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March 20, 2015

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VIA HAND-DELIVERY

Accepted / Filed

MAR 20 2015

**Federal Communications Commission
Office of the Secretary**

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *In the Matter of Universal Service High-Cost Filing Deadlines; Petition of Virgin Islands Telephone Corp. d/b/a/ Innovative Telephone for Waiver of the National Exchange Carrier Association Adjustment Period.* WG Docket No. 08-71

DOCKET FILE COPY ORIGINAL

Dear Ms. Dortch:

On behalf of Virgin Islands Telephone Corp. d/b/a Innovative Telephone ("Innovative"), enclosed please find the original and one copy of Innovative's Application for Review for filing in the above-referenced proceeding. If you have any questions about the enclosed application, please do not hesitate to contact me.

Sincerely yours,

/s/ Bennett L. Ross

Bennett L. Ross

BLR:rw

cc: Carol E. Matthey

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ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
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Universal Service High-Cost Filing)
Deadlines)
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Petition of Virgin Islands Telephone)
Corp. d/b/a Innovative Telephone for)
Waiver of the National Exchange)
Carrier Association Adjustment Period)

WC Docket No. 08-71

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Federal Communications Commission
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**VIRGIN ISLANDS TELEPHONE CORP. D/B/A INNOVATIVE TELEPHONE'S
APPLICATION FOR REVIEW**

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March 20, 2015

Table of Contents

I.	INTRODUCTION AND SUMMARY	1
II.	BACKGROUND	4
III.	ARGUMENT	7
IV.	CONCLUSION.....	16

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**VIRGIN ISLANDS TELEPHONE CORP. D/B/A INNOVATIVE TELEPHONE'S
APPLICATION FOR REVIEW**

I. INTRODUCTION AND SUMMARY

Pursuant to 47 C.F.R. § 1.115, the Virgin Islands Telephone Corp. d/b/a Innovative Telephone (“Innovative”) respectfully seeks Commission review of the February 24, 2015 Order of the Wireline Competition Bureau (“Bureau”) denying Innovative’s petition requesting a waiver of the National Exchange Carrier Association’s (“NECA”) rolling 24-month adjustment period to ensure that accurate loop counts are used in calculating Innovative’s 2011 High Cost Loop Support (“HCLS”).¹

In denying the requested relief, the Bureau committed serious errors that the Commission must remedy. First, the Bureau required that Innovative show as a condition to a waiver that its existing universal service support “is inadequate” – a showing that other carriers seeking and receiving a waiver have not been not required to make. Holding Innovative to a different waiver standard than other similarly situated carriers is arbitrary and capricious.

¹ *In the Matter of Universal Service High-Cost Filing Deadlines*, WC Docket No. 08-71, Order, DA 15-247 (rel. Feb. 24, 2015) (“Order”).

Furthermore, even if the adequacy of Innovative's existing support were a valid consideration, the Bureau ignored the Commission's recent *Section 706 Report*, which confirms the challenges that Innovative faces in deploying service in the U.S. Virgin Islands.² According to the Commission, the population in the U.S. Virgin Islands without access to fixed 25 Mbps/3 Mbps broadband is *more than two and half times* the percentage of the total U.S. population that lacks such access. And, 72 percent of the population in rural areas of the U.S. Virgin Islands currently lacks access to "advanced telecommunications capability" as recently defined by the Commission, well above corresponding levels in rural areas on the mainland. Under the circumstances, the Bureau's view that Innovative does not face "further strain" in serving its customers is belied by the Commission's own data.

Second, the Bureau disregarded Commission precedent that warranted granting Innovative a waiver. In numerous decisions, the Commission has granted waivers to permit the consideration of information submitted on an untimely basis in calculating a carrier's universal service support. Innovative met the standard for a waiver articulated in those decisions because it filed corrected loop counts three days after discovering the error and took steps to ensure the accuracy of its loop data on a going-forward basis. The Bureau did not address, or even attempt to distinguish, Commission precedent that supported Innovative's waiver request.

Third, the Bureau improperly dismissed the public interest benefits of calculating Innovative's 2011 HCLS based on accurate rather than inaccurate loop counts. The Commission

² *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, 2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment, FCC 15-10, GN Docket No. 14-126, ¶¶ 79 & 82, Tables 4 & 6 (rel. Jan. 29, 2015) ("*Section 706 Report*").

previously has stressed the importance of accurate data in implementing the programs it oversees, and the Commission has a duty to consider accurate rather than inaccurate data.

