DOCKET FILE COPY ORIGINAL

FCC MAIL SECTION

JAN 12 10 20 AM '98

DISP

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
	)	
	)	

MEMORANDUM OPINION AND ORDER

Adopted: January 2, 1998 Released: January 2, 1998

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On September 30, 1997, the Pennsylvania Public Utility Commission ("Pennsylvania Commission") submitted a request for waiver of the definition of "rural area" contained in section 54.5 of the Commission's rules.[1] This definition is used to determine which health care providers are eligible to participate in the universal service support program[2] and also partially determines the discount rate for schools and libraries that are eligible for universal service support.[3] We conclude that the Pennsylvania Commission has not demonstrated good cause justifying a waiver. Accordingly, we deny the Pennsylvania Commission's request.

II. BACKGROUND

2. With respect to support mechanisms for health care providers, section 254(h)(1)(A) of the Communications Act of 1934, as amended ("the Act"), requires the Commission to adopt a definition of "rural area" both to determine the location of health care providers eligible for universal service support, and to determine the "comparable rural areas" used to calculate the credit or reimbursement to a telecommunications carrier that provides

[1] 47 C.F.R. § 54.5.

[2] *See* 47 C.F.R. § 54.601(a)(4).

[3] *See* 47 C.F.R. § 54.505(b)(3).

services to those health care providers at reduced rates.[4] The Commission, adopting the approach recommended by the Federal-State Joint Board on Universal Service ("Joint Board"), defined a "rural area" as one that is located in a non-metropolitan county, as classified by the Office of Management and Budget's ("OMB's") list of Metropolitan Statistical Areas ("MSAs"), or is identified by the Goldsmith Modification published by the Office of Rural Health Policy of the U.S. Department of Health and Human Services ("ORHP/HHS").[5] The Commission agreed with the Joint Board's conclusion that the MSA/Goldsmith approach is more easily used and administered than other proposals suggested for identifying rural areas.[6]

3. In addition, section 254(h)(1)(B) mandates that discounts for eligible schools and libraries must be "appropriate and necessary to ensure affordable access to and use of" the services designated for support.[7] Building on the Joint Board's recognition that schools and libraries in high cost areas will confront relatively higher barriers to maintaining communications links, the Commission identified high cost schools and libraries as those located in rural, as opposed to urban, areas for purposes of determining discount amounts.[8] The Commission concluded that, for purposes of discounts for telecommunications providers serving eligible schools and libraries, "rural area" is defined as non-metropolitan counties, as measured by the OMB's MSA list, and census blocks or tracts in metropolitan counties identified by the Goldsmith Modification.[9]

III. POSITION OF PARTIES

4. The Pennsylvania Commission contends that applying these rules will have an "adverse impact" on the schools, libraries and health care providers located in nine Pennsylvania counties.[10] Specifically, the Pennsylvania Commission argues that, although

---

[4] 47 U.S.C. § 254(h)(1)(A). *See also* Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Report and Order*, 12 FCC Rcd at 9113 (1997) (Universal Service Order).

[5] 47 C.F.R. § 54.5. *See also* Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Recommended Decision*, 12 FCC Rcd at 441 at 441 (Recommended Decision).

[6] Universal Service Order, 12 FCC Rcd at 9115-16.

[7] 47 U.S.C. § 254(h)(1)(B). *See also* Universal Service Order, 12 FCC Rcd at 9035.

[8] Universal Service Order, 12 FCC Rcd at 9042.

[9] 47 C.F.R. § 54.505(b)(3)(ii).

[10] Pennsylvania Commission petition at 1. The counties at issue are: Butler, Carbon, Columbia, Fayette, Lebanon, Perry, Pike, Somerset, and Wyoming. Pennsylvania Commission petition at 3.

these counties do not qualify as "rural" under the Commission's rules, they have a "strong 'rural' character and nature."[11] The Pennsylvania Commission cites various factors to demonstrate that a waiver is necessary, including, relative to 24 Pennsylvania counties classified as urban under the Commission's rules: a significantly lower primary care physician-to-population ratio; a significantly higher proportion of residents living within designated areas of medical underservice; and significantly fewer hospitals and hospital beds.[12]

5. In addition, the Pennsylvania Commission attaches to its petition an "Interim Report" prepared by the Pennsylvania Universal Telephone Service Task Force ("Pennsylvania Task Force").[13] This report presents an analysis of the fiscal impact of (1) providing universal service support to the public or non-profit health care providers located in the nine counties at issue and (2) increasing by ten percent the discount percentage eligible schools and libraries located in these counties would receive if they were designated as rural.[14] Based on its analysis, the Pennsylvania Task Force concluded that including the 46 health care providers located in the nine counties at issue would cost $475,087.00, or less than 2/10 of one percent of the $400 million dollar cap imposed on the health care portion of the universal service program.[15] The Pennsylvania Task Force also concluded that the additional ten percent discount -- the most a school's discount can increase by reclassifying its location as rural -- would result in approximately $504,955.00 of additional support for the 317 schools

---

[11] Pennsylvania Commission petition at 1.

