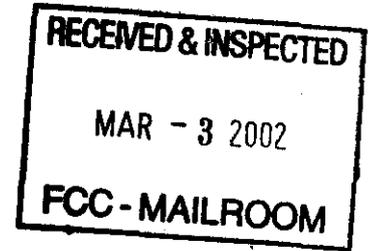


Before the
Federal Communications Commission
Washington, D.C. 20554



In the Matter of)

Federal-State Joint Board on)
Universal Service)

CC Docket 96-45)

ORDER ON RECONSIDERATION

Adopted: February 22, 2002

Released: February 27, 2002

By the Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. The Common Carrier Bureau (Bureau) has before it a petition for reconsideration filed by the Pennsylvania Public Utility Commission (Pennsylvania PUC or petitioner)¹ seeking reconsideration of Bureau Order denying the Pennsylvania PUC's original waiver petition.² We have reviewed the petition and supporting comments, and now, for the reasons discussed below, we deny the Pennsylvania PUC's petition for reconsideration.

¹ Combined Petition for Reconsideration of the Pennsylvania Public Utilities Commission, CC Docket No. 96-45 (filed February 2, 1998) (Pennsylvania PUC Petition for Reconsideration). This petition was filed on behalf of the Pennsylvania PUC as well as the Center for Rural Pennsylvania of the Pennsylvania General Assembly; the Office of Information Technology; the Pennsylvania Rural Development Council; the Pennsylvania Department of Education; and the Office of Rural Health of Penn State University.

² Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Memorandum Opinion and Order*, 13 FCC Rcd 274 (Com. Car. Bur. 1998) (*Bureau Order*). On February 13, 1999, the Bureau issued a public notice of the Pennsylvania PUC's petition for reconsideration, and requested comment. Pennsylvania Public Utility Commission Petition for Reconsideration, Public Notice, 13 FCC Rcd 3011 (Com. Car. Bur. 1998). In response, several parties filed comments in support of the petition. Comments of Bell Atlantic-Pennsylvania (filed May 4, 1998); Comments of the Pennsylvania Information Highway Consortium (filed April 6, 1998); Comments of the Pennsylvania PUC (filed February 27, 1998); Comments of the Public Utilities Commission of Ohio (filed March 4, 1998); Comment of the State of Indiana (filed February 27, 1998); Comments of the State of North Carolina (filed March 18, 1998); Comments of the Texas Office of Utility Counsel (filed March 4, 1998); Reply Comments of Pennsylvania PUC (filed March 16, 1998).

2. Previously, the Pennsylvania PUC sought a waiver of the Commission's definition of "rural area" for purposes of applying for discounts under the schools and libraries and rural health care universal service support mechanisms. The Commission's definition of rural area relies on the Metropolitan Statistical Areas (MSAs) published by the Office of Management and Budget (OMB) and the most recent Goldsmith Modifications published by the Office of Rural Health Policy of the U.S. Department of Health and Human Services.³ This definition is used to determine the eligibility of health care providers, schools, and libraries for discounted telecommunications services.⁴ Specifically, Pennsylvania PUC sought to have nine of its counties that do not meet the Commission's definition but, according to the Pennsylvania PUC, have rural characteristics, treated as rural areas.⁵ In denying this waiver request, the Bureau reasoned that the evidence submitted by the Pennsylvania PUC (such as a lower physician-to-resident ratio relative to other urban areas in Pennsylvania) did not establish "special circumstances" that would justify a waiver of the Commission's general rule because the Federal-State Joint Board on Universal Service had already considered and rejected including such criteria in the definition of "rural area."⁶ The Bureau concluded that granting the Pennsylvania PUC's waiver request would have undermined the Commission's method for ensuring that the universal service support mechanisms are specific, predictable, and sufficient.⁷

3. In its petition for reconsideration of the Bureau Order, the Pennsylvania PUC makes three arguments. First, the Pennsylvania PUC argues that the Bureau Order was defective because it did not provide examples of "special circumstances" that would warrant grant of a waiver from the Commission's rules regarding the definition of "rural area" for schools, libraries and health care providers located in certain area.⁸ Second, the Pennsylvania PUC offers what it characterizes as "new and relevant supplemental evidence" that was not reasonably discoverable at the time of its initial pleading and that, according to the Pennsylvania PUC, warrants reconsideration of the Bureau's order. Specifically, the Pennsylvania PUC argues that the Bureau's order, by failing to grant exemption from the Commission's use of OMB/Goldsmith Modification classification of counties, imposes an inequity on counties east of the Mississippi River. The

³ See *Bureau Order*, para. 1. A health care provider is eligible for discounts only if it is located in a rural area. See 54.601(a)(4). A school or library is eligible for a greater discount if it is located in a rural area. See 47 C.F.R. §§ 54.505(b)(3), 54.505(c). Although the test for whether a school or library is located in a rural area is set out separately from the definition of rural area applied to health care providers, these separate tests are substantively identical. See 47 C.F.R. §§ 54.5, 54.505(b)(3); see also *Bureau Order*, at 1 (noting that same definition is used in both contexts).

⁴ *Id.*

⁵ See *Bureau Order*, para. 4.

⁶ See *Bureau Order*, paras. 6-8.