The Bureau's only response – that Innovative was to blame for filing the inaccurate loop data – is no response at all. Many parties seeking a waiver of the Commission's universal service rules are at fault to one degree or another; otherwise they would not need a waiver. And, denying Innovative a waiver because of its alleged "negligence" in filing incorrect loop count data ignores the significant financial difficulties faced by Innovative during this time period, which had to endure the involuntary bankruptcy of its parent company and the lack of financial resources due to the malfeasance of its former owner. To deny a waiver under such circumstances would be unduly harsh and inequitable.

Fourth, the Bureau's decision to deny Innovative a waiver is predicated on a misreading of the Commission's rules. The Bureau insists that only HCLS disbursements received in 2011 are properly included in a price cap carrier's baseline frozen support amount; because Innovative seeks adjustments that would not be disbursed in 2011, the Bureau theorizes that these adjustments are "specifically excluded" by the Commission's rules.

However, contrary to the Bureau's theory, Section 54.312(a)(1) of the Commission's rules defines baseline frozen support as the amount disbursed "*for 2011*," not "*in 2011*." Here, Innovative seeks increased baseline frozen support of \$679,032 annually, which consists of: (i) \$565,860 in high cost support for 2011 and annual frozen CAF support based on accurate loop counts for January through October 2011; and (ii) \$113,172 in increased annual frozen CAF support based on accurate loop counts for November and December 2011. Because the additional support that Innovative seeks is unquestionably "*for 2011*," the adjustments requested by Innovative are entirely consistent with – and are not foreclosed by – the Commission's rules.

Finally, even if the Bureau's reading of the Commission's rules were correct, which is not the case, Innovative is entitled to at least a \$113,172 increase in its frozen support that results from calculating Innovative's baseline support amount using accurate loop counts for November and December 2011. Innovative corrected these loop counts *within the rolling 24-month adjustment period*, and NECA agreed to use the corrected November and December 2011 loop counts in calculating Innovative's 2011 HCLS by January 31, 2012. That this additional support "was not disbursed in calendar year 2011" as a result of the actions or inactions of NECA or USAC is not a valid basis for denying Innovative support to which it is lawfully entitled.

Accordingly, the Commission should grant Innovative's application for review of the *Order* and waive NECA's 24-month adjustment period. Good cause exists for the waiver because it would ensure that the company's universal service support is calculated consistent with the Commission's rules and is based on accurate rather than inaccurate loop counts. A waiver would result in additional funding that Innovative would use to advance the Commission's broadband goals by ensuring that "advanced telecommunications capability" is deployed on a reasonable and timely basis and by helping to close the digital divide in the U.S. Virgin Islands, a result that would plainly be in the public interest.

II. BACKGROUND

HCLS distributions begin in January of a funding year and reoccur monthly thereafter for the entire year. NECA estimates the size of a carrier's HCLS in October of the year immediately

preceding the funding year.³ The estimate is based on historical year-end data from two years before the funding year and can be recalculated over a 24-month adjustment period.⁴

As the Bureau correctly notes, NECA employs a “rolling” adjustment window: as each calendar month in a funding year passes, the corresponding month two years prior closes for purposes of data adjustments. *Order* ¶ 2. Specifically, “[c]ompany-submitted USF data adjustments will only be accepted to the extent that any months in the corresponding cost study period are open to accept adjustments for settlements.”⁵ Thus, for example, at the end of July 2011, the July 2009 data month was no longer available for adjustment.

In this case, Innovative’s 2011 HCLS support is based on its year-end 2009 data, which it filed with NECA in July 2010. At the time of its submission and for more than a year afterward, Innovative had no reason to believe that the data it had submitted was inaccurate. However, in November 2011, Innovative implemented a new physical facilities database that was developed to allow the company to determine more accurately the number of loops in service.⁶

By comparing the contents of the new database with a previous billing records database upon which Innovative historically relied to determine loop count data, Innovative determined that its 2009 loop counts submitted to NECA were inaccurate. Specifically, Innovative had

³ “Overview and Analysis of 2010 USF Data Submission,” National Exchange Carrier Association, Inc., at 1 (2010) (“NECA 2010 USF Analysis”); *see also* 47 C.F.R. § 36.611.

