FCC Rcd 6593, 6594, paras. 3 (MB 2017) (*Razorcake Order*).

⁴⁰ 47 CFR § 1.106(p)(2); see *Razorcake Order*, 32 FCC Rcd at 6594, para. 3.

⁴¹ 47 CFR §§ 1.106(c)(1); 1.106(b)(2).

⁴² 47 CFR § 1.106(c)(2).

⁴³ Petition at 2 (citing *Waiver Denial Order*, 31 FCC Rcd at 12029, para. 20).

⁴⁴ See Petition at 1-2; Smart City Apr. 29, 2013 Waiver Request at 2-3.

⁴⁵ See *Waiver Denial Order*, 31 FCC Rcd at 12028-29, paras. 20-21.

⁴⁶ See Petition at 2-3; Smart City Apr. 29, 2013 Waiver Request; see also *Northeast Cellular*, 897 F.2d at 1166; *Tucson Radio, Inc. v. FCC*, 452 F.2d 1380, 1382 (D.C. Cir. 1971) (*Tucson Radio*).

⁴⁷ See *Tucson Radio*, 452 F.2d at 1382 (“The burden is on the applicant seeking waiver of these rules to plead specific facts and circumstances which would make the general rule inapplicable.”); *Northeast Cellular*, 897 F.2d at 1166.

⁴⁸ See 47 CFR §§ 1.106(p)(2); 1.106(c); 1.106(b)(2)(i)-(ii).

factual evidence from Verizon, call detail records, is also untimely.⁴⁹ That argument does not “relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters to the Commission” and Smart City fails to explain why it could not “through the exercise of ordinary diligence” have learned of this argument prior to such opportunity.⁵⁰ When Smart City filed its waiver request, it was aware that its request rested on its own unsupported assertion that its settlement with Verizon accurately represented the amount Smart City would have been able to include in its BPR, had it received that revenue before March 31, 2012. Indeed, prior to filing its waiver request, Smart City requested call detail records from Verizon without success.⁵¹ If Smart City believed that under these circumstances the Commission should have asked Verizon to produce the call detail records to demonstrate how much Verizon owed Smart City, it should have made that request, along with supporting legal arguments, as part of its initial waiver request.⁵²

15. We also find that the public interest does not require us to now seek the call detail records from Verizon.⁵³ Directing Verizon to produce call detail records pertaining to legacy ICC may not provide all the information necessary to validate the amounts Smart City seeks to add to its BPR via its waiver request consistent with intrastate tariffs and state law.⁵⁴ It could instead entangle Commission staff in protracted negotiations with both companies about what information and documentation are necessary to validate relevant recovery amounts, years after the underlying dispute occurred.

16. Additionally, Smart City has offered no alternative, verifiable support that would lead us to conclude that it reasonably relied on receiving the revenue amounts at issue. When the Eligible Recovery rules were adopted, there were numerous disputes and widespread uncertainty over the identification and treatment of VoIP traffic for purposes of ICC.⁵⁵ Against this backdrop, the Commission limited the transitional Eligible Recovery calculation to specific types of revenues actually collected by March 31, 2012, in an effort to reflect carriers’ reasonable reliance on such revenues during the prior ICC regime.⁵⁶ Because carriers could not reasonably rely on uncollected revenues, amounts in dispute were excluded from Eligible Recovery calculations.⁵⁷ The Commission however anticipated that carriers might be able to validate their reliance on legacy ICC from the relevant period as the result of the decision of a state court or regulatory agency finding that a carrier should have received certain revenue

⁴⁹ See Petition at 3. This Order does not address whether the Commission would have granted Smart City’s request to seek evidence from Verizon, had Smart City made a timely request for the Commission to do so.

⁵⁰ See 47 CFR §§ 1.106(p)(2); 1.106(c); 1.106(b)(2)(i)-(ii).

⁵¹ Smart City Apr. 21, 2015 Letter at 1; *Waiver Denial Order*, 31 FCC Rcd at 12028-29, para. 20.

⁵² See 47 CFR § 1.106(b)-(c). This Order does not address whether the Commission could or would grant a carrier’s request for another carrier to produce call detail records or other documentation to resolve a traffic billing dispute. See 47 U.S.C. § 218 (Commission authority to request information from regulated entities); 47 U.S.C. § 220(c) (same).

⁵³ See 47 CFR § 1.106(c)(2).

⁵⁴ See e.g., *USF/ICC Transformation Order*, 26 FCC Rcd at 18019, para. 960 (“telephone numbers and other call detail information do not always reliably establish the geographic end-points of a call”); *id.* at 17982, para. 898 & n.1745; see also *Waiver Denial Order*, 31 FCC Rcd at 12029, para. 21.