[12] Pennsylvania Commission petition at 3. By the phrase, "designated areas of medical underservice," we interpret the Pennsylvania Commission to mean areas reporting demographics indicative of below-average medical care.

[13] Interim Report Concerning the Definition of Rural Areas Prepared by the Subcommittee on Rural Health Care and Schools and Libraries, Pennsylvania Universal Telephone Service Task Force, adopted July 14, 1997 ("Pennsylvania Interim Report").

[14] *See* Pennsylvania Interim Report at 5-7.

[15] The Pennsylvania Task Force determined that there are 46 eligible health care providers located in the nine counties at issue. The Pennsylvania Task Force calculated the distance from the health care provider to the city with a population of 50,000 or more nearest to each health care provider; identified the incumbent local exchange carrier (LEC) for each health care provider and for each city with a population of 50,000 or more; calculated the maximum allowable distance for each health care provider; compared the rates for T-1 service offered by each incumbent LEC serving the health care provider in the nine counties with the rates for T-1 service available in the cities with populations of 50,000 or more. Pennsylvania Interim Report at 5-6. We note that the Pennsylvania Task Force did not provide specific prices indicating that the prices of a T-1 in these nine counties are similar to rates in rural areas in the state. Rather, in describing its method, the Pennsylvania Task Force states generally:"[f]or example, the local channel charge for a T-1 is higher in rural areas than in urban areas." *Id.* at 6.

located in the nine counties.[16] The Pennsylvania Task Force also concluded that classifying the 55 libraries located in the nine counties would cost an additional $39,600.00.[17] Based on its calculations, the Pennsylvania Task Force concluded that designating the schools and libraries located in the nine counties would cost $544,555.00, or less than 3/100 of one percent of the $2.25 billion dollars of support that will be available for eligible schools and libraries.[18]

IV. DISCUSSION

6. Under section 1.3 of our rules, the Commission may waive any provision of its rules or orders if "good cause" is shown.[19] The standard for good cause requires the petitioner to demonstrate that special circumstances warrant deviation from the rule and that such a deviation would better serve the public interest than the general rule.[20] The Court of Appeals for the D.C. Circuit has stated that a waiver may permit a more rigorous adherence to an effective regulation by allowing the agency to take into account considerations of hardship, equity, or more effective implementation of overall policy on an individualized basis, while also emphasizing that "[a]n applicant for waiver faces a high hurdle even at the

---

[16] Pennsylvania Interim Report at 6. The Pennsylvania Task Force cited the Commission's estimate that schools nationwide will spend $3.0 billion annually to purchase the technology services eligible for discounts. The Pennsylvania Task Force assumed that the weighted national average of discounts is 60 percent, and, thus, concluded that discounts for schools and libraries will cost $1.8 billion. The Pennsylvania Task Force divided this amount by 113,000, its estimate of the total number of schools nationwide, to compute an approximate discount for each school of $15,929.00. Using this number, the Pennsylvania Task Force determined that the maximum additional discount that would be available by reclassifying the 317 schools in the nine counties would be ten percent of the discount per school, or $1,592.92. Multiplying this number by 317, the number of schools in the nine counties, the Pennsylvania Task Force estimated that designating these counties as rural would cost approximately $504,955.00 in universal service support. *Id.*

[17] Pennsylvania Interim Report at 7. The Pennsylvania Task Force estimated that libraries nationwide will spend $180 million annually to purchase services eligible for discounts. The Pennsylvania Task Force also estimated that the national weighted average of discounts for libraries is 60 percent and, thus, calculated the cost of discounts on eligible services to be $108 million. The Pennsylvania Task Force then divided this number by the total number of libraries nationwide (15,000) and determined that $7,200.00 is the approximate discount per library. Assuming that a library's discount would increase by ten percent if a library was reclassified from urban to rural, the Pennsylvania Task Force determined that $720.00 is the average amount of support that each such library would gain. Finally, the Pennsylvania Task Force multiplied $720.00 by the number of libraries in the nine counties at issue (55) to calculate the approximate cost of the requested reclassification at $39,600.00. *Id.*

[18] Pennsylvania Interim Report at 7.

[19] 47 C.F.R. § 1.3.

[20] *See Northwest Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), cert. denied, 409 U.S. 1027 (1972) (*WAIT Radio*).

starting gate."[21] In *WAIT Radio*, the court explained that "[t]he very essence of a waiver is the assumed validity of the general rule. . . ."[22] Therefore, the test for whether the Pennsylvania Commission may be granted a waiver is whether it has shown such special circumstances that warrant deviation from our definition of "rural area." We conclude that the Pennsylvania Commission has failed to make this showing.