⁴ “Update on High Cost Loop Support Payments,” Letter from NECA to NECA Member Companies, at Attachment, “Change in Procedures Regarding Retroactive USF Data Submissions” (Nov. 12, 2004) (“NECA 2004 Letter”). NECA’s 24-month adjustment period is the product of a contractual agreement between NECA and its member companies, in place since NECA began operations in the early 1980s. *See* Report of the National Exchange Carrier Association, Inc., WC Docket No. 05-29, at 3 (Jan. 28, 2005).

⁵ NECA 2004 Letter.

⁶ 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”), Attachment A, Declaration of Donald E. Parrish at ¶ 5 (“Parrish Declaration”).

erroneously included 1,805 loops that were related to non-switched wideband services, which, under NECA procedures, must be excluded in loop and access line count data submitted for USF data collection and NECA pooling purposes.⁷ This error resulted in Innovative's line counts being overstated, which "effectively lowered Innovative's average cost per loop and reduced the amount of HCLS it would otherwise have received in 2011 by \$565,860." *Order* ¶ 4.

When this error was discovered on November 14, 2011, Innovative promptly alerted NECA that the loop count data previously submitted for calendar year 2009 was inaccurate and that Innovative would be submitting corrected data promptly. On November 17, 2011, Innovative filed with NECA its corrected loop count data as of December 2009, along with supporting documentation. Innovative also took steps beyond the development of a new physical facilities database to ensure the accurate reporting of loop count data on a going forward basis.⁸

Because they were timely filed within the 24-month adjustment period, NECA agreed to include corrected November and December 2011 loop counts in calculating Innovative's 2011 HCLS. As reflected in an email from Robert Knoble of NECA dated December 13, 2011, NECA indicated that "[t]hese revisions will be processed at the end of January [2012], then sent to USAC."⁹ However, for whatever reason, that did not happen, as Innovative's frozen baseline support amount is based upon the inaccurate loop counts for November and December 2011 that NECA agreed to correct because they were made within the 24-month adjustment period. The failure to include accurate loop count data for November and December 2011 in calculating

⁷ See "Loop Count Guide for USF, Cost Study, and Cost Company Pool Reporting," NECA, Version 30 (8/10/2010).

⁸ Parrish Declaration ¶¶ 8-9.

⁹ 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, Attachment (filed Sept. 11, 2014).

Innovative's 2011 HCLS – whether caused by NECA or USAC – occurred through no fault of Innovative but has resulted in Innovative's frozen baseline support amount being understated by \$113,172 annually.

III. ARGUMENT

The Bureau concluded that Innovative had not demonstrated good cause for a waiver because the company failed to show “that the frozen support it is receiving is inadequate.” *Order* ¶ 6. However, by requiring Innovative to make this showing, the Bureau placed a heightened burden on Innovative that other carriers seeking and receiving a waiver of the Commission's universal service rules have never been required to meet.

The Commission is routinely confronted with waiver requests by carriers seeking additional universal service support based on information that was not filed on a timely basis.¹⁰ In deciding whether to grant these requested waivers, the Commission historically has not inquired into the adequacy of the high-cost support the carrier would receive absent a waiver and has not mandated that the carrier demonstrate that such support was “inadequate” as a condition to receiving a waiver.

It is arbitrary and capricious to hold Innovative to a different standard for obtaining a waiver than other carriers, as the *Order* does.¹¹ As the D.C. Circuit has explained, an agency

¹⁰ See, e.g., *Petitions for Waiver of Universal Service High-Cost Filing Deadlines et al.*, Order, 26 FCC Rcd 4908 (Wireline Comp. Bur. 2011) (granting a request to waive the section 54.802(a) line count filing deadline for an entity that filed eight business days after the deadline); *Federal-State Joint Board on Universal Service, Westgate Communications LLC d/b/a Weavtel, Petition of Waiver of the Section 54.903 Interstate Common Line Support Reporting Date*, Order, 23 FCC Rcd 12797 (Wireline Comp. Bur. 2008) (granting the request to waive the section 54.903(a) projected data reporting deadline for an entity that filed its projected data almost three months after the filing deadline); *Petitions for Waiver of Universal Service High-Cost Filing Deadlines et al.*, Order, 25 FCC Rcd 843 (Wireline Comp. Bur. 2010) (granting requests to waive various high-cost filing deadline rules for entities that made untimely filings).