⁵⁵ See *id.* at 18002-30, paras. 933-76.

⁵⁶ See *Connect America Fund; Developing a Unified Intercarrier Compensation Regime; Petitions for Waiver of Section 51.917 of the Commission’s Rules*, WC Docket No. 10-90, CC Docket No. 01-92, Order, 32 FCC Rcd 5456, 5457, para. 2 (2017) (*West Kentucky Waiver Order*); *Connect America Fund; Developing a Unified Intercarrier Compensation Regime; Petitions for Waiver of Section 51.917 of the Commission’s Rules*, WC Docket No. 10-90, CC Docket No. 01-92, Order, 29 FCC Rcd 9958, 9964, para. 18 (2014) (*Halo Order*); *USF/ICC Transformation Order*, 26 FCC Rcd at 17962-63, 17982, paras. 858, 898 & n.1745; see 47 CFR § 51.917(b)(7)(ii).

⁵⁷ See *USF/ICC Transformation Order*, 26 FCC Rcd at 17982, para. 898 & n.1745.

before March 31, 2012.⁵⁸ Smart City concedes, as it did in its original waiver request, that it has neither the decision of a court or regulatory agency verifying the settlement amount as funds to which Smart City was properly entitled.⁵⁹ Nor did Smart City provide the Commission with alternative independent verification to justify its reliance on the disputed ICC. A state court or commission decision was one factual situation that could validate Smart City's reliance on the disputed ICC but was not the exclusive method. For example, the Commission granted waiver relief to a carrier to include unbilled ICC settlement amounts in its BPR that were verified by staff at a state public utility commission consistent with applicable tariffs and state law.⁶⁰

17. We also reject Smart City's argument that the Commission refusal to consider a settlement agreement in the absence of a court or commission order is irrational or unsound public policy.⁶¹ In fact, in a recent matter involving an ICC dispute that was not resolved before the March 31, 2012 cut-off, the Commission granted a waiver of the rules at issue here absent a court or commission order where the petitioner provided independent verification that the settlement amounts were intrastate switched access revenue consistent with applicable tariffs and state law.⁶² Smart City's waiver request was flawed not because it entered a settlement agreement but because it did not independently verify the settlement amounts consistent with the applicable tariff and state law.⁶³

18. Settlement agreements are contractual, bargained for exchanges between parties that do not carry the same weight as a decision by a court or commission of competent jurisdiction.⁶⁴ As Smart City's Petition underscores, a variety of considerations factor into settlement agreements including the costs of protracted negotiations and litigation, what parties are able to prove through discovery, bargaining strategy, and the parties' separate assessments of the risk of litigation.⁶⁵ The settlement between Verizon and Smart City establishes what the two parties agreed to but does not and cannot verify the amount of money Smart City was entitled to recover from Verizon for the disputed traffic. Indeed, Smart City does not claim that the parties reached agreement on how much Smart City was entitled to receive and Smart City acknowledges that it received only a portion of the disputed amount in settlement of its claims.⁶⁶ As such, Smart City's settlement did not establish, as a factual and legal matter, that the disputed traffic at issue was subject to intrastate switched access charges pursuant to intrastate tariffs and state law in effect at that time and, thus, appropriate to include in the BPR calculation.⁶⁷

⁵⁸ *Id.*

⁵⁹ See Petition at 3 (noting "the absence of a court or commission order"); Smart City Apr. 29, 2013 Waiver Request at 5 ("the outstanding intrastate access revenue was billed and collected after March 31, 2012, and it was not recovered as a result of a court or regulatory agency decision"); see also *id.* at 5 n.9 (seeking "waiver of the provision that waivers of this nature are a result of 'the decision of a court or regulatory agency of competent jurisdiction'") (citing *USF/ICC Transformation Order*, 26 FCC Rcd at 17982, para. 898 & n.1745).

⁶⁰ See *West Kentucky Waiver Order*, 32 FCC Rcd at 5459-60, paras. 11-12; 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).

⁶¹ Petition at 3-5.

⁶² See *West Kentucky Waiver Order*, 32 FCC Rcd at 5459-60, paras. 11-13.

⁶³ See *id.*

⁶⁴ See *Duk Hea Oh v. Nat'l Capital Revitalization Corp.*, 7 A.3d 997, 1013 (D.C. Cir. 2010); *T Street Dev., LLC v. Dereje & Dereje*, 586 F.3d 6, 11 (D.C. Cir. 2009).

⁶⁵ See Petition at 4.

⁶⁶ *Id.* at 1-2.

⁶⁷ See *West Kentucky Waiver Order*, 32 FCC Rcd at 5460, para. 13.

