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

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| In the Matter of | ) | |
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| San Carlos Apache Telecommunications Utility, Inc. | ) | CC Docket No. 96-45 |
| | ) | |
| Petition for Waiver of Sections 36.611 and 36.612 of the Commission's Rules | ) | |

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# ORDER

**Adopted:** August 9, 2001 **Released:** August 10, 2001

By the Deputy Chief, Common Carrier Bureau:

## I. INTRODUCTION

1. In this Order, we deny a request from San Carlos Apache Telecommunications Utility, Inc. (San Carlos), for waiver of sections 36.611 and 36.612 of the Commission's rules.[1] The requested waiver would enable San Carlos to receive accelerated high-cost loop support payments.[2] For the reasons discussed herein, San Carlos has failed to show good cause for waiver of sections 36.611 and 36.612 of the Commission's rules in this instance.

## II. BACKGROUND

### A. Operation of High-Cost Loop Support Mechanism

2. In accordance with section 36.611 of the Commission's rules, on July 31 of each year, incumbent local exchange carriers (LECs) file the preceding year's loop cost data with the National Exchange Carriers Association, Inc. (NECA).[3] NECA compiles and analyzes these data to determine the average cost per loop for each incumbent LEC study area as well as the nationwide average cost per

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[1] Petition of San Carlos Apache Telecommunications Utility, Inc., for Waiver of Sections 36.611 and 36.612 of the Commission's Rules (filed April 10, 2000) (Petition).

[2] We note that, in its original petition, San Carlos requested accelerated high-cost loop support totaling approximately $659,271 for the period September 1, 1997, through August 31, 1999. *Id.* According to San Carlos, $659,271 is the difference between $831,726 and $172,455. At the time of its petition, San Carlos had received $172,455 by filing quarterly updates under section 36.612 of the Commission's rules. *See* Petition at Attachment B-1. Since filing its petition, San Carlos has received the remaining $659,271 for costs incurred between September 1, 1997, through August 31, 1999. Therefore, this Order treats San Carlos's petition as a request for accelerated high-cost loop support payment for costs that San Carlos has incurred but for which San Carlos has not yet received support. For example, in accordance with sections 36.611 and 36.612 of the Commission's rules, San Carlos has not received all the support to which it is entitled for costs incurred in 2000. *See* 47 C.F.R. §§ 36.611, 36.612.

[3] *See* 47 C.F.R. § 36.611.

loop, adjusted by the indexed caps on the high-cost fund.[4] Each rural carrier's high-cost loop support and each non-rural carrier's interim hold-harmless support[5] for the following year is based on the relationship between the carrier's study area average cost per loop and the nationwide average cost per loop, as limited by the indexed caps.[6] Carriers generally do not receive high-cost loop support and interim hold-harmless support based on these data until the beginning of the second calendar year after the costs are incurred, however, because under section 36.611 of the Commission's rules the cost data are not submitted by carriers until seven months after the end of a calendar year, and NECA requires time to analyze the data and make the necessary nationwide calculations of support by determining the nationwide average loop cost adjusted to reflect the indexed caps.[7] As a result, carriers without historical data, such as newly-established carriers, must wait for up to two years before receiving any high-cost loop support and interim hold-harmless support payments.

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[4] 47 C.F.R. § 36.601(c). The Commission recently modified its rules to provide for separate indexed caps on rural high-cost loop support and non-rural interim hold-harmless support. *See Federal-State Joint Board on Universal Service*, and *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers, Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking in CC Docket No. 96-45, and Report and Order in CC Docket No. 00-256*, FCC 01-157, at paras. 48-53 (rel. May 23, 2001), as corrected by Errata, CC Docket Nos. 96-45, 00-256 (Acc. Pol. Div. rel. Jun. 1, 2001) (*Rural High-Cost Reform Order*). The indexed cap used to determine rural incumbent LEC high-cost loop support is based on a "Rural Growth Factor" that will allow the rural carrier portion of the high-cost loop fund to grow based on annual changes in the Gross Domestic Product-Chained Price Index and the total number of working loops of rural carriers. *Id.* The indexed cap used to determine non-rural incumbent LEC interim hold-harmless support limits the maximum growth in the total amount of support available from the high-cost fund to the previous year's support amount, increased by an index factor that is equal to the rate of growth in the total number of working loops nationwide for the preceding calendar year. *See Federal-State Joint Board on Universal Service, Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charge*, Fourth Order on Reconsideration in CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, 13 FCC Rcd 5318, 5336-37 (1997).

