



June 30, 2016

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Via ECFS

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

**Re: WC Docket No. 10-90 et al.
Smart City Telecommunications LLC d/b/a Smart City Telecom
Petition for Limited Waiver of Section 51.917(b)(7)(ii), 2011 Rate-of-Return Carrier
Base Period Revenue
Supplement to Petition**

Dear Ms. Dortch,

Smart City Telecom (“Smart City” or the “Company”) hereby supplements its pending petition for limited waiver of Section 51.917(b)(7)(ii)¹ to address concerns raised in discussions with staff of the Wireline Competition Bureau (“Bureau”) of the Federal Communications Commission (“FCC” or “Commission”).

In discussions held with Wireline Competition Bureau (“Bureau”) staff,² Smart City was made aware of the Bureau’s concerns that the facts associated with the Petition do not fall squarely within the bounds of footnote 1745 in the *Transformation Order*³. This footnote provides guidance for carriers to seek waiver of Commission rules to include additional revenue in their Base Period Revenue (“BPR”) amounts to account for revenues billed for terminating switched access service provided in FY2011 but recovered after the March 31, 2012 cut-off “as the result of the decision of a court or regulatory agency of competent jurisdiction.”⁴ The footnote also states that the adjusted Baseline “will not include settlements regarding charges after the March 31, 2012 cut-off . . .”⁵

In the discussions, Bureau staff explained that in the circumstances outlined in the Petition, there was a “dispute” which did not involve a finding from a court or regulatory agency of competent jurisdiction. Further, there was a “settlement” which, according to the Bureau’s interpretation of this footnote, means that the revenues cannot be included in the BPR. The following seeks to address the Bureau’s concerns.

¹ See 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 March 27, 2013 (“Petition”).

² See Letter from John Kuykendall, Vice President, John Staurulakis, Inc. on behalf of Smart City to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90, et. al, filed June 29, 2016 (“June 29 Ex Parte Letter”).

³ See *Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161 (rel. Nov. 18, 2011) (“*Transformation Order*”) at n.1745, *pets. for review pending sub nom. In re: FCC 11-161*, No. 11-9900 (10th Cir. filed Dec. 8, 2011).

⁴ *Transformation Order* at n.1745.

⁵ *Id.*

1. The Commission Has Determined that Petitions Seeking Adjustments to BPR Amounts are not Required to Fall “Within the Four Corners” of Footnote 1745

In the *August 2014 Halo Waiver Order* and the *June 2015 Halo Waiver Order*⁶ (collectively, the “*Halo Waiver Orders*”), the Commission acted favorably upon petitions which sought to include revenues that were billed but not collected due to an access avoidance scheme and subsequent bankruptcy by Halo Wireless, Inc. In those decisions, the FCC examined footnote 1745 and found that in the *Transformation Order*, “the Commission explicitly contemplated that certain circumstances could justify adjustments to recover baseline amounts, and described some situations where adjustments may be appropriate.”⁷ The Commission then noted that the petitions under consideration “make similar, but not identical, requests to the requests described in this Guidance.”⁸ The Commission then stated,

The guidance applies to requests to include revenue in a carrier’s BPR that a carrier has recovered as a result of the order of a court or regulatory agency, but here Petitioners have not recovered the revenues that they seek to include in their BPR and, as a result of Halo’s bankruptcy protection, it is unlikely that they will. Accordingly, Petitioners’ ability to fall within the four corners of that guidance is at best delayed, and is ultimately uncertain.⁹

Accordingly, it is undisputed that footnote 1745 in the *Transformation Order* exists to provide “guidance” to petitioners where certain circumstances could justify adjustments to BPR amounts, that the situations set forth in the guidance are only “some situations” where adjustments may be appropriate and that petitions seeking such adjustments do not have to fall “within the four corners” of that guidance.

2. Similar to the Findings in the *Halo Waiver Orders*, “Good Cause” Exists for Granting Smart City’s Petition and Grant of the Petition is in the Public Interest

In the *Halo Waiver Orders*, the Commission found that in situations where petitions seeking adjustments to BPR amounts do not fall squarely within the guidance, waiver is appropriate where “good cause” exists and where grant would be in the public interest.¹⁰ Specifically, in the *August 2014 Halo Waiver Order*, the Commission found that in considering waivers seeking to amend recovery amounts, “it is necessary to balance the need to ensure accurate BPR calculations against the burdens associated with adjusting recovery amounts, including any potential burdens on end users and universal service funding.”¹¹ The Commission then determined that under the circumstances addressed in that decision, the “inclusion of the

⁶ See *Connect America Fund et al.*, WC Docket No. 10-90 *et al.*, Order, FCC 14-121 (rel. Aug. 7, 2014) (“*August 2014 Halo Waiver Order*”); *Connect America Fund et al.*, WC Docket No. 10-90 *et al.*, Order, DA 15-739 (rel. June 24, 2015) (“*June 2015 Halo Waiver Order*”).

