

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
Westelcom’s Petition for Limited, Expedited) WC Docket No. 15-69
Waiver of the Definition of a “Rural CLEC” in)
Section 61.26(a)(6) of the Commission’s Rules)

COMMENTS OF AT&T SERVICES, INC.

AT&T Services, Inc., on behalf of itself and its affiliates (AT&T), respectfully urges the Commission to deny Westelcom’s Petition for Limited, Expedited Waiver of the Definition of a “Rural CLEC” in Section 61.26(a)(6) of the Commission’s Rules, filed in the above-referenced docket.¹ Specifically, Westelcom “seeks waiver of the definition of ‘Rural CLEC’ so that it can continue to charge the ‘rural exemption’ rate for its interstate switched access services.”² The Petition fails to demonstrate that the requested waiver is warranted for good cause or that it would be consistent with the public interest.³

As the Commission has explained, its rural exemption is a “narrow” and “administratively simpl[e]” exception to the general “market-based” rule that a CLEC’s tariffed rates may not exceed those of the competing ILEC.⁴ The exemption is available only to a CLEC

¹ Petition for Limited, Expedited Waiver by Westelcom Network, Inc. of Section 61.26(a)(6) of the Commission’s Rules, WC Docket No. 15-69 (filed Mar. 23, 2015) (updated version filed Mar. 30, 2015) (“Petition”).

² *Wireline Competition Bureau Seeks Comment on Westelcom’s Petition for Limited, Expedited Waiver of the Definition of a “Rural CLEC” in Section 61.26(a)(6) of the Commission’s Rules*, WC Docket No. 15-69, Public Notice, DA 15-372 (WCB rel. Mar. 25, 2015).

³ 47 C.F.R. § 1.3 (“Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.”). The Commission may exercise its discretion to waive a regulation where the particular facts make strict compliance inconsistent with the public interest. *See Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*citing WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969)).

⁴ *Access Charge Reform et al.*, WC Docket No. 96-262, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd 9108, para. 37 (2004) (“*Eighth Report and Order*”).

“competing with a non-rural incumbent LEC” and does not apply “if *any portion* of the competitive LEC’s service area falls within a non-rural area.”⁵ Indeed, providing service to even “a single end user in a non-rural area” is enough to “entirely disqualify” a CLEC from using the rural exemption.⁶ The Commission has wisely resisted other attempts to broaden the exemption through waivers or forbearance⁷ or to otherwise game the rules.⁸

The Census Bureau reclassification that disqualifies Westelcom as a Rural CLEC provides no basis for a waiver of the rule. Section 61.26(a)(6) provides that

Rural CLEC shall mean a CLEC that does not serve (*i.e.*, terminate traffic to or originate traffic from) any end users located within either:

- (i) Any incorporated place of 50,000 inhabitants or more, *based on the most recently available* population statistics of the Census Bureau or
- (ii) An urbanized area, as defined by the Census Bureau.⁹

In adopting this rule, the Commission deliberately chose an administratively simple, bright-line rule that would limit the exemption to only a small numbers of carriers.¹⁰ The Commission chose an objective standard that relies on the U.S. Census in both prongs of the test.

The Commission could not have been unaware that changes in the Census could have consequences for this rule. As an initial matter, it is self-evident that a decennial census will

⁵ *Id.* ¶ 33 (emphasis added).

⁶ *Id.* ¶ 36.

⁷ See, e.g., *Petition of Northern Telephone & Data Corp. for Waiver of Section 61.26(b)(1) of the Commission’s Rules*, WC Docket No. 09-216, Order, 25 FCC Rcd 274 (2010); *Petition of OrbitCom, Inc. for Forbearance from CLEC Access Charge Rules*, WC Docket No. 08-162, Memorandum Opinion and Order, 23 FCC Rcd 13187 (2008); *Access Charge Reform, PrairieWave Telecommunications, Inc. Petition for Waiver of Sections 61.26(b) and (c) or in the Alternative Section 61.26(a)(6) of the Commission’s Rules*, CC Docket No. 96-262, Order, 23 FCC Rcd 2556 (2008).