[5] In the event that support provided to a non-rural carrier in a given state is less under the non-rural forward-looking high-cost support mechanism, the non-rural carrier is eligible for interim hold-harmless support, which is equal to the amount of support for which the non-rural carrier would have been eligible under the Commission's existing high-cost loop support mechanism. *See* 47 C.F.R. §§ 54.309, 54.311. Last year, the Commission adopted the recommendations of the Federal-State Joint Board on Universal Service (Joint Board) for phasing down the interim hold-harmless support for non-rural carriers. *See Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Thirteenth Report and Order and Further Notice of Proposed Rulemaking, FCC 00-428 (rel. Dec. 8, 2000). The Commission adopted measures to phase down interim hold-harmless support, excluding long term support, through $1.00 reductions in average monthly, per-line support beginning January 1, 2001, and every year thereafter until there is no more interim hold-harmless support. *Id.* at para. 1. The Commission also adopted the Joint Board's recommendation not to phase down interim hold-harmless support for eligible exchanges transferred to rural carriers until the Commission reexamines section 54.305 of its rules or until rural high-cost reform is complete. *Id.* at para 21. Interim hold-harmless support for exchanges transferred to non-rural carriers will be phased down over the same time period as the seller's support would have been phased down. *Id.* at para. 22. The Commission also sought comment on whether to continue applying section 54.305 to transfers of telephone exchanges between non-rural carriers following phase-down. *Id.* at paras. 23-24.

[6] *See* 47 C.F.R. § 36.631.

[7] *See* 47 C.F.R. § 36.612

3. Under section 36.612 of the rules, however, carriers can update their data on a quarterly basis and receive support earlier than the beginning of the second calendar year after incurring the costs.[8] If a carrier files a quarterly update, by September 30, for instance, NECA recalculates high-cost loop support and interim hold-harmless support for all carriers based in part on that carrier's updated data (e.g., cost data covering the last nine months of the previous calendar year and the first three months of the current calendar year, as well as its loop costs), rather than the calendar year data submitted on July 31. Thus, the quarterly update provision allows carriers to receive support based on updated cost and loop count information much earlier than the beginning of the second calendar year after costs are incurred.

### B. The Petition

4. On April 10, 2000, San Carlos, a tribally-owned and operated telecommunications carrier that was formed to serve the San Carlos Apache Reservation (Reservation) in Arizona, filed a request for waiver of sections 36.611 and 36.612 of the Commission's rules.[9] The requested waiver would enable San Carlos to receive accelerated high-cost loop support payments. San Carlos submits that grant of its waiver request will allow it to pay down existing debt, to obtain additional funding to complete construction, and to achieve positive financial results, thereby permitting it to continue fulfilling its universal service commitments by providing and extending reasonably priced local telephone service to previously unserved and underserved portions of the Reservation.[10] In the absence of the requested waiver, San Carlos argues that it will be forced to dramatically increase rates or request loans from its Tribal Council.[11] San Carlos also states that the absence of accelerated universal service support will threaten the availability of additional loan funds to complete construction to remaining unserved areas and subscribers as planned, and threaten the continued availability of services already deployed.[12]

5. On May 8, 2000, the Common Carrier Bureau (Bureau) released a public notice seeking comment on the petition.[13] Comments in support of San Carlos's petition were submitted by the National Telephone Cooperative Association, the National Tribal Telecommunications Alliance, and Mescalero Apache Telecom, Inc.

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[8] *See id.*

[9] The Reservation spans the Gila, Graham, and Pinal counties in southeastern Arizona. *Petition* at 4. On November 8, 1996, the Accounting and Audits Division granted San Carlos a study area waiver associated with San Carlos's purchase of an exchange previously operated by Qwest Corporation (Qwest) (formerly U S WEST Communications, Inc.). *See San Carlos Apache Telecommunications Utility, Inc., and U S WEST Communications, Inc., Petition for Waivers of Sections 61.41(c)(2), 69.3(e) and the Definition of "Study Area" Contained in Part 36 Appendix-Glossary of the Commission's Rules*, AAD 96-52, Memorandum Opinion and Order, 11 FCC Rcd 14591 (Acc. Aud. Div. 1996).