¹¹ *Etelson v. OPM*, 684 F.2d 918, 926 (D.C. Cir. 1982).

acts arbitrarily and capriciously when it “applies different standards to similarly situated entities and fails to support this disparate treatment with a reasoned explanation and substantial evidence in the record.”¹²

Furthermore, even if the adequacy of Innovative’s current level of frozen support were properly an issue in considering the merits of its waiver request, the Commission’s recent Section 706 Report makes plain the challenges that Innovative faces in serving customers “absent waiver or recalculation of frozen CAF support.” *Order* ¶ 6. Based on the Commission’s data, 45 percent of the population in the United States Virgin Islands lacks access to fixed 25 Mbps/3 Mbps broadband, as compared to 17 percent of the U.S. population.¹³ This lack of access to broadband is particularly acute in rural areas of the United States Virgin Islands where, according to the Commission, 72 percent of the population lacks such access, as compared to 53 percent of the U.S. population overall.

Under the circumstances, denying Innovative’s waiver petition would be counter-productive to the Commission’s efforts to ensure that “advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion,” 47 U.S.C. § 1302(b), and to close the “digital divide” (a problem the Commission concluded is “one of supply, not demand”).¹⁴ As the Commission has acknowledged, the CAF is an integral part of its initiatives to “increas[e] broadband investment and promot[e] competition to Americans in unserved and underserved areas”¹⁵ If the Commission were to grant the requested waiver, Innovative would receive increased annual support in the amount of \$679,032, which would be used to

¹² *Burlington N. & Santa Fe Ry. Co. v. Surface Transp. Bd.*, 403 F.3d 771, 777 (D.C. Cir. 2005).

¹³ *Section 706 Report*, ¶¶ 79 & 82, Tables 4 & 6.

¹⁴ *Id.* ¶ 5.

¹⁵ *Id.* ¶ 17.

“establish a framework to ensure a basic level of [broadband] service to be available” to all residents of the U.S. Virgin Islands, “while at the same time working to provide access to advanced services.”¹⁶ That granting the requested waiver would help advance the Commission’s broadband deployment objectives underscores its public interest benefits, which the Bureau ignored.

In denying the requested waiver, the Bureau also ignored Commission precedent cited in Innovative’s petition in which the agency granted a waiver in order to allow the consideration of untimely data in calculating a carrier’s universal service support. In those cases, the Commission relied upon the fact that the carrier filed the required data or certifications promptly after the filing deadline and took steps to ensure that such filings are made on a timely basis going forward.¹⁷

Here, after discovering that it had submitted inaccurate loop count data, Innovative filed corrected data three days later. Additionally, Innovative implemented a new facilities database and revised its internal procedures to ensure the timely filing of accurate loop count data on a going-forward basis. Thus, granting Innovative a waiver would be entirely consistent with Commission precedent, which the Bureau did not address or even attempt to distinguish.¹⁸

¹⁶ *Id.* ¶ 54.

¹⁷ See, e.g., *Petitions for Waiver of Universal Service High-Cost Filing Deadlines*, Order, 25 FCC Rcd 843, ¶ 22 (WCB 2010) (granting requests for waiver of various high-cost universal service support filing deadlines); *NPCR, Inc. Petition for Waiver of Section 54.802(a) of the Commission’s Rules*, Order, 22 FCC Rcd 560 (2007) (same); see also *Petitions for Waiver of Universal Service High-Cost Filing Deadlines, Flat Rock Telephone Co-Op, Inc. (SAC #341012) Petition for Waiver of Section 54.301(e)(1) Filing Deadline for Submission of True-Up Data for Local Switching Support for a Rural Incumbent Local Exchange Carrier, et al.*, Order, 25 FCC Rcd 4637 (Wireline Comp. Bur. 2010).

¹⁸ Because NECA’s 24-month adjustment period is applied on a rolling basis, there is no actual filing deadline that Innovative missed. *Order* ¶ 2. Thus, despite the Bureau’s claim otherwise, granting Innovative a waiver would not “be inconsistent with the Commission’s

The requested waiver also is in the public interest by ensuring that Innovative's frozen support is based on accurate rather than inaccurate loop counts. The Bureau does not dispute this public interest benefit, which is not surprising given that the Commission repeatedly has emphasized the importance of accurate data in implementing programs it oversees.¹⁹ This is particularly true in the context of the federal universal service program, since the principles underlying that program as specified in 47 U.S.C. § 254(b) will not be achieved if universal service funding is calculated based on inaccurate data that results in less support than would otherwise be warranted.