⁷ *August 2014 Halo Waiver Order* at para. 16; *June 2015 Halo Waiver Order* at para. 15.

⁸ *August 2014 Halo Waiver Order* at para. 16.

⁹ *Id.*

¹⁰ *August 2014 Halo Waiver Order* at para. 15; *June 2015 Halo Waiver Order* at 14.*Id.* at para. 21.

¹¹ *August 2014 Halo Waiver Order* at para. 18.

revenues associated with unpaid amounts billed to Halo in the BPR calculations, coupled with appropriate safeguards, would produce more accurate recovery calculations.”¹²

In addressing objections raised by commenters, the Commission elaborated on its findings and noted that granting the petitions will “allow Petitioners’ BPRs to reflect actual service provided during FY 2011 to terminate actual calls bound for Petitioners’ customers.”¹³ The Commission then explained,

The Commission created the ICC recovery mechanism for the specific purpose of providing a revenue stream to replace, in part, ICC revenue reductions resulting from the ICC reforms adopted in the *Transformation Order*. For rate-of- return LECs, the recovery mechanism operates by comparing pre-reform ICC revenues with ICC revenue for each year of the transition. It would not serve the public interest if the ICC recovery mechanism provides insufficient revenue to Petitioners because of the combined impact of Halo’s access avoidance scheme and subsequent bankruptcy.¹⁴

The Commission also noted that when the agency adopted the *Transformation Order*, “it planned for carriers being, and anticipated that carriers would be, able to include revenues from the provision of actual intrastate access service in calculating their BPRs.”¹⁵ Similar to the petitioners in the *Halo Waiver Orders*, Smart City’s Petition satisfies the “good cause” standard, and grant of the Petition would be in the public interest.

Grant of the Petition is in the public interest as it will allow Smart City’s BPR to reflect not only amounts billed but also revenue collected for actual service provided during FY2011 to terminate actual calls which were originated by customers of Verizon Business (“Verizon”) and were bound for Smart City’s customers. In Smart City’s situation, not only were the intrastate access amounts associated with FY 2011 properly *billed* for service as was the case for the petitioners in the *Halo Waiver Orders*,¹⁶ but a majority of those amounts were then *collected* as part of the settlement process. Accordingly, grant of Smart City’s Petition would be in the public interest by allowing Smart City’s BPR to reflect intrastate access amounts associated with FY 2011 which were *billed and collected* for actual service during that time period. These amounts would have been included in the BPR except for the fact that the settlement occurred after March 31, 2012. On the other hand, denial of the waiver would frustrate the public interest in that strict application of the rules would disallow the inclusion of these revenues which were billed during FY2011 and collected less than nine months after the March 31, 2012 deadline.

Further, in the *June 2015 Halo Waiver Order*, the Commission found that the Petitioners demonstrated “good cause” for waiver and that “absent such waivers, the unique combination of

¹² *Id.* Smart City hereby certifies that it meets all of these “safeguards” except two which are not applicable: the safeguard which pertains to Halo’s bankruptcy proceeding and the safeguard that a court or regulatory agency of competent jurisdiction has made a finding. As explained below, because the parties were able to reach a settlement and partial payment was made, intervention by a court or regulatory agency of competent jurisdiction was not necessary.

¹³ *Id.* at para. 22.

¹⁴ *Id.*

¹⁵ *Id.* at para. 21.

¹⁶ *See, Id.* at para. 20.

these circumstances would result in significant reductions to Petitioners' ICC recovery mechanism revenues."¹⁷ The Commission then noted, "without some form of Commission action, such impact on recovery amounts would continue far into the future."¹⁸ The same is true for Smart City. Smart City estimates that if the waiver is not granted, the exclusion of the amount which it seeks to be included in its BPR would result in a cumulative negative effect of approximately \$750,000 over a five-year period. This negative impact would grow significantly as the ICC recovery mechanism, of which it should be a part, will continue for many years to come. Accordingly, "good cause" exists for grant of Smart City's Petition in order to rectify the significant reductions to Smart City's recovery mechanism revenues that has already occurred and prevent further reductions which will occur "far into the future" absent grant of this Petition.

3. The Existence of a "Dispute" Which Was Resolved Through a "Settlement" Does Not Justify Denial of the Petition

As explained in the *June 29 Ex Parte Letter*, the Bureau has raised concerns that the revenues that Smart City seeks to add to its BPR calculations were the result of a "dispute" which was "settled" and did not involve a court or regulatory agency of competent jurisdiction.¹⁹ The responses provided by the Smart City and its representatives in that meeting are summarized in the *June 29 Ex Parte Letter* and are incorporated herein by reference. The following provides additional information to address these concerns.

