

JUN 11 9 20 AM '99

DISCONTINUED

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
American Samoa Government and the)
American Samoa Telecommunications)
Authority)
)
Petition for Waivers and Declaratory)
Rulings to Enable American Samoa to)
Participate in the Universal Service High)
Cost Support Program and the National)
Exchange Carrier Association Pools and)
Tariffs)

CC Docket No. 96-45
AAD/USB File No. 98-41

ORDER

Adopted: June 9, 1999

Released: June 9, 1999

By the Chief, Accounting Policy Division:

I. INTRODUCTION

1. On February 6, 1998, the American Samoa Government and the American Samoa Telecommunications Authority (American Samoa Tel. or, collectively, American Samoa) filed a petition requesting waivers and declaratory rulings to enable American Samoa Tel. to participate in the universal service high cost support mechanisms and to become a member of the National Exchange Carriers Association (NECA).¹ The petitioners request a waiver of the provisions in Parts 36 and 69 of the Commission's rules that restrict application of those rules to incumbent local exchange carriers (LECs) and a waiver of sections 36.611 and 36.612 of the Commission's rules in order to enable American Samoa Tel. to receive high cost loop support based on forecasted or estimated costs. In addition, American Samoa seeks a waiver of the definition of "average schedule company" and certain other provisions in Part

¹ Petition of the American Samoa Government and the American Samoa Telecommunications Authority for Waivers and Declaratory Rulings to Enable American Samoa to participate in the Universal Service High Cost Support Program and the National Exchange Carrier Association Pools and Tariffs (filed Feb. 6, 1998) (American Samoa petition). On March 3, 1997, the Universal Service Branch, Accounting and Audits Division released a public notice soliciting comments on the petition for declaratory ruling and waiver. Comments were filed by the NECA and American Samoa Telecom, LLC, on March 18, 1998. Reply comments were filed by American Samoa on March 30, 1998.

69 to enable American Samoa Tel. to participate as an average schedule company in NECA's access tariffs and pools and a waiver of the definition of "study area" in Part 36. In this Order, we grant in part and deny in part this petition, as explained below.

II. BACKGROUND

2. In 1984, the Commission established high cost support mechanisms to promote the nationwide availability of telephone service at reasonable rates.² These mechanisms provide support by allowing incumbent LECs with higher than average local loop costs to allocate an additional portion of those costs to the interstate jurisdiction to be recovered from interstate revenues. This enables the state jurisdictions to establish lower local exchange rates in study areas receiving such assistance.³

3. In the *Universal Service Order* released on May 8, 1997, the Commission established new federal universal service support mechanisms consistent with the Communications Act of 1934 (the Act), as amended by the Telecommunications Act of 1996 (1996 Act).⁴ Pursuant to the *Universal Service Order*, support for providing service in a high cost area will be based upon the forward-looking economic cost of providing the supported services to that service area.⁵ Non-rural incumbent LECs will begin receiving high cost support based on forward-looking costs on January 1, 2000.⁶ Rural incumbent LECs will begin to receive support based on forward-looking costs no earlier than January 1, 2001.⁷ Until an incumbent LEC receives high cost support based upon forward-looking costs, that incumbent LEC's support will continue to be based upon historical cost data, but will be provided through the federal mechanism rather than the interstate access charge rate structure.⁸ In the *Universal Service Order*, the Commission also concluded that carriers in insular areas of the United States are eligible to participate in the federal universal service support

² See generally *Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board*, CC Docket No. 80-286, 96 FCC 2d 781 (1984).

³ *Id.*

⁴ See *Federal-State Joint Board on Universal Service*, Report and Order, CC Docket No. 96-45, 12 FCC Rcd 8776, at 8888-8951, paras. 199-325 (1997) (*Universal Service Order*), as corrected by *Federal-State Joint Board on Universal Service*, Errata, CC Docket No. 96-45, FCC 97-157 (rel. June 4, 1997), appeal pending in *Texas Office of Public Utility Counsel v. FCC and USA*, No. 97-60421 (5th Cir. 1997).

⁵ *Universal Service Order*, 12 FCC Rcd at 8898-8926, paras. 223-272.

⁶ *Federal-State Joint Board on Universal Service, Access Charge Reform*, Seventh Report and Thirteenth Order on Reconsideration in CC Docket 96-45; Fourth Report and Order in CC Docket No. 96-262; and Further Notice of Proposed Rulemaking in CC Docket Nos. 96-45, 96-262, FCC 99-119 (rel. May 28, 1999).

⁷ *Universal Service Order*, 12 FCC Rcd at 8889, paras. 204.

⁸ See *Universal Service Order*, 12 FCC Rcd at 8926-47, paras. 273-318.

mechanisms.⁹

4. Local exchange service was provided in American Samoa until 1998 by a government agency, the American Samoa Office of Communications.¹⁰ On January 8, 1998, the Governor of American Samoa created American Samoa Tel. by executive order to administer the telecommunications operations formerly run by the Office of Communications.¹¹ In its petition, American Samoa states that American Samoa Tel. qualifies as a "rural telephone company" under sections 3(37) and 251(f)(1) of the Act, because it has fewer than 50,000 access lines, and also states that its predecessor, the Office of Communications, was designated as an "eligible telecommunications carrier" pursuant to sections 214 and 254 of the Act.¹² Petitioners state further that, because neither American Samoa Tel. nor its predecessor have participated in NECA revenue pools or other pre-existing universal service mechanisms, the Commission's universal service rules prevent it from receiving high cost support.¹³ American Samoa requests the waivers and declaratory rulings necessary to enable American Samoa Tel. to participate in the universal service support mechanisms for high cost areas and seeks certain waivers of the Commission's rules requiring the submission of historical cost data.