As the Commission has recognized in other contexts, the agency has "a well-established duty under the Administrative Procedure Act ('APA') to 'analyze . . . new data' when faced with existing data that 'are either outdated or inaccurate.'"²⁰ Consistent with its APA obligations, the Commission consistently has relied on updated, accurate data whenever possible. For example, for universal service purposes, the Bureau has found that "[t]he public interest is served by

(footnote cont'd.)

recent decision to enforce high-cost filing deadlines strictly and reduce support for late filings." *Order* ¶ 7 (citing *Connect America Fund; ETC Annual Reports and Certifications; Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) from Obsolete ILEC Regulatory Obligations that Inhibit Deployment of Next-Generation Networks*, *Order*, 29 FCC Rcd 15644 (2014)).

¹⁹ See, e.g., *Structure and Practices of the Video Relay Service Program*, Declaratory Ruling, *Order and Notice of Proposed Rulemaking*, 25 FCC Rcd 6012, ¶ 14 (2010) ("Accurate call data are essential to ensuring the integrity of the [Video Relay Service] Fund"); *Bell Atlantic/NYNEX Merger Order Performance Monitoring Reports*, 14 FCC Rcd 7485, ¶ 2 (1999) (granting waiver to extend the time for filing performance data, recognizing "the critical importance of filing accurate data . . ."); *Commission Requirements for Cost Support Material To Be Filed With January 1, 1990, Access Tariff Revisions*, 4 FCC Rcd 7204, ¶¶ 13-19 (1989) (granting waivers of tariff data filing requirements because of the importance of the Commission having "accurate data").

²⁰ *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd 6567, ¶ 138 (2014) (citing *Dow Agrosciences LLC v. Nat'l Marine Fisheries Service*, 707 F.3d 462, 473 (4th Cir. 2013)).

ensuring accurate data is used in necessary computations, regardless of the extent of support reduction or increase.”²¹

Just last year, the Commission granted two waiver petitions allowing carriers to include in their recovery calculations funds they were unable to collect from Halo Wireless; in so doing, the Commission found that the waiver would serve the public interest because it would result in the carriers’ Base Period Revenue reflecting “actual service provided during FY 2011 to terminate actual calls bound for Petitioners’ customers.”²² The same rationale applies here – granting the requested waiver will ensure that Innovative’s frozen baseline support amount reflects actual loops in service used to provide actual switched services to Innovative’s customers.

While not disputing the Commission’s legal duty to use and policy preference for accurate data, the Bureau asserts that the filing of inaccurate loop count data was the result of Innovative’s “own negligence” – an assertion that is both unfounded and unfair. *Order* ¶ 7. As a threshold matter, many parties seeking a waiver are at fault to one degree or another; otherwise, they would not need a waiver in the first place. The very purpose of a waiver is to allow the Commission to overlook such fault when “the particular facts make strict compliance inconsistent with the public interest.”²³ Indeed, the Commission would rarely grant a waiver if

²¹ *Connect America Fund; High-Cost Universal Service Support*, 27 FCC Rcd 12106, ¶ 4, n.9 (2012) (granting request for expedited waiver to correct a carrier’s study area boundaries that were used in the regression analysis that established “benchmarks” for high cost loop support); *Connect America Fund; High-Cost Universal Service Support*, 27 FCC Rcd 11075, ¶ 4, n.9 (2012) (same).

²² *Connect America Fund; High-Cost Universal Service Support*, Order, FCC 14-121, ¶ 22 (rel. Aug. 7, 2014).

²³ *See, e.g., Verizon Communications Inc., Petition for Waiver of Section 54.802(a) of the Commission’s Rules*, Order, 21 FCC Rcd 10155, ¶ 6 (WCB 2006).

the fact that the party seeking a waiver was to blame for its predicament constituted a disqualifying circumstance.

Furthermore, as the Commission is aware, and as Innovative explained in its petition, the company has experienced significant financial challenges, which resulted from the involuntary chapter 11 bankruptcy of Innovative's parent, Innovative Communication Corporation ("ICC"), after ICC defaulted on its debt obligations and its former chairman engaged in mismanagement and malfeasance associated with company assets.²⁴ As a result of the bankruptcy, control of ICC's operating subsidiaries was transferred to the National Rural Utilities Cooperative Finance Corporation – a transaction approved by the Commission in December 2009 and consummated in October 2010.