[10] *See* Petition at 10.

[11] *Id.* at 2.

[12] *Id.* at 10.

[13] *See San Carlos Apache Telecommunications Utility, Inc., Seeks Waiver of Sections 36.611 and 36.612 of the Commission's Rules*, CC Docket No. 96-45, Public Notice, DA 00-1018 (Com. Car. Bur. rel. May 8, 2000).

## III. DISCUSSION

6. Generally, Commission rules may be waived for good cause shown.[14] As noted by the Court of Appeals for the D.C. Circuit, however, agency rules are presumed valid.[15] The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.[16] In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.[17] Waiver of the Commission's rules therefore is appropriate only if special circumstances warrant a deviation from the general rule, and such a deviation will serve the public interest. For the reasons set forth below, we conclude that a waiver of sections 36.611 and 36.612 of the Commission's rules is not warranted in this instance.

7. Thus far, we have granted waivers of sections 36.611 and 36.612 of the Commission's rules only in limited circumstances, namely to accelerate the provision of support to cover costs incurred by new carriers initiating services in predominantly unserved areas.[18] We have found compelling reasons to do so in instances where the carrier has not yet begun to receive universal service support, and where the support is based on estimated costs and subject to true-up.[19] We have concluded that delaying the timing of high-cost loop support under those circumstances could have the unintended effect of discouraging new carriers from extending service in unserved remote areas, thereby frustrating the statutory goal of promoting the provision of services at reasonable rates.[20] We have noted that, because new companies seeking to serve predominantly unserved areas make large capital investments to initiate services, without immediate support, their company-specific rates would likely be extremely high.[21] In short, such areas would have likely remained unserved if these carriers were unable to provide service.[22] We have declined to grant such a request to the extent that waiver of sections 36.611 and 36.612 would

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[14] 47 C.F.R. § 1.3.

[15] *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

[16] *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

[17] *WAIT Radio*, 418 F.2d at 1159; *Northeast Cellular*, 897 F.2d at 1166.

[18] *See Mescalero Apache Telecom, Inc., GTE Southwest Incorporated, and Valor Telecommunications of New Mexico, LLC, Joint Petition for Waiver of the Definition of "Study Area" Contained in the Part 36, Appendix-Glossary of the Commission's Rules, Waiver of Sections 61.41(c)(2), 69.3(e)(11), 36.611, and 36.612 of the Commission's Rules*, CC Docket No. 96-45, DA 01-129 (Acc. Pol. Div. rel. Jan. 18, 2001) (*Mescalero*); *Border to Border Communications, Inc., Petition for Waiver of Sections 36.611 and 36.612 of the Commission's Rules*, AAD 94-61, Memorandum Opinion and Order, 10 FCC Rcd 5055 (Com. Car. Bur. 1995) (*Border to Border*); *South Park Telephone Company, Petition for Waiver of Sections 36.611 and 36.612 of the Commission's Rules*, AAD 97-41, Order, 13 FCC Rcd 198 (Acct. Aud. Div. 1997) (*South Park*); *Sandwich Isles Communications, Inc., Petition for Waiver of Section 36.611 of the Communications Rules and Request for Clarification*, AAD 97-82, Order, 13 FCC Rcd 2407 (Acct. Aud. Div. 1998) (*Sandwich Isles*).

[19] *See South Park*, 13 FCC Rcd at 201-22.

[20] *Id.*; *Border to Border*, 10 FCC Rcd at 5057. *See also* 47 U.S.C. § 254(b); Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

[21] *See South Park*, 13 FCC Rcd at 202.

[22] *See Sandwich Isles*, 13 FCC Rcd at 2411.

provide additional support payments for prior periods.[23]

8. San Carlos is to be commended for improving the quality of service for existing customers and extending reasonably-priced service to unserved customers on the Reservation. San Carlos has failed, however, to show good cause justifying waiver of sections 36.611 and 36.612 of the Commission's rules in this instance.