A. Definition of Incumbent LEC and NECA Membership

5. Section 251(h)(1) of the Act defines an incumbent LEC as a LEC that, with respect to an area: (1) provided telephone exchange service in such area on February 8, 1996, the date of enactment of the 1996 Act, and (2) was a member of NECA on February 8, 1996, or became such member's successor or assign.¹⁴ The Commission's rules essentially adopt section 251(h)(1) of the Act's definition of incumbent LEC for purposes of determining

⁹ *Universal Service Order*, 12 FCC Rcd at 8997, para. 414 n.1064 citing 47 U.S.C. § 254(b)(3) ("Consumers in all regions of the Nation, including . . . those in rural, insular, and high cost areas, should have access to telecommunications and information services . . .") (emphasis added); Joint Explanatory Statement at 131. In the universal service proceeding, the Commission explicitly considered American Samoa, the Commonwealth of the Northern Mariana Islands (CNMI), Guam, Puerto Rico, and the U.S. Virgin Islands to be insular areas. *Universal Service Order*, 12 FCC Rcd at 8995-9001, paras. 410-23.

¹⁰ The telephone network in American Samoa was originally constructed by the U.S. Navy and the U.S. Department of the Interior. See Executive Order No. 02-1998, attachment to American Samoa petition.

¹¹ American Samoa Tel. is a semi-autonomous government agency, governed by a Board of Directors who are appointed by the Governor. See *id.*

¹² See American Samoa petition at 4; 47 U.S.C. §§ 153(37), 214(e), 251(f)(1), 254.

¹³ American Samoa petition at 6.

¹⁴ 47 U.S.C. § 251(h)(1).

universal service support.¹⁵ The Commission's high cost support rules calculate the amount of support provided to a carrier based on its status as either an incumbent LEC or a competitive eligible telecommunications carrier.¹⁶ An incumbent LEC receives support according to particular calculations based on historical and projected cost data,¹⁷ and a competitive eligible telecommunications carrier receives the same amount of support per customer that the incumbent LEC previously serving that customer received.¹⁸ Carriers that do not meet the definition of an incumbent LEC, but that also do not serve customers formerly served by an incumbent LEC, have sought waivers of the incumbent LEC requirement for purposes of calculating universal service support. In addition, a LEC serving an insular area that did not meet the definition of incumbent LEC was designated an incumbent LEC by rule.

6. *Incumbent LEC Waivers.* Pursuant to the Commission's waiver authority, the Accounting and Audits Division (the Division) of the Common Carrier Bureau (the Bureau) permitted carriers that do not meet the definition of incumbent LEC to receive universal service support. Specifically, the Division granted waivers to new telephone companies providing service in previously unserved areas, such as South Park Telephone Company (South Park) and Sandwich Isles Communications, Inc., (Sandwich Isles), that permitted these companies to begin receiving high cost loop support.¹⁹ In granting these waivers, the Division waived the incumbent LEC requirements of parts 36 and 69 of the Commission's rules, and permitted South Park and Sandwich Isles to become members of NECA and participate in NECA pools and tariffs.²⁰ These waivers do not, however, affect the carriers' obligations

¹⁵ See 47 C.F.R. §§ 51.5, 54.5.

¹⁶ Part 54 of the Commission's rules defines a "competitive eligible telecommunications carrier" as "a carrier that meets the definition of an 'eligible telecommunications carrier' [under part 54] and does not meet the definition of an 'incumbent local exchange carrier' in § 51.5" 47 C.F.R. § 54.5.

¹⁷ See, e.g., 47 C.F.R. §§ 36.611, 54.301, 54.303. As noted above, once the Commission implements a forward-looking economic cost mechanism, carriers will no longer receive support based on historical and projected cost data submitted to the Administrator, but instead will receive support calculated by a forward-looking economic cost model. See *supra* para. 3.

¹⁸ 47 C.F.R. § 54.307.

¹⁹ *South Park Telephone Company, Petition for Waiver of Sections 36.611 and 36.612 of the Commission's Rules*, Order, AAD 97-41, DA 97-2730, 13 FCC Rcd 198 (Acct. Aud. Div. 1997) (*South Park*); *Sandwich Isles Communications, Inc., Petition for Waiver of Section 36.611 of the Commission's Rules and request for Clarification*, Order, AAD 97-82, DA 98-166, 13 FCC Rcd 2407 (Acct. Aud. Div. 1998) (*Sandwich Isles*), application for review pending. See also *Wilderness Valley Telephone Company, Inc., Petition for Waiver of Sections 69.605(c) and 69.3(e)(11) of the Commission's Rules*, Order on Reconsideration, AAD 96-99, DA 98-603, 13 FCC Rcd 6573 (Acct. Aud. Div. rel. March 31, 1998) (*Wilderness Valley recon.*) (waiving the incumbent LEC requirement of Part 69 and permitting Wilderness Valley to participate in NECA pools and tariffs).

²⁰ See *South Park* at para. 12; *Sandwich Isles* at para. 15. High cost loop support for incumbent LECs is calculated by NECA from data submitted to NECA pursuant to section 36.611, which defines an incumbent LEC

under section 251 of the Act.²¹

7. *Incumbent LEC Rulemaking.* Section 251(h)(2) of the Act allows the Commission, by rule, to "provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of [section 251]."²² Pursuant to section 251(h)(2), the Commission adopted a rule treating Guam Telephone Authority ("Guam Telephone") as an incumbent LEC for purposes of section 251.²³ The Commission declined to adopt the same rule with respect to a class or category of LECs situated similarly to Guam Telephone, however, because the record in that proceeding did not identify any members of such class or category.²⁴

8. Prior to adoption of the rule treating Guam Telephone as an incumbent LEC, the Common Carrier Bureau granted Guam Telephone's request to join NECA.²⁵ In the *Guam NECA Order*, the Bureau found that Guam Telephone could join NECA because it had demonstrated that it is a telephone company providing exchange service and exchange access service and, therefore, is similar to the carriers that participate in NECA.²⁶ The Bureau found

as a carrier that meets the definition of incumbent LEC in section 51.1 of the Commission's rules. See 47 C.F.R. § 36.611. Participation in NECA pools and tariffs is restricted in Part 69 to telephone companies or LECs that meet the definition of incumbent LEC in section 251(h) of the Act. See 47 C.F.R. § 69.2(hh).