⁸ See, e.g., *AT&T v. Great Lakes Comnet, Inc. and Westphalia Telephone Company*, EB Docket No. 14-222, Memorandum Opinion and Order, FCC 15-31, para. 27 (rel. Mar. 18, 2015), *pet. for review filed, Great Lakes Comnet, Inc. and Westphalia Telephone Company v. FCC*, Case No. 15-1064 (D.C. Cir. filed Mar. 23, 2015).

⁹ 47 C.F.R. § 61.26(a)(6) (emphasis added).

¹⁰ See *Access Charge Reform*, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923, paras. 68, 75 (2001); *Eighth Report and Order* at para. 37.

result in periodic changes that could affect the application of the rule to any particular carrier. Moreover, the Commission recognized that the Census statistics would change from time to time, indicating in the rule itself that the definition of “Rural CLEC” would be “based on the most recently available” Census statistics.¹¹ Specifically in the instant case, the change was reclassification of one of the communities in Westelcom’s service area from an “urban cluster” to an “urbanized area.”¹² Although Westelcom was apparently not aware of the change when it happened,¹³ it can be no surprise that periodic adjustments to Census methodology, including such classifications, could affect the application of the rule. Indeed, as Westelcom notes, the Census Bureau has expressly advised agencies about the potential consequences of relying on Census classifications.¹⁴ Nonetheless, the Commission made a reasonable policy choice in favor of an objective standard that is easy to administer.¹⁵ Thus, the fact that Westelcom did not anticipate (and evidently was not even aware of) the change in its status as a Rural CLEC provides no good cause for a waiver of the rule.

The Commission should likewise reject Westelcom’s contentions that it merely seeks the extended transition to bill-and-keep promised in *USF/ICC Transformation Order*.¹⁶ The proper application of the CLEC access charge rules in no way denies Westelcom the phase down to bill-and-keep under the *USF/ICC Transformation Order*. Rather, it provides the same transition to

¹¹ 47 C.F.R. § 61.26(a)(6)(i) (emphasis added)

¹² See Petition at 2, 8-10.

¹³ See *id.* at 10 & n.35.

¹⁴ See *id.* at 16 (citing 76 Fed. Reg. 53030 (Aug. 24, 2011)).

¹⁵ See *Delta Radio, Inc. v. FCC*, 387 F.3d 897, 901 (D.C. Cir. 2004) (“[T]he strict application of a rule is not *per se* an abuse of discretion but ‘may be justified by the gain in certainty and administrative ease, even if it appears to result in some hardship in individual cases.’” (quoting *BellSouth v. FCC*, 162 F.3d 1215 (D.C. Cir. 1999) (quoting *Turro v. FCC*, 859 F.2d 1498, 1500 (D.C.Cir.1988))).

¹⁶ See Petition at 2, 10, 17.

all non-Rural CLECs,¹⁷ including Westelcom, that will allow them to benchmark rates against competing ILECs for the remainder of the transition (until the last step down in 2018 for CLECs benchmarked against price cap carriers).¹⁸ Neither the *USF/ICC Transformation Order* nor the CLEC access charge rules provide any transition where the access rate reductions, as here, are because the CLEC is no longer eligible for the rural exemption. A waiver would extend the transition for this one non-Rural CLEC, giving it a windfall of access revenues that is entirely unwarranted under the waiver standard or by the *USF/ICC Transformation Order*.

Further, Westelcom's public interest arguments fail and should be rejected. Westelcom argues that a waiver is needed to continue investment in its broadband infrastructure and to provide services, including to healthcare facilities.¹⁹ For support, Westelcom points to the policy goals of the *USF/ICC Transformation Order* and the *Healthcare Connect Order*.²⁰ In fact, Westelcom even argues that these orders supersede the policy objectives of the CLEC access charge rules.²¹ AT&T agrees that Commission policy should encourage network investment and AT&T applauds Westelcom's apparent commitment to the community.²² Westelcom, however, grossly misreads the orders it cites. Indeed, granting Westelcom's waiver would be directly contrary to the policy purposes of these orders. The primary purpose of the *USF/ICC Transformation Order* was to finally wring inefficient and arbitrage-inducing subsidies out of the

¹⁷ For purposes of this proceeding, AT&T uses the term "non-Rural CLEC" to mean CLECs that do not satisfy the definition of "Rural CLEC."