7. The identification of a rural area under our rules is a two-part process. First, a school, library or health care provider must determine whether it is located in a metropolitan county, as defined by the MSA lists published by OMB.[23] Second, if it is located in a metropolitan county, a school, library or health care provider may nevertheless be located in a rural area if its location falls within one of the rural pockets within metropolitan counties identified by the Goldsmith Modification list used by ORHP/HHS.[24] The Commission, based on the Joint Board's recommendation, found that adopting the MSA/Goldsmith Modification approach to identifying rural areas is "consistent with the Joint Board's recommendation and congressional intent to adopt a mechanism that includes the largest reasonably practicable number of rural health care providers, that because of their location, are prevented from obtaining telecommunications services at rates available to urban customers."[25] We remain convinced that the MSA/Goldsmith approach is the best method of identifying "rural areas" currently available.

8. The Pennsylvania Commission's waiver petition fails to meet the "good cause" standard. The evidence submitted by the Pennsylvania Commission in support of its request, including significantly fewer hospitals and hospital beds and a lower physician-to-resident ratio in the nine counties relative to urban areas in Pennsylvania, does not demonstrate that a waiver of our rules governing universal service support for telecommunications services is

---

[21] *WAIT Radio* at 1157.

[22] *Id.* at 1158.

[23] 47 C.F.R. § 54.505(b)(3)(ii); 47 C.F.R. § 54.601(a)(4). *See* Universal Service Order, 12 FCC Rcd at 9114 n.1698 (OMB, with assistance from the Bureau of Census, designates counties as metropolitan or non-metropolitan in character based on the size of the largest urban aggregation in a county and patterns of commuting between counties)

[24] 47 C.F.R. § 54.505(b)(3)(ii); 47 C.F.R. § 54.601(a)(4). *See* Universal Service Order, 12 FCC Rcd at 9115 n.1700 (the Goldsmith Modification identifies small town and open-country parts of large metropolitan counties by census tract or block-numbered area, as defined by the Bureau of Census).

[25] Universal Service Order, 12 FCC Rcd at 9116 *citing* Recommended Decision, 12 FCC Rcd at 441 and S. Rep. No. 230, 104th Cong., 2d Sess. at 132 and 133. We note that the Advisory Committee on Telecommunications and Health Care also recommended that the Commission use the ORHP/HHS method to identify rural areas. *See* Universal Service Order, 12 FCC Rcd at 9114.

justified.[26] Moreover, a showing that the rates charged for telecommunications services in the nine counties exceed those charged in other non-rural areas, without more, would not warrant a grant of a waiver from the Commission's rules. We note that schools, libraries and health care providers in the nine counties will benefit from universal service support despite their location in non-rural areas. To the extent that health care providers in these counties are unable to obtain toll-free access to the Internet, they are eligible to benefit from support designed to ensure such access.[27] With respect to the schools and libraries support mechanism, the schools and libraries in the nine counties at issue are already entitled to discounts, which are determined based on economic need as well as location in a rural area.[28] We conclude that the evidentiary showing presented by the Pennsylvania Commission does not establish the "special circumstances" that would justify a waiver of the Commission's general rule.

9. We also note that the Commission set forth clear guidelines for determining whether, and to what extent, rural health care providers and schools and libraries are eligible for support.[29] These guidelines are designed to comply with the statutory mandate that universal service mechanisms be "specific, predictable and sufficient."[30] The Pennsylvania Commission, by presenting the calculations of the Pennsylvania Task Force included with the Pennsylvania Commission's petition, provide estimates of the impact on universal service support if its waiver request concerning the nine Pennsylvania counties were granted. This analysis, however, does not take into account the impact on universal service support if other state commissions requested similar relief for non-rural counties in their states that have rural characteristics. Granting such waiver petitions would undermine the Commission's method

[26] We note that the Joint Board rejected an approach under which the Commission would consider specific factors -- such as the ratio of physicians to residents in an area -- to determine whether the health care providers in a particular area should be eligible to benefit from universal service support. *See* Recommended Decision, 12 FCC Rcd at 439 ("employing the methods recommended here for determining rural areas, we see no need to consider other factors such as number of doctors in the community or driving distance from the hospital in formulating a definition of rural area.").

[27] *See* Universal Service Order, 12 FCC Rcd at 9159 (concluding that each health care provider that cannot obtain toll-free access is entitled to receive a limited amount of toll-free access).

[28] *See* Universal Service Order, 12 FCC Rcd at 9050 (adopting discount matrix showing discounts ranging from 20 to 90 percent fulfills statutory obligation to ensure schools and libraries receive supported services at rates less than those charged to other parties).

[29] For example, the Commission established a matrix for determining the discount rate for which a school or library is eligible, based on two factors: economic need and location in a rural area.

[30] Universal Service Order, 12 FCC Rcd at 9141 (*citing* 47 U.S.C. § 254(b)(5)) and 9054-55.

for ensuring that universal service support mechanisms are specific, predictable and sufficient.[31]

10. It is THEREFORE ORDERED, pursuant to section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i) 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 Pennsylvania Commission's request for waiver IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

A. Richard Metzger, Jr.
Chief, Common Carrier Bureau

[31] *See WAIT Radio* at 1157, 1159.