²¹ See *South Park*, 13 FCC Rcd at 203; *Sandwich Isles*, 13 FCC Rcd at 2413.

²² 47 U.S.C. § 251(h)(2).

²³ *Treatment of the Guam Telephone Authority and Similarly Situated Carriers as Incumbent Local Exchange Carriers under Section 251(h)(2) of the Communications Act*, Report and Order, CC Docket No. 97-134, FCC 98-163 (rel. July 20, 1998) (*Guam ILEC Order*). The Commission previously had determined that Guam Telephone Authority was not an incumbent LEC within the meaning of section 251(h) because it was not a member of NECA on February 8, 1998, and did not become a successor or assign of a NECA member. *Guam Public Utilities Commission, Petition for Declaratory Ruling concerning Sections 3(37) and 251(h) of the Communications Act, Treatment of the Guam Telephone Authority and Similarly Situated Carriers as Incumbent Local Exchange Carriers under Section 251(h)(2) of the Communications Act*, Declaratory Ruling and Notice of Proposed Rulemaking, 12 FCC Rcd 6925 (1997) (*Guam NPRM*).

²⁴ *Guam ILEC Order* at para. 1.

²⁵ See *Guam Telephone Authority Petition for Declaratory Ruling to Participate in the National Exchange Carrier Association, Inc.*, CCB/CPD File No. 96-29, Memorandum Opinion and Order, DA 97-1007, 13 FCC Rcd 1440 (1997) (*Guam NECA Order*).

²⁶ *Guam NECA Order*, 13 FCC Rcd at 1446-47. In the *Guam NECA Order* the Bureau found that section 69.601(b) implicitly requires that NECA members must, at a minimum, be telephone companies and that such companies must provide the basic exchange service for which distribution of carrier common line (CCL) revenues would be justified. *Id.* (citing *Offshore Telephone Company Request to Participate in the National Exchange Carrier Association, Inc.*, 3 FCC Rcd 4137, as revised at 3 FCC Rcd 4513, 4516-17 (1988), *aff'd per curiam sub nom.* *Offshore Telephone Co. v. FCC*, 873 F.2d 408 (D.C. Cir. 1989)). At that time, section

that Guam Telephone's current federal access tariff demonstrated that it currently offers access services on Guam and that Guam Telephone provides local exchange services for which distribution to Guam Telephone of carrier common line (CCL) revenues would be justified.²⁷ The Bureau also noted that Guam Telephone's membership in NECA and its recently revised access charge rate would facilitate the ability of interstate, interexchange carriers to provide service to Guam at integrated rates in accordance with section 254(g) of the Act.²⁸

B. Study Area Waiver

9. A study area is a geographic segment of an incumbent LEC's telephone operations. Generally, a study area corresponds to an incumbent LEC's entire service area within a state.²⁹ Study area boundaries are important primarily because incumbent LECs perform jurisdictional separations at the study area level. For jurisdictional separations purposes, the Commission froze all study area boundaries effective November 15, 1984.³⁰ The Commission took this action primarily to ensure that incumbent LECs do not set up high-cost exchanges within their service territories as separate study areas to maximize interstate cost allocations and payments from universal service support mechanisms.³¹

10. Study area waivers are required whenever a company seeks to create or reconfigure study areas except under three conditions: (a) a separately incorporated company is establishing a study area for a previously unserved area; (b) a company is combining

69.2(hh) of the Commission's rules defined a telephone company as "a carrier that provides telephone exchange service as defined in section 3(r) [now section 3(47)] of the Communications Act of 1934." Section 69.2(hh) currently provides:

Telephone Company or local exchange carrier as used in this part means an incumbent local exchange carrier as defined in section 251(h)(1) of the 1934 Act as amended by the 1996 Act.

47 C.F.R. § 69.2(hh). Accordingly, under the commission's current rules, a carrier that does not meet the definition of incumbent LEC would need a waiver of the incumbent LEC provisions in part 69 in order to joining NECA.

²⁷ *Guam NECA Order*, 13 FCC Rcd at 1446.

²⁸ See 47 U.S.C. § 254(g).

²⁹ For purposes of this discussion, we will consider the term "state" to include a United States Territory.

³⁰ 47 C.F.R. Part 36 App. (defining "study area"). See MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, *Recommended Decision and Order*, 49 Fed. Reg. 48325 (1984) (*1984 Joint Board Recommended Decision*); *Decision and Order*, 50 Fed Reg. 939 (1985) (*1985 Order Adopting Recommendation*).

³¹ *1984 Joint Board Recommended Decision*, at para. 66; *1985 Order Adopting Recommendation*, at paras. 1.5.

previously unserved territory with one of its existing study areas in the same state; and (c) a holding company is consolidating existing study areas in the same state.³² When Guam Telephone requested a declaratory ruling allowing it to establish a study area for the first time, the Division found that the situation did not fall within the exceptions from the waiver requirements because the territory had been served by Guam Telephone since 1973.³³

11. In evaluating petitions seeking a study area waiver, the Commission uses a three-pronged standard: (1) the change in study area boundaries must not adversely affect the high cost loop fund; (2) the state commission(s) having regulatory authority over the exchange(s) to be transferred must not object to the change; and (3) the public interest must support such a change.³⁴ In the *Guam Study Area Waiver Order*, the Division found that authorizing a new study area that merely encompasses Guam Telephone Authority's existing service area would not compromise the Commission's reasons for freezing the study area boundaries and that the three-pronged standard for study area waivers had been met.³⁵