Once a new management team was in place, Innovative began making necessary system upgrades, including implementing a new physical facilities database that allowed the company to determine that its 2009 loop count data submitted to NECA was inaccurate. Innovative should be praised for taking steps to improve its systems and to ensure accurate loop counts, not punished as the *Order* seeks to do.

The Bureau's claim that "the Commission has never granted a waiver directing NECA to open its 24-month adjustment window" is misleading. *Order* ¶ 7, n.30. First, as far as Innovative is aware, there have only been two other petitions filed with the Commission seeking a waiver of NECA's 24-month adjustment period – one was dismissed for lack of interest, and the other was resolved on alternative grounds.²⁵ Second, the Commission has directed NECA to

²⁴ See *Stanford Springel as Chapter 11 Trustee for the Bankruptcy Estate of Innovative Communication Corporation*, Order, 24 FCC Rcd 14360, ¶ 2 (2009).

²⁵ Public Notice, *Wireline Competition Bureau Dismisses Four Petitions for Waiver of Various High-Cost Universal Service Filing Deadlines*, WC Docket No. 08-71; CC Docket No. 96-45, 29 FCC Rcd 1922 (2014) (dismissing for lack of interest petition by Pine Belt Telephone

re-open its 24-month adjustment window in other cases, and its power to do so “is well-established.”²⁶ Thus, there is no merit to the Bureau’s suggestion that granting Innovative the requested waiver would be without precedent.²⁷

The final theory advanced by the Bureau for denying the waiver – that the Commission “specifically excluded the adjustments requested by Innovative” – is premised on a misreading of the Commission’s rules. *Order* ¶ 8. Citing the *USF/ICC Transformation Order*, the Bureau states that the Commission will “provide frozen high-cost support to [price cap] carriers equal to the amount of support each carrier *received* in 2011 in a given study area.” *Id.* (emphasis in original). On that basis, the Bureau concludes that “frozen support was to be determined ‘without regard to prior period adjustments related to years other than 2011,’ meaning that any

(footnote cont’d.)

Company seeking to re-open NECA’s 24-month window); *2001 Annual Access Tariff Filings*, Memorandum Opinion and Order, 16 FCC Rcd 21519 (2001) (denying petition for declaratory ruling by Moultrie Independent Telephone Company seeking clarification of the treatment of affiliate sale/lease-back transactions, which rendered moot the company’s request for the Commission to direct NECA to re-open the 24-month adjustment window).

²⁶ *Florida Public Service Commission – Request for Interpretation of the Applicability of the Limit on Change in Interstate Allocation, Section 36.154(f) of the Commission’s Rules*, Order Granting Motion for Partial Stay, 11 FCC Rcd 14324, ¶ 6 (CC Bur. 1996); see also *Amendment of Part 69 of the Commission’s Rules to Ensure Application of Access Charges to All Interstate Toll Traffic*, Memorandum Opinion and Order, 2 FCC Rcd 2154, ¶ 26 (1987) (directing NECA to recognize claims for reimbursement for certain periods outside the pool window); *Accounting Treatment of Payments Made by the Puerto Rico Telephone Company and the Puerto Rico Communications Corporation to the Puerto Rico Department of Treasury*, Memorandum Opinion and Order, DA 96-95 (CC Bur. 1996) (directing NECA to reimburse PRTC and PRCC retroactive to 1992).

²⁷ Indeed, NECA recently filed a petition seeking authority from the Commission to adjust pool settlements paid to Sandwich Isles Communications, Inc. in periods now closed under its 24-month adjustment window. See *Petition of NECA for Clarification and/or Declaratory Ruling*, WC Docket No. 09-133 at 1 (filed Feb. 6, 2015), (requesting a clarification of *Sandwich Isles Communications, Inc.*, WC Docket No. 09-133, Declaratory Ruling, 25 FCC Rcd. 13647 (Wireline Comp. Bur. 2010), pet. for recon. and app. for rev. pending). NECA’s petition only confirms that the Commission has granted and should grant relief from the 24-month adjustment window in appropriate circumstances, as is the case here.