¹⁸ *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, para. 801 (2011) ("*USF/ICC Transformation Order*"), *petitions for rev. denied sub nom, In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014).

¹⁹ Petition at 2-3, 14-15.

²⁰ *See id.* at 13-15.

²¹ *See id.* at 13, 16.

²² *See id.* at 11-12.

intercarrier compensation regime and instead establish explicit mechanisms to achieve universal service goals. Those two orders do exactly that: they establish explicit subsidy mechanisms to address access reductions, broadband investment, and healthcare services.²³

But a waiver for Westelcom would do exactly the opposite: it would expand the inefficient implicit subsidy system by allowing a new class of carrier, a former Rural CLEC, to collect implicit subsidies through high rural rates to which it is not entitled under the rules at the expense of interexchange customers. As the Commission explained in the *USF/ICC Transformation Order*, “the current ICC system is unfair for consumers, with hundreds of millions of Americans paying more on their wireless and long distance bills than they should in the form of hidden, inefficient charges. We need a more incentive-based, market-driven approach that can reduce arbitrage and competitive distortions.”²⁴ The Commission was clear that intercarrier compensation reform “will ultimately free consumers from shouldering the hidden multi-billion dollar subsidies embedded in the current system”²⁵ and “will ensure that consumers pay only for service that they choose and receive, eliminating the existing opaque implicit subsidy system under which consumers pay to support other carriers’ network costs.”²⁶ The basis of Westelcom’s plea²⁷ seems to be that it needs AT&T’s (and other long distance carriers’) customers to continue to “support [Westelcom’s] network costs.”²⁸ Granting Westelcom’s waiver would be going in exactly the wrong direction—expanding rather than

²³ See *USF/ICC Transformation Order* at paras. 115-647; *Rural Health Care Support Mechanism*, WC Docket No. 02-60, *Report and Order*, 27 FCC Rcd 16678, paras. 1-10 (2012) (“*Healthcare Connect Order*”).

²⁴ *USF/ICC Transformation Order* at paras. 9; see also *id.* (“ICC has become riddled with inefficiencies and opportunities for wasteful arbitrage.”)

²⁵ See *id.* at paras. 736

²⁶ See *id.* at paras. 738.

²⁷ See, e.g., Petition at 15.

²⁸ See *USF/ICC Transformation Order* at para. 738.

eliminating subsidies, contrary to goals of the orders Westelcom cites, the CLEC access charge rules, and the Communications Act.

Finally, Westelcom has demonstrated no special circumstances that justify such a waiver. For the reasons discussed above, there is nothing special about the applicability of the CLEC access rules in this case, and consequences of the Census cannot fairly be characterized as unexpected. And, if granted, the waiver requested by Westelcom would not be as narrow as it claims, applicable only to Westelcom's purported unique situation.²⁹ Such a waiver for Westelcom could invite other "me too" waiver petitions, which the Commission could not reasonably deny, creating a loophole that would undermine the CLEC access charge rules and their policy purpose.³⁰ Further, the Commission should not view this as a short-term problem, given that end-office switching rates are on course to bill-and-keep, because tandem-switched transport (in this case) is not currently subject to a transition and will be essentially unchanged for many years to come.³¹ Indeed, the Commission should act quickly to deny Westelcom's petition so that the pending proceeding does not become an excuse for Westelcom to deny or delay refunds due to interexchange carriers, including AT&T, for the unlawful rural access rates charged by Westelcom after the 2012 reclassification.

²⁹ See Petition at 17-18.

³⁰ To the extent the Commission is persuaded to grant Westelcom's request, the Commission should carefully craft the language of any waiver order to avoid opening a significant loophole and potentially encouraging arbitrage.

³¹ See *USF/ICC Transformation Order* at para. 1306.

For these reasons, Westelcom has not demonstrated that a waiver is warranted, and therefore, the Commission should promptly deny the Petition.

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Respectfully submitted,

By: /s/ Christi Shewman

Christi Shewman

Gary L. Phillips

Lori A. Fink

AT&T Services, Inc.

1120 20th Street, N.W., Suite 1000

Washington, D.C. 20036

(202) 457-3090 (phone)

(202) 457-3073 (fax)

Attorneys for AT&T Services, Inc.