C. Historical Cost and Average Schedule Rules

12. High cost loop support currently is calculated using data provided by incumbent LECs pursuant to the Commission's cost accounting and jurisdictional separations rules.³⁶ The amount of a carrier's high cost loop support is based on the relationship of its historical loop cost to the national average loop cost. In order to determine this relationship, approximately half of all incumbent LECs submit their historical loop cost data to NECA each year pursuant to part 36.611 and 36.612 of the Commission's rules.³⁷ Because the cost data is not submitted by carriers until seven months after the end of a calendar year, and because NECA requires time to analyze the data and make the necessary nationwide calculations of support, carriers generally do not receive high cost support based on these data until the beginning of the second calendar year after costs are incurred. The impact of this

³² See *Request for Clarification Filed by the National Exchange Carrier Association, Inc., and Petitions for Waivers Filed by Alaska Telephone Company, Ducor Telephone Company, and Kingsgate Telephone, Inc., Concerning the Definition of "Study Area" in the Part 36 Appendix-Glossary of the Commission's Rules*, AAD 95-173, AAD 96-29, AAD 96-51, Memorandum Opinion and Order, 11 FCC Rcd 8156, 8160 (Com. Carr. Bur. July 16, 1996).

³³ *Guam Telephone Authority, Petition for Declaratory Ruling*, Report and Order, AAD 97-27, DA 97-595 (Acct. Aud. Div. rel. March 21, 1997) (*Guam Study Area Waiver Order*).

³⁴ *Guam Study Area Waiver Order* at para. 3.

³⁵ *Id.* at para. 13.

³⁶ See 47 C.F.R. Parts 36, 69.

³⁷ Account data are submitted to the Administrator by each carrier's study area. See 47 C.F.R. § 36.611, 36.612.

rule is mitigated, however, by section 36.612 of the rules, which allows carriers to update on a quarterly basis the calendar year data that they submit to NECA on July 31 of each year.³⁸

13. The remainder of incumbent LECs, known as "average schedule companies," are not required to perform jurisdictionally separated cost studies.³⁹ Average schedule treatment historically has been available to companies that are presumed, because of their small size, to lack the resources to justify a requirement that they perform separations and access charge cost studies to determine their compensation from interstate services.⁴⁰ NECA develops a schedule based on generalized industry data to reflect the costs of a typical small incumbent LEC and average schedule companies receive support based on these schedules.⁴¹

III. DISCUSSION

14. Section 254(b)(3) of the Act establishes the principle that consumers in insular areas should have access to telecommunications and information services that are reasonably comparable to those services provided in urban areas and available at rates that are reasonably comparable to rates charged for similar services in urban areas.⁴² As explained in the Joint Explanatory statement, Congress intended that the Joint Board and the Commission would consider consumers in insular areas, such as the Pacific Island territories, when developing support mechanisms for consumer access to telecommunications and information services.⁴³

³⁸ See 47 C.F.R. § 36.612. If a carrier files a quarterly update, NECA recalculates the carrier's high cost support for the remainder of the year based on the updated data (e.g., data covering the last nine months of the previous calendar year and the first three months of the current calendar year), rather than the calendar year data submitted on July 31. Thus, the quarterly update provision allows carriers to receive support earlier than the beginning of the second calendar year after costs are incurred.

³⁹ Section 69.605(c) of the Commission's rules defines an average schedule company as "a telephone company that was participating in average schedule settlements on December 1, 1982." 47 C.F.R. § 69.605(c).

⁴⁰ Prior to the adoption of the Commission's access charge rules in 1984, incumbent LEC compensation arrangements were handled through private contractual agreements within the telephone industry. The industry's settlement mechanism based the amount of incumbent LEC compensation either on cost studies or average schedule formulas that were used to estimate an incumbent LEC's cost of service. To facilitate implementation of its access charge rules, the Commission incorporated a modified version of the industry's existing average schedule arrangement. *National Exchange Carrier Association, Inc. Proposed Modifications to the 1997 Interstate Average Schedule Formulas*, Order on Reconsideration and Order, AAD 97-2, DA 97-2710 at para. 3 (Comm. Carr. Bur. rel. Dec. 24, 1997); see also *Proposed MTS and WATS Market Structure*, Third Report and Order, CC Docket No. 78-72, Phase I, 93 FCC 2d 241 (1983).

⁴¹ These average schedule companies may convert to "cost companies" and receive compensation from NECA based on their company-specific costs. Once they make this election, however, they cannot later resume average schedule status. See 47 C.F.R. § 69.605(c).

⁴² 47 U.S.C. § 254(b)(3).

⁴³ Joint Explanatory Statement at 131.

Given these objectives, it would not be consistent with universal service goals to preclude carriers serving insular areas from participating in the high cost support mechanisms simply because they were not members of NECA on February 8, 1996.⁴⁴

15. The Commission may waive any provision of its rules on its own motion, or on petition, if good cause therefor is shown.⁴⁵ A petitioner applying for a waiver must demonstrate that special circumstances warrant a deviation from the general rule, and that such a deviation will serve the public interest.⁴⁶ As explained below, we waive certain sections of the Commission's rules to enable American Samoa Tel. to participate in the federal high cost support programs.