9. We are not persuaded that special circumstances warrant such a deviation from sections 36.611 and 36.612 of the Commission's rules. Unlike previous petitioners that received waivers of sections 36.611 and 36.612, San Carlos has been in operation for almost four years and has successfully extended affordable service throughout the Reservation under the rules governing high-cost and low-income universal service support.[24] San Carlos has not justified the need for accelerated support. By San Carlos's own admissions, the operation of sections 36.611 and 36.612 of the Commission's rules in this instance has not frustrated the Act's goal of promoting the national availability of telephone service at reasonable rates.[25] Through December 31, 2000, San Carlos received approximately $1,063,293 in high-cost loop support.[26] Since commencing operations, San Carlos states that it has installed digital switches to allow the provision of advanced telecommunications services, including CLASS services, and equal access facilities (providing a choice of at least six long distance carriers).[27] San Carlos has installed a host digital switch, two remotes, and several concentrators to extend services to over 1,000 new subscribers.[28] As a result of San Carlos's efforts, 90 percent of its network has been upgraded and the number of customers with telephone service on the Reservation has increased by over 200 percent. Specifically, San Carlos has installed 1,387 access lines on the Reservation.[29] San Carlos states that the current penetration rate on the Reservation is approximately 80 to 85 percent.[30] According to San Carlos, "virtually all inhabited establishments have service available" and "[a]t this time there are no unfilled orders for service."[31] San Carlos has performed all these tasks while keeping its monthly rate for basic

[23] *See, e.g., Border to Border*, 10 FCC Rcd at 5057.

[24] *See id.*

[25] *See* 47 U.S.C. § 254(b).

[26] The December 31, 2000, high-cost loop support payment was paid in January 2001.

[27] Petition at 5-6.

[28] *Id.* at 5.

[29] *See* Letter from David Cosson, Counsel for San Carlos Apache Telecommunications Utility, Inc., to Sharon Webber, Federal Communications Commission, filed April 30, 2001.

[30] *See* Letter from David Cosson, Counsel for San Carlos Apache Telecommunications Utility, Inc., to Magalie Roman Salas, Federal Communications Commission, filed December 12, 2000. The national average penetration rate is 94.6 percent. *See Monitoring Report, September 2000*, CC Docket No. 98-202 (rel. Nov. 9, 2000). By contrast, we recently granted a waiver request to Mescalero Apache Telecom, Inc., a newly-formed tribally-owned carrier planning to serve an area with a penetration rate of approximately 48 percent. *See Mescalero*, DA 01-129, at para. 24.

[31] *See* Letter from David Cosson, Counsel for San Carlos Apache Telecommunications Utility, Inc., to Sharon Webber, Federal Communications Commission, filed April 30, 2001, at 1; Letter from David Cosson, Counsel for San Carlos Apache Telecommunications Utility, Inc., to Magalie Roman Salas, Federal Communications Commission, filed December 12, 2000, at 1.

local service at $15 per line.[32] We therefore conclude that San Carlos has failed to demonstrate that special circumstances warrant waiver of sections 36.611 and 36.612.

10. We also conclude that the public interest would not be served by grant of the requested waiver. Specifically, the Commission's universal service mechanisms are designed to address the type of concerns raised by carriers, such as San Carlos, that without immediate access to additional support they will be unable to serve consumers located in high-cost rural areas without increasing local rates. We note, for example, that San Carlos will continue to be eligible for high-cost loop support to the extent that its average loop costs exceed 115 percent of the national average loop cost.[33] In addition, the Commission has adopted several rule changes to ensure the continued availability of affordable and quality telecommunications services in rural America. For example, the Commission recently modified its rules for providing high-cost universal service support to rural telephone companies for the next five years.[34] The modified rules increase high-cost loop support for rural telephone companies effective July 1, 2001.[35] The total amount of high-cost loop support available to rural carriers will increase annually by a "Rural Growth Factor" that will allow the high-cost loop fund to grow based on annual changes in the Gross Domestic Product-Chained Price Index and the total number of working loops of rural carriers.[36] The modified rules also will enable rural telephone companies to receive additional "safety net additive" support for significant new investments that are not supported under the indexed cap to the high-cost loop support mechanism.[37] As a result of the Commission's modified rules, San Carlos may receive increased high-cost loop support and may qualify for additional "safety net additive" support.