19. We also reject Smart City's suggestion that the *Waiver Denial Order* conflicts with public policy favoring amicable settlement of disputes.⁶⁸ The case law cited by Smart City in support of this proposition is inapposite to the situation at hand.⁶⁹ Those cases stand for the straight-forward proposition that public policy favors amicable settlements, and therefore courts should enforce such settlements.⁷⁰ The Commission's *Waiver Denial Order* does nothing to undermine the enforceability or validity of the settlement agreement Smart City entered with Verizon or other similar settlement agreements. The Commission did not suggest that Smart City "should have rejected what it considered a reasonable settlement offer."⁷¹ Instead, the Commission simply rejected Smart City's settlement agreement as providing sufficient evidence of Smart City's appropriate reliance on legacy ICC from the settlement. And, for the reasons provided above, we reject Smart City's belated assertion that the Commission could have inquired into the circumstances of the settlement to determine the underlying facts to prevent gaming by the parties.⁷²

20. Finally, we are not persuaded by Smart City's argument that the approach the Commission took in the *Waiver Denial Order* discourages amicable settlement of disputes going forward.⁷³ Doubtless, there are circumstances under which settlement agreements should be treated no differently than court orders. This is not one of those circumstances. It is in the public interest for BPR amounts to be as accurate as possible and to reflect only amounts reasonably relied upon.⁷⁴ A decision by a state court or agency is the most effective way to verify the accuracy of disputed amounts consistent with state law and intrastate tariffs and carriers' reliance on such amounts. Settlement amounts, without verification of consistency with applicable tariffs and state law, provide no assurances of accuracy and therefore do not demonstrate reasonable reliance. Moreover, our rules limiting BPR amounts to those collected by the March 31, 2012 deadline affect only pre-existing ICC disputes.⁷⁵ Thus, this limitation would not apply to, or discourage, future ICC settlements under the new regime adopted in the *USF/ICC Transformation Order*.⁷⁶

V. CONCLUSION

21. In conclusion, Smart City failed to present sufficient reason warranting reconsideration of the *Waiver Denial Order*.⁷⁷ Excluding disputed ICC amounts without a court or commission order, or other evidentiary support serves the public interest because it limits BPR amounts to those that a carrier had a reasonable expectation of recovering. In so doing, we avoid the risk that Smart City's BPR is

⁶⁸ Petition at 4.

⁶⁹ See *id.* (citing *In re Phenylpropanolamine (PPA) Products*, 460 F.3d 1217, 1227 (9th Cir. 2006) (*PPA Products*); *Aro Corp. v. Allied Witan Co.*, 531 F. 2d 1368, 1372 (6th Cir. 1976) (*Aro Corp.*); *D.H. Overmyer Co. v. Loflin*, 440 F. 2d 1213, 1215 (5th Cir. 1971) (*D.H. Overmyer*)).

⁷⁰ See *PPA Products*, 460 F.3d at 1227; *Aro Corp.*, 531 F. 2d at 1372; *D.H. Overmyer Co.*, 440 F. 2d at 1215.

⁷¹ Petition at 4.

⁷² *Id.* at 5.

⁷³ Petition at 4-5.

⁷⁴ *USF/ICC Transformation Order*, 26 FCC Red at 17982, para. 898 n.1745; see *Halo Order*, 29 FCC Red at 9961, para. 7 ("[A]ccurate BPR calculations are critical to the successful operation of the recovery mechanism.").

⁷⁵ See 47 CFR § 51.917(b)(7).

⁷⁶ As an alternative and independent basis for rejecting Smart City's argument that the "Commission's refusal to consider a settlement agreement in the absence of a court or commission order is irrational and unsound public policy," we find that Smart City failed to meet the procedural requirements for consideration of new arguments made in a petition for reconsideration. See 47 CFR § 1.106; Petition at 3-5. Smart City offers no explanation as to why it was previously unable to present this argument to the Commission, nor does it offer any basis on which we can find that consideration of this new argument is required in the public interest. See *id.* § 1.106(b)(2), (c), (p)(2).

⁷⁷ See 47 CFR § 1.106; 47 U.S.C. § 405(a).

inflated as the result of unverified ICC revenues which would be a burden on ratepayers and CAF ICC support. Accordingly, we deny Smart City's petition for reconsideration because, as discussed above, it relies on facts and arguments known to Smart City at the time of its petition for waiver, and reconsideration of those facts and arguments is not required by the public interest.

VI. ORDERING CLAUSES

22. 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 sections 1.3 and 1.106 of the Commission's rules, 47 CFR §§ 1.3, 1.106 the petition for reconsideration of Smart City Telecommunications LLC d/b/a Smart City Telecom filed on November 21, 2016 is DENIED.

23. 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