A. Definition of Incumbent LEC and NECA Membership

16. American Samoa Tel. requests a waiver of the incumbent LEC requirement in sections 36.611 and 69.2 of the Commission's rules in order to participate in NECA tariffs and pools, citing *South Park* and *Sandwich Isles*.⁴⁷ In *South Park*, the Commission found that the "purpose of the incumbent LEC restriction in section 36.611 is to distinguish competitive LECs from incumbent LECs for purposes of calculating universal service support and not to impose interconnection requirements." Because *South Park* was the sole provider of service to the area and not a competitive LEC, the Division found that "the purposes underlying the incumbent LEC requirements in Parts 36 and 69 of the Commission's rules are not applicable to *South Park*'s request to receive high cost support and to participate in NECA."⁴⁸ American

⁴⁴ The Pacific Island Territories have historically been treated as international destinations for purposes of telecommunications regulation, but telecommunications markets on the islands are currently undergoing major changes. *Universal Service Order*, 12 FCC Rcd at 8995, para. 412. Beginning July 1, 1997, the Commonwealth of the Northern Mariana Islands and Guam were included in the North American Numbering Plan (NANP) and shortly thereafter interexchange carriers serving those islands were required to integrate their rates with the rates for services that they provide to other states. American Samoa is the only U.S. territory or possession with more than *de minimis* interstate interexchange telecommunications traffic that originates or terminates in the fifty states or other U.S. territories or possessions that is not, or is not currently scheduled to be included in the NANP. *Id.* at 8996 & n. 1058. American Samoa Telecom asks that we resolve the issue of American Samoa Tel.'s participation in the NANP prior to acting on its petition. We note that American Samoa's rate integration plan is pending before the Commission and the issue of its participation in NANP will be addressed in that proceeding. See American Samoa Government's Proposed Rate Integration Plan for American Samoa, in CC Docket 96-61, *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended*, filed October 1, 1997.

⁴⁵ 47 C.F.R. § 1.3.

⁴⁶ See *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *Wait Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); 47 C.F.R. § 1.3.

⁴⁷ American Samoa petition at 9-10.

⁴⁸ *South Park* at para. 12.

Samoa claims that the underlying purposes of the incumbent LEC requirements in Part 36 and Part 69 are similarly not applicable, because American Samoa Tel. is the sole provider of local exchange and exchange access service in American Samoa and is not a competitive LEC.⁴⁹

17. American Samoa Tel. is the sole provider of local exchange and exchange access service in American Samoa and not a competitive LEC, as was the case in *South Park*. We therefore find that the purposes underlying the incumbent LEC requirements in Parts 36 and 69 of the Commission's rules are not applicable to American Samoa's request to participate in the universal service high cost support mechanisms and to participate in NECA. We note that, as discussed above, calculation of universal service support in Part 54 of our rules also depends upon a carrier's status as either an incumbent LEC or a competitive eligible telecommunications carrier.⁵⁰ We find that the purpose of the incumbent LEC requirement in sections 54.301 and 54.303 of the Commission's rules, as is the case in section 36.611, is to distinguish incumbent LECs from competitive eligible telecommunications carriers for purposes on calculating universal service support. We therefore find that the purposes underlying the incumbent LEC requirements in Part 54 of the Commission's rules are not applicable to American Samoa's request to participate in the universal service high cost support mechanisms calculated pursuant to Part 54. Accordingly, we waive the incumbent LEC requirements in Parts 36, 54, and 69 of the Commission's rules to permit American Samoa to become a member of NECA, participate in NECA tariffs and pools, and participate in the universal service high cost support mechanisms. This waiver does not affect American Samoa Tel.'s obligations under section 251 of the Act.⁵¹

B. Study Area Waiver

18. Petitioners state that American Samoa has never been classified as a study area in the past and argue that "[i]n light of the need to have a designated 'study area' in order to calculate historical cost, a waiver of the definition is necessary to ensure that [American Samoa Tel.] may receive universal service for high cost loop support."⁵²

19. We agree that a study area waiver is needed for American Samoa Tel. to

⁴⁹ American Samoa petition at 10.

⁵⁰ See supra at para. 4; see also 47 C.F.R. §§ 54.301, 54.303, 54.307. Section 54.301 provides the method for calculating local switching support; section 54.303 provides the method for calculating long term support; and section 54.307 provides the method for calculating support to a competitive eligible telecommunications carrier.

⁵¹ Although section 251(h)(2) would require a rulemaking to treat American Samoa as an incumbent LEC for purposes of section 251, as demonstrated by Commission precedent, the Division has delegated authority to waive the incumbent LEC requirements of parts 36 and 69 of the Commission's rules for purposes of enabling carriers to become NECA members.

⁵² American Samoa petition at 13.

receive universal service high cost support. American Samoa Tel.'s situation does not fall within the exceptions from the waiver requirements, because the territory has been served by American Samoa Tel. for many years.⁵³ We find that a waiver is justified, because authorizing a new study area that merely encompasses American Samoa's existing service area would not compromise the Commission's reasons for freezing the study area boundaries.⁵⁴ Although this reasoning is similar to that the Division used in granting Guam Telephone Authority's study area waiver, as discussed above,⁵⁵ we do not find it necessary here to apply the same three-pronged test in the specific circumstances presented here. The *Guam Study Area Waiver Order* was issued prior to enactment of the 1996 Act, which provides that "[c]onsumers in all regions of the Nation, including . . . those in rural, *insular*, and high cost areas should have access to telecommunications and information services . . .".⁵⁶ In the *Universal Service Order*, the Commission concluded that carriers in insular areas of the United States are eligible to participate in the federal universal service support mechanisms.⁵⁷ We find it reasonable to assume that neither Congress nor the Commission intended that the study area freeze would prevent carriers serving insular areas from receiving universal service support. Accordingly, we find that granting American Samoa Tel.'s request for a study area waiver would not compromise the Commission's reasons for freezing the study area boundaries and is consistent with the directives in the 1996 Act.

C. Historical Cost and Average Schedule Rules

20. Petitioners state that American Samoa Tel. has no historical loop cost information and request a waiver so that it can receive high cost loop support as of January 1, 1998.⁵⁸ American Samoa Tel. proposes to submit to NECA an estimate of historical costs and/or a rolling annualized average of current costs, which would be subject to quarterly true-up adjustments based on actual costs. NECA comments that this methodology is "administratively feasible" and supports American Samoa's request, noting that the "proposed

⁵³ See *supra* para. 9. Two of the three exceptions require that the study area would include previously unserved areas. The third exception relates to consolidating existing study areas.