First, as explained above, pursuant to the *Halo Waiver Orders*, it is not necessary for waiver petitions that seek adjustments to BPR amounts fall squarely within the Commission's guidance. Instead, such petitions may be granted if "good cause" exists and where grant would be in the public interest. As demonstrated above, Smart City's Petition satisfies these criteria. Accordingly, although the amounts in dispute were not recovered as a result of a decision by a court or regulatory agency but instead as a result of a settlement, these slight variations from the Commission's guidance does not justify a denial of the Petition. In fact, the circumstances in this waiver are even more favorable to grant than the FCC envisioned in the guidance or that was provided to the petitioners in the *Halo Waiver Orders* in that Smart City successfully negotiated carrier payments and no court or regulatory agency had to be involved.

Second, as was the case with the petitioners in the *Halo Waiver Orders*, Smart City does not seek any monetary relief directly related to the billing dispute.²⁰ On the contrary, in Smart City's case, the billing dispute ended with the payment of the settlement amount and only those revenues that were the result of the settlement that pertained to intrastate terminating switched access associated with FY2011 have been included in the Petition's request for the adjustment to the Company's BPR.

Third, similar to the petitioners in the *Halo Waiver Orders*, Smart City diligently pursued the unpaid intrastate access revenue. In the *August 2014 Halo Waiver Order*, the Commission observed, "Petitioners' diligent pursuit of unpaid intrastate access revenue is part of the factual situation that we find persuasive in granting relief in this Order."²¹ The Commission then noted, "Petitioners have every incentive to include all amounts, intrastate access and otherwise, that are disputed between themselves and Halo in their bankruptcy claim."²² As demonstrated in

¹⁷ *June 2015 Halo Waiver Order* at para. 6 citing *August 2014 Halo Waiver Order* at para. 4.

¹⁸ *June 2015 Halo Waiver Order* at para. 6.

¹⁹ See *June 29 Ex Parte Letter* at 1.

²⁰ See, e.g., *August 2014 Halo Waiver Order* at para. 5.

²¹ *Id.* at n.29.

²² *Id.*

timeline showing the history of the dispute attached to the *June 20 Ex Parte*, since October 2010,²³ Smart City diligently pursued Verizon regarding the unpaid invoices which ultimately resulted in the settlement made in December 2012 in which Verizon “no longer contended that the minutes-of-use were VoIP” and paid an amount that was for “*originating and terminating switched access charges*.”²⁴

Fourth, Smart City respectfully disagrees with the Bureau’s assessment that the Commission’s guidance prohibits inclusion of revenues billed for terminating switched access service provided in FY2011 and collected after March 31, 2012 pursuant to a “settlement.” It is Smart City’s understanding that the statement in the guidance which prohibits “settlements regarding charges after the March 31, 2012 cut-off” from being included in the adjusted Baseline does not refer to *amounts collected through a settlement* that are associated *solely* with compensable traffic for actual service provided during FY2011 to terminate actual calls. Instead, it is our understanding that the reference to “settlements regarding *charges after* the March 31, 2012 cut-off” refer to charges other than revenue associated with compensable traffic for service provided during FY2011. We believe this interpretation to be consistent with the concept found in the fifth condition in the *Halo Waiver Orders* which prohibits any “interest, late payment fees, collection fees, or attorney fees” in the adjusted BPR “in order to ensure that BPR adjustments are limited to revenue associated with compensable traffic, and do not include other types of revenue.”²⁵

If the Commission, however, were to determine that in order to grant petitions seeking adjustments to BPRs, revenues recovered after the March 31, 2012 deadline must be a result of a court or regulatory agency of competent jurisdiction and cannot be collected pursuant to a “settlement,” as demonstrated herein, “good cause” exists and the public interest would be advanced by waiving such conditions in the circumstances in Smart City’s case where intervention from a court or regulatory agency was not necessary due to the existence of a settlement in which Verizon paid an amount that was for originating and terminating switched access charges.²⁶

Respectfully Submitted,

Smart City Telecommunications LLC d/b/a
Smart City Telecom



By: James Schumacher,

Vice President, Finance and Administration

June 30, 2016

²³ See Letter from John Kuykendall, Vice President, John Staurulakis, Inc. on behalf of Smart City to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90, et. al, filed June 20, 2016 (“*June 20 Ex Parte Letter*”) at Attachment 2.

²⁴ *June 20 Ex Parte Letter* at 2 citing Letter from John Kuykendall, Vice President, John Staurulakis, Inc. on behalf of Smart City to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90, et. al, filed April 21, 2015.

²⁵ *August 2014 Halo Waiver Order* at para. 23.

²⁶ See Petition at p.5, n.9 (seeking waiver of this condition “to the extent necessary”).