11. Of particular interest to San Carlos, the Commission, in recognition of the historical federal trust relationship between the federal government and federally-recognized Indian tribes, also modified rules governing federal Lifeline and Link-Up support in 2000 to increase access to telecommunications services and subscribership among low-income individuals living on American Indian and Alaska Native lands (referred to hereinafter as "tribal lands").[38] Specifically, the Commission created a fourth tier of federal Lifeline support, consisting of up to an additional $25 per month, to qualifying low-income individuals living on tribal lands.[39] The Commission also revised its rules governing the Link-Up program to provide up to $100 of federal support to reduce the cost of both initial

[32] *See* Petition at 9.

[33] *See* 47 C.F.R. § 36.631.

[34] *See Rural High-Cost Reform Order.*

[35] *See id.* at paras. 31-53.

[36] *Id.*

[37] *See id.* at paras. 77-90.

[38] *See Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas*, CC Docket No. 96-45, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, FCC 00-208, paras. 22-23, (rel. Jun. 30, 2000) (*Twelfth Report and Order*), *stayed in part by Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas*, CC Docket No. 96-45, Order and Further Notice of Proposed Rulemaking, FCC 00-322 (rel. Aug. 31, 2000), as corrected by Errata, CC Docket No. 96-45, DA 00-2128 (Com. Car. Bur. rel. Sep. 20, 2000).

[39] *See id.* at paras. 42-58.

connection charges and line extension charges of qualifying low-income individuals living on tribal lands.[40] These additional sources of support will assist San Carlos in its efforts to continue providing affordable services to qualified low-income individuals living on the Reservation. We, therefore, conclude that in this instance the public interest would not be served by permitting San Carlos to receive accelerated high-cost loop support.

12. Finally, we observe that the Commission's high-cost loop support distribution rules have been in place for many years. In negotiating the purchase of an exchange, it is incumbent on the purchaser and the seller to take into account necessary investment and future cash flows related to the sale.[41] In 1996, in its initial study area waiver request, San Carlos provided a description of its upgrades and extensions of service, but made no claim that its planned upgrades would be burdened by the application of sections 36.611 and 36.612.[42] In fact, San Carlos stated that it would upgrade existing facilities "without necessitating inordinate increases in basic service rates."[43] San Carlos also stated that it would "extend lines to currently unserved customers of the Reservation without imposing excessive additional line extension charges."[44] Thus, San Carlos clearly considered the costs associated with upgrading the acquired exchange, but did not request a waiver for immediate high-cost loop support at that time. Moreover, because high-cost loop support often represents an important source of funds for the operation of an exchange with high loop costs and because the Commission has only waived sections 36.611 and 36.612 of its rules in very limited circumstances, San Carlos could not have reasonably relied upon obtaining a waiver of these rules when it purchased the exchange from U S West.

13. In summary, San Carlos has failed to demonstrate good cause for waiver of sections 36.611 and 36.612 of the Commission's rules. Consequently, San Carlos's request for accelerated high-cost loop support is denied.

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[40] *See id.* at paras. 59-63.

[41] *See Accipiter*, 13 FCC Rcd at 3145-46; *Fremont*, 13 FCC Rcd at 12314.

[42] *See San Carlos Apache Telecommunications Utility, Inc., and U S WEST Communications, Inc., Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary of the Commission's Rules, Petition for Waiver of Section 69.3(e)(11) of the Commission's Rules, Petition for Waiver of Section 61.41(c) and (d) of the Commission's Rules*, AAD 96-52, Expedited Joint Petition for Waiver, at Attachment A (filed Apr. 19, 1996) (*Study Area Petition*). *See also Accipiter*, 13 FCC Rcd at 3145-46; *Fremont*, 13 FCC Rcd at 12314.

[43] *See Study Area Petition* at 12.

[44] *Id.*

## IV. ORDERING CLAUSE

14. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 5(c), 201, 202, and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 155(c), 201, 202, 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 San Carlos Apache Telecommunications Utility, Inc. for waiver of sections 36.611 and 36.612 of the Commission's rules IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Carol E. Mattey
Deputy Chief, Common Carrier Bureau