⁵⁴ *Guam Study Area Waiver Order* at para. 13.

⁵⁵ See *supra* para. 11.

⁵⁶ 47 U.S.C. § 254(b)(3) (emphasis added).

⁵⁷ *Universal Service Order*, 12 FCC Rcd at 8997, para. 414 n.1064 (citing 47 U.S.C. § 254(b)(3)); Joint Explanatory Statement at 131. In the universal service proceeding, the Commission explicitly considered American Samoa, the Commonwealth of the Northern Mariana Islands (CNMI), Guam, Puerto Rico, and the U.S. Virgin Islands to be insular areas. *Universal Service Order*, 12 FCC Rcd at 8995-9001, paras. 410-23.

⁵⁸ American Samoa petition at 11.

true-up mechanism will permit actual data to be incorporated as soon as possible."⁵⁹ American Samoa also requests permission to have the option of being treated as an average schedule company.⁶⁰

21. *Average schedule treatment.* Section 69.605(c) of the Commission's rules defines an average schedule company as "a telephone company that was participating in average schedule settlements on December 1, 1982."⁶¹ This definition of average schedule company essentially "grandfathered" existing average schedule incumbent LECs but allows neither the creation of new average schedule companies nor the conversion of cost-based carriers to average schedule settlement status, absent a waiver of the Commission's rules. The Commission has concluded that an unrestricted opportunity for cost companies to convert to average schedule status would likely operate to the detriment of interstate ratepayers because the conversion may result in inflated interstate revenue requirements.⁶² An unrestricted opportunity for cost companies to convert to average schedule status also creates the possibility for "gaming" the universal service rules. For example, as a general rule, the Commission does not grant average schedule company status to a new company in a stand-alone study area because of the risk that a new company with lower than average costs would collect support as an average schedule company and then switch to cost settlement status when upgrade expenditures create higher than average costs.⁶³

22. The special circumstances used to justify past waivers of section 69.605(c) fall

⁵⁹ NECA comments at 5.

⁶⁰ Section 69.605(c) of the Commission's rules defines an average schedule company as "a telephone company that was participating in average schedule settlements on December 1, 1982." 47 C.F.R. § 69.605(c). American Samoa Tel. states that it "is seriously considering whether it should participate in NECA's pools as an average schedule company or as a 'cost-based' carrier" and that it "intends to work closely with NECA in this regard." American Samoa petition at 12. American Samoa seeks a waiver of the Commission's rules to enable American Samoa Tel. to participate in NECA's access tariffs and pools as an average schedule company if American Samoa Tel., "in consultation with NECA determines that the average schedule company basis is appropriate." *Id.* at 12-13. NECA does not comment on American Samoa's request to be treated as an average schedule company. See NECA comments.

⁶¹ 47 C.F.R. § 69.605(c).

⁶² See, e.g., NECA's Proposed Waiver of Section 69.605(c) of the Commission's Rules, *Memorandum Opinion and Order*, 2 FCC Rcd 3960 (1987) (*5,000 Line Waiver Order*).

⁶³ See *Petitions for Waivers filed by Alpine Communications et. al., Concerning Sections 61.41(c)(2), 69.3(e)(110), 69.605(c) and the Definition of "Study Area" Contained in the Part 36 Appendix-Glossary of the Commission's Rules*, Memorandum Opinion and Order, AAD 96-94, DA 97-354, 12 FCC Rcd 2367, 2375 (Acct. Aud. Div. 1997) (*Alpine*) (denying request of carrier serving 6,818 access lines for average schedule status). In the case of an extremely small size company, however, the Commission has granted a newly-formed entity's request for average schedule status. *Wilderness Valley Telephone Company, Inc., Petition for Waiver of Sections 69.605(c) and 69.3(e)(11)*, Order, AAD 96-99, DA-98-379, 13 FCC Rcd 4511 (Acct. Aud. Div. 1998) (granting request for average schedule status to carrier serving between 32 and 75 access lines) (*Wilderness Valley*).

into three broad categories.⁶⁴ First, the Bureau has granted limited opportunities for exchange carriers serving 5,000 or fewer access lines to convert to average schedule settlements to deal with industry-wide changed circumstances.⁶⁵ Second, the Bureau has granted waivers to certain small exchange carriers that clearly lacked the resources to operate on a cost-study basis.⁶⁶ Third, to ensure a smooth settlement process, the Division has granted waivers to average schedule companies that have acquired another company, and allowed the combined companies to merge into one average schedule company.⁶⁷ We also note that, when the Division required average schedule companies to convert to cost settlements after certain acquisitions, we permitted the new combined study areas to use average schedule settlements, until the companies have performed the necessary cost studies to convert to cost settlements.⁶⁸

23. We find that American Samoa has demonstrated none of the special circumstances the Commission has used to justify a waiver of section 69.605(c). With approximately 17,880 access lines,⁶⁹ American Samoa Tel. is larger than any individual carrier previously granted such waivers.⁷⁰ We note that the Bureau considered and denied a request to extend the opportunity to convert to average schedule status that had been given carriers

⁶⁴ See *BPS Telephone Co. Petition for Waiver of Section 69.605(c) of the Commission's Rules*, Memorandum Opinion and Order on Reconsideration, AAD 95-67, DA 97-1956, 12 FCC Rcd 13820, 13824-25 (Acct. Aud. Div. 1997).