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.” *Id.*

The Bureau’s conclusion that only HCLS disbursements actually received in 2011 should be included in a price cap carrier’s baseline frozen support is inconsistent with the Commission’s rules. Section 54.312(a)(1) of those rules defines “Total 2011 support” as “the amount of support disbursed to a price cap local exchange carrier or rate-of-return carrier affiliated with a price cap local exchange carrier *for* 2011, without regard to prior period adjustments related to years other than 2011 and as determined by USAC on January 31, 2012.” 47 C.F.R. § 54.312(a)(1) (emphasis added). Thus, the plain language of this rule requires that the support be “for” 2011, not “disbursed during” 2011, as asserted by the Bureau.

In this case, the additional support that Innovative seeks is unquestionably “for” 2011. Specifically, if granted, the waiver would result in increased annual support to Innovative in the total amount of \$679,032 annually, which consists of: (i) \$565,860 in high cost support for 2011 and annual frozen CAF support based on accurate loop counts for January through October 2011; and (ii) \$113,172 in increased annual frozen CAF support based on accurate loop counts for November and December 2011. Thus, the adjustments requested by Innovative are entirely consistent with – and not specifically excluded by – the Commission’s rules.²⁸

²⁸ The Bureau also misreads the term “without regard to prior period adjustments related to years other than 2011,” which actually means the opposite of what the Bureau claims. That clause denotes that high cost disbursements related to periods other than 2011 are excluded from frozen baseline support. It does not mean, as the Bureau asserts “that any prior period adjustments actually disbursed in 2011 are included in the frozen support baseline” *Order* ¶ 8. If the Bureau were correct, Innovative’s frozen support baseline is understated and should be increased by \$267,823 annually. According to USAC, the portion of Innovative’s frozen support related to 2011 HCLS was \$3,487,920. However, during 2011, Innovative received actual HCLS disbursements in the amount of \$3,755,743. This difference of \$267,823 is associated with period adjustments that did not relate to but were paid in 2011, which the Bureau apparently believes should be included in Innovative’s frozen support baseline amount.

Even if the Commission's rules required that support be "disbursed in" 2011 in order to be included in a price cap carrier's baseline support – which is not the case – the Bureau never articulates any grounds for calculating Innovative's baseline support amount using inaccurate loop counts for November and December 2011. Innovative corrected these loop counts *within the rolling 24-month adjustment period*, and NECA agreed to use the corrected November and December 2011 loop counts in calculating Innovative's 2011 HCLS by the January 31, 2012 deadline. Nonetheless, and for reasons that are unclear, Innovative's frozen support baseline amount was calculated based on inaccurate November and December 2011 loop counts – an error that resulted in Innovative's frozen CAF support being understated by \$113,172 annually.

Had NECA and USAC timely disbursed Innovative's 2011 HCLS based on November and December 2011 loop count data timely submitted by Innovative, the company's frozen support baseline amount would have included "support derived from the properly corrected" loop counts "that should have been paid ... [and] disbursed in calendar year 2011." *Order* ¶ 8. Innovative should not be penalized to the tune of \$113,172 annually because high cost support for 2011 was not disbursed by January 31, 2012 due only to the arbitrary timeframe by which NECA and USAC disbursed funds related to Innovative's appropriate and timely submitted adjustments.²⁹

²⁹ The Bureau claims "that carriers serving 110 study areas are similarly situated to Innovative" because they "received support for prior periods after the January 31, 2012 cutoff that was not included in frozen baseline amounts." *Order* ¶ 8, n.36. But this claim does not withstand scrutiny. First, it is impossible to determine based on the data referenced by the Bureau that none of the disbursements shown for 2012 were considered in a study area's frozen support because the data is reported on a calendar year. Due to the fact that some portion of these 2012 HCLS disbursements presumably occurred during January 2012 prior to the January 31, 2012 cutoff date, the Bureau's conclusion that none of the 2012 adjustments were included in frozen support is unsubstantiated. Second, to Innovative's knowledge, none of the carriers in these 110 study areas sought or had any grounds to seek a waiver to adjust loop count data used

IV. CONCLUSION

For the foregoing reasons, the Commission should grant Innovative's application for review, waive NECA's rolling 24-month adjustment window, require that NECA recalculate Innovative's 2011 HCLS and baseline frozen support amount based on correct loop count data, and direct NECA to distribute additional support to Innovative consistent with these recalculations.

Respectfully submitted,

By: /s/ Bennett L. Ross

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Corp. d/b/a Innovative Telephone

March 20, 2015

(footnote cont'd.)

in calculating their 2011 HCLS, as Innovative did. Thus, these carriers are not "similarly situated" to Innovative, notwithstanding the Bureau's claim to the contrary.