⁶⁵ See *5,000 Line Waiver Order*; see also *Petitions Seeking Average Schedule Settlements for Affiliated Cost Companies with 5,000 or Fewer Access Lines*, Memorandum Opinion and Order, 3 FCC Rcd 6003 (Comm. Carr. Bur. 1988) (granting a "one time opportunity to all exchange carriers with fewer than 5,00 access lines" to elect average schedule settlements). Subsequently, the Bureau considered and denied a request to extend a similar opportunity to exchange carriers serving 10,000 or fewer access lines. NECA Revision of Section 69.605 of the Commission's Rules to Allow Small Cost Settlement Companies to Elect Average Schedule Settlement Status, Order, 11 FCC Rcd 16504 (Comm. Carr. Bur. 1996) (*10,000 Line Waiver Order*).

⁶⁶ See, e.g., *Papago Tribal Utility Authority Petition for Waiver of Section 69.605(c) of the Commission's Rules*, Memorandum Opinion and Order, 2 FCC Rcd 6631 (Comm. Carr. Bur. 1987) (granting average schedule status to carrier serving fewer than 400 lines in a 700 square mile area); *National Utilities, Inc. and Beetles Telephone Co. Inc., Petition for Waiver of Section 69.605(c) of the Commission's Rules*, Report and Order, 8 FCC Rcd 8723 (Comm. Carr. Bur. 1993) (granting average schedule status to carriers serving 2,350 lines from eleven exchanges, and 50 access lines from one exchange, respectively); *Wilderness Valley*, 13 FCC Rcd 4511.

⁶⁷ See, e.g., *Baltic Telecom Cooperative, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 2433 (Acct. Aud. Div. 1997); *Alpine*, 12 FCC Rcd at 2374.

⁶⁸ See *Alpine*, 12 FCC Rcd at 2376.

⁶⁹ Letter from David L. Sieradzki, Counsel for American Samoa Tel., to Magalie Roman Salas, dated May 11, 1998.

⁷⁰ We note that there are larger average schedule companies, but these companies were average schedule companies on December 1, 1982. See *supra* para. 21.

serving 5,000 or fewer lines to carriers serving between 5,001 and 10,000 lines.⁷¹ We understand, however, that American Samoa Tel. currently does not have historical cost data. Therefore, in order to enable American Samoa to participate in universal service support mechanisms and NECA pools and tariffs as soon as practicable, we will permit American Samoa Tel. to participate as an average schedule company beginning the effective date of this order, but require American Samoa Tel. to convert to a cost company no later than July 1, 2001. In addition, we waive the provisions of section 69.3 of the Commission's rules that require advance notification in order to participate, effective July 1, 1999, in NECA's common line, traffic sensitive, and end user tariffs and pools.⁷²

24. *High cost loop support.* It has been long-standing Commission policy not to grant waivers of sections 36.611 and 36.612 of its rules.⁷³ The Bureau has granted waivers of these rule sections only in limited circumstances, namely to cover costs incurred by a carrier serving previously unserved areas.⁷⁴ In *Border to Border*, the Bureau granted a waiver to permit a LEC serving a previously unserved area to begin receiving high cost loop support after a year of operation based on a combination of current and projected cost data.⁷⁵ The Bureau found that "special circumstances" warranted a waiver so that the Commission's rules would not "have the unintended effect of discouraging service in a high cost area" and "frustrate the Commission[']s goal of promoting affordable service."⁷⁶ The Bureau allowed *Border to Border* to begin receiving high cost loop support on the effective date of its order, but declined to provide support for the previous year in which *Border to Border* had been providing service at affordable rates.⁷⁷ Based on this precedent, the Division adopted similar

⁷¹ See *10,000 Line Waiver Order*, 11 FCC Rcd 16504.

⁷² 47 C.F.R. § 69.3(a).

⁷³ See *Fremont Telephone Company, Petition for Waiver of Sections 36.611 and 36.612 of the Commission's Rules*, Order on Reconsideration, AAD 97-56, DA 98-2335 (Comm. Carr. Bur. rel. Nov. 23, 1998); *GVNW Inc. Petition for Declaration Ruling, or Alternatively, a Waiver of Section 36.612(a) of the Commission's Rules on USF Data Collection*, Order, 11 FCC Rcd 13915 (Comm. Carr. Bur. 1996); *TeleAlaska Inc., and TelHawaii Inc., Petition for Waiver of Sections 36.611, 36.612, and 61.41(c)(2) and the Definition of "Study Area" Contained in the Part 36 Appendix-Glossary of the Commission's Rules*, Memorandum Opinion and Order, 12 FCC Rcd 10309 (Acct. Aud. Div. 1997) (*TeleAlaska*).

⁷⁴ See *Border to Border Communications, Inc.*, Memorandum Opinion and Order, AAD 94-61, 10 FCC Rcd 5055 (Comm. Carr. Bur. 1995) (*Border to Border*); see also *South Park*, 13 FCC Rcd 198; *Sandwich Isles*, 13 FCC Rcd 2407.

⁷⁵ *Border to Border*, 10 FCC Rcd at 5057.

⁷⁶ *Id.*

⁷⁷ *Id.* The Bureau found that *Border to Border* had been providing residential service for more than a year at an affordable monthly rate of \$19.00 per loop. Because *Border to Border* could not show that its rates had discouraged customers from seeking service, the Bureau found that the rules had neither frustrated the

procedures in *South Park* and *Sandwich Isles*, permitting these companies to begin receiving high cost loop support before their historical cost data became available by submitting data based on current and projected costs.⁷⁸

25. Petitioners claim that certain language in the *Universal Service Order* entitled American Samoa Tel. to receive high cost loop support as of January 1, 1998, the effective date of the Commission's rules adopted in that Order.⁷⁹ In the *Universal Service Order*, the Commission determined that under the principles set forth in 1996 Act, carriers serving insular areas that had not been included in the previous universal service mechanism should

Commission's goal of promoting the availability of telephone service at reasonable rates or disserved the public interest. The Bureau found, however, that in the future the rules would have the unintended effect of discouraging service. Specifically, Border to Border demonstrated that its average loop cost was well in excess of the rate it was allowed to charge by the state. Either the Texas Public Utilities Commission could allow Border to Border to raise rates substantially above current levels, which Border to Border predicted would result in effectively denying service, or Border to Border would choose to terminate service by the end of the year. The Commission found that such a likelihood could not be readily dismissed, considering the high average loop costs demonstrated by Border to Border. *Id.*

⁷⁸ South Park was permitted to submit forecasted costs to NECA in its section 36.611 data submissions and directed to provide to the Accounting and Audits Division its actual costs when these data become available, so that the Division can determine whether adjustments to the high cost loop support amounts are necessary. *South Park*, 13 FCC Rcd at 203. Sandwich Isles was permitted to submit to NECA a rolling annualized average of current costs, subject to quarterly true-up adjustments based on actual costs. *Sandwich Isles*, 13 FCC Rcd at 2409, 2411. GTE has filed an application for review of the *Sandwich Isles* decision, which is currently pending before the Commission. GTE claims that the areas Sandwich Isles proposes to serve are not unserved but are within or adjacent to areas currently served by GTE. See GTE Hawaiian telephone Company Incorporated Application for review of an Order Granting in Part a Petition for Waiver by Sandwich Isles Communications, Inc., AAD 97-82, filed March 5, 1998.

⁷⁹ American Samoa Tel. claims it is unclear whether any waiver is even necessary based upon the *Universal Service Order*, which states:

We agree with Guam Tel. Authority that, under the principles set out in section 254(b)(3) this carrier should be eligible for universal service support and clarify the procedures to be used for any carrier, such as Guam Tel. Authority, that may not have historical costs studies on which to base the set support amounts. Guam Tel. Authority or any other carrier serving an insular area, such as CNMI, that is not currently included in the existing universal service mechanism, shall receive support based on an estimate of [the] annual amount of their embedded costs.

12 FCC Rcd at 8947, para. 318. The paragraph continues as follows:

Such carriers must submit verifiable embedded-cost data to the fund administrator. We anticipate that such carriers will work with the fund administrator to determine the exact support level to which they are entitled.

be eligible for universal service support.⁸⁰ The Commission also clarified the procedures to be used for Guam Tel. Authority, and any other insular carriers, that may not have historical cost studies on which to base the support amounts.⁸¹ Specifically, the Commission determined that such carriers will receive support based on an estimate of the annual amount of their embedded costs and are required to submit verifiable embedded cost data to the Administrator.⁸²

26. We conclude that we should grant the requested waiver of section 36.611, in part, to allow American Samoa Tel. to be eligible to begin receiving high cost loop support beginning July 1, 1999. As discussed above, because high cost loop support is based on historical data, carriers generally do not receive high cost support based on these data until the beginning of the second calendar year after costs are incurred, although the impact of this lag is mitigated by the rules allowing carriers to file quarterly updates.⁸³ In the *Universal Service Order*, the Commission noted that insular areas generally have subscribership levels significantly lower than the national average, "largely as a result of income disparity, compounded by the unique challenges these areas face by virtue of their locations."⁸⁴ We find that it would further the goals of promoting universal service in insular areas of the United States, to allow American Samoa Tel. to begin receiving high cost loop support without waiting for the lag period to elapse.⁸⁵ We find that the *Universal Service Order* supports the waivers granted herein permitting American Samoa Tel. to participate in the high cost support mechanisms and to begin receiving high cost loop support based on average schedule settlements, as discussed above, until verifiable embedded cost data is to be filed with the Administrator.

27. While not opposing petitioners' request for waiver of the historical cost rules, a wireless competitor to American Samoa Tel., American Samoa Telecom, LLC, submitted comments requesting that we require American Samoa Tel. to submit all cost information for

⁸⁰ *Universal Service Order*, 12 FCC Rcd at 8947, para. 318. We note that insular areas have much lower subscribership rates than other parts of the United States. See *Universal Service Order*, 12 FCC Rcd at 8843, para. 121.

⁸¹ *Universal Service Order*, 12 FCC Rcd at 8947, para. 318.

⁸² *Universal Service Order*, 12 FCC Rcd at 8947, para. 318..

⁸³ See *supra* para. 12.

⁸⁴ *Universal Service Order*, 12 FCC Rcd at 8838-39, para. 112.

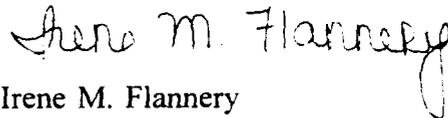
⁸⁵ Petitioners report that American Samoa Tel. charges a monthly subscriber rate of \$9.00 for single-party service and unlimited local calling. In addition, in January 1998, American Samoa Tel. implemented a Lifeline rate plan for low-income consumers, with a monthly rate of \$3.75 for local service. American Samoa's annual per capita income is \$3,309 and the median annual household income is \$16,114. More than eighty percent of households in American Samoa subscribe to telephone service provided by American Samoa Tel. American Samoa petition at 4.

the past five years with respect to its network and central office capitalization and operation.⁸⁶ We find that American Samoa Telecom has provided no compelling reason why we should impose such a condition on American Samoa Tel.'s waiver and we decline to do so.

IV. ORDERING CLAUSE

28. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 5(c), 201, 202, 205, 218-220, and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 155(c), 201, 202, 205, 218-220, and 254, 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 petition of the American Samoa Government and the American Samoa Telecommunications Authority for waiver of Sections 36.611, 36.612, 54.301, 54.303, 69.2, 69.3(a), 69.601, 69.605(c), and the definition of "study area" in Part 36, Appendix-Glossary, of the Commission's rules, 47 C.F.R. §§ 36.611, 36.612, 54.301, 54.303, 69.2, 69.3(a), 69.601, 69.605(c), and Part 36 App., is GRANTED IN PART to the extent described in this Order and otherwise IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Irene M. Flannery
Chief, Accounting Policy Division

⁸⁶ American Samoa Telecom comments at 2.