⁷ See *Bureau Order*, para. 9; 47 U.S.C. § 254 (b)(5).

⁸ Pennsylvania PUC Petition for Reconsideration, at 2, 8.

Pennsylvania PUC proposes that the Commission adopt a four-part test to apply to future requests for waiver from the OMB/Goldsmith Modification classifications. The Pennsylvania PUC contends that, under this proposed test, the nine counties in Pennsylvania that were the subject of the original waiver request would qualify as "rural." The Pennsylvania PUC asserts that these arguments are based on new evidence that was not previously available to it.⁹ Finally, the Pennsylvania PUC urges the Bureau to reconsider the Commission's conclusion that only "common carriers" are eligible to receive universal service support under section 254(h)(1).¹⁰

II. DISCUSSION

4. Pursuant to section 1.3 of the Commission's rules, the Commission may grant waiver of a rule if the party can demonstrate good cause.¹¹ As interpreted by the courts, this requires that a petitioner show that "special circumstances warrant a deviation from general rule and such a deviation will serve the public interest."¹² The burden, therefore, falls on the petitioner, not the Commission, to demonstrate the unique facts on which the Commission may rely in considering whether a waiver would be in the public interest. Thus, the Pennsylvania PUC's contention that the Commission has a obligation to set forth for petitioners the circumstances that would warrant the grant of a waiver is not supported by the law. In the case at hand, we found that the circumstances specified by the Pennsylvania PUC did not warrant grant of its waiver request.¹³

5. In addition, with respect to the supplemental evidence presented by the Pennsylvania PUC in its petition for reconsideration, we conclude that the Pennsylvania PUC has not demonstrated, under the Commission's rules, that we should consider these facts at this stage of the proceeding. Specifically, the Pennsylvania PUC argues that the Bureau should consider as evidence that the nine counties are served by rural telephone companies.¹⁴ The Pennsylvania PUC also argues that the commitment of state resources

⁹ See Pennsylvania PUC for Reconsideration, at 11-12.

¹⁰ *Id.* at 17.

¹¹ 47 C.F.R. § 1.3.

¹² *Northeast Cellular Tel. 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.

¹³ See *Bureau Order*, para. 8 (neither a showing that the counties at issue have significantly fewer hospital beds and a lower-physician-to-resident ratio, nor a showing that the rates charged for telecommunications services in the nine counties exceed those charged in other non-rural areas, without more, demonstrates that "special circumstances" justify a waiver of the Commission's rule); see also *Bureau Order*, para. 9 (noting that the Commission's rule is designed to comply with the statutory mandate that universal service is "specific, predictable and sufficient" and that the Pennsylvania PUC does not demonstrate how adoption of its proposed departure from this general rule would ensure that support remains "specific, predictable and sufficient").

¹⁴ Pennsylvania PUC Petition for Reconsideration at 15.

in the nine non-rural counties supports its claim that these counties should be classified as rural. The Pennsylvania PUC cites the enactment of the Children's Health Care Act in 1992 and the designation in 1996 of certain municipalities as health care shortage areas under this Act.¹⁵

6. Section 1.106(c) of the Commission's rules states that a petition for reconsideration that relies on facts not previously presented to the Commission may be granted only in limited circumstances, such as where the petitioner could not, through the exercise of ordinary diligence, have learned of the evidence prior to the last opportunity to present such matters.¹⁶ We find that these circumstances are not present here. The record does not support the conclusion that the Pennsylvania PUC could not have learned, through ordinary diligence, of the facts on which it now relies. In any event, if we were to find that the facts were appropriately before us in the present proceeding, consideration of these facts would represent an approach that has already been considered and rejected when the Joint Board and Commission were adopting the definition of "rural area."¹⁷

7. The Pennsylvania PUC has also asked that we reconsider the Commission's conclusion that only "common carriers" may receive universal service support for providing telecommunications services to eligible schools, libraries and health care providers under section 245 (h)(1).¹⁸ The Bureau does not have delegated authority to reconsider the decisions of the Commission.¹⁹ More importantly, this issue was addressed in the Commission's *Universal Service Order* and *Fourth Reconsideration Order*.²⁰ Accordingly, the proper forum for the petitioner's reconsideration request

¹⁵ *Id.* at 14-15.

¹⁶ 47 C.F.R. § 1.106(c). A petition for reconsideration will be entertained if, *inter alia*: (1) the petition relies on facts which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters; or (2) the petition relies on facts unknown to petitioner until after such matters which could not, through ordinary diligence, have been learned prior to such opportunity. 47 C.F.R. §§ 1.106(c)(1), 1.106(b)(2). The Commission may also determine that consideration of the facts relied upon is required in the public interest. 47 C.F.R. § 1.106(c)(2).

¹⁷ *See Bureau Order*, para. 8, n.26.

¹⁸ *See* Pennsylvania PUC Petition for Reconsideration, at 17; *see also* 47 U.S.C. § 254 (h)(1).

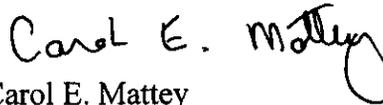
¹⁹ *See* 47 C.F.R. §§ 0.91, 0.291.

²⁰ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9002, 9054-62, 9139-45 (1997) (*Universal Service Order*), as corrected by *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Errata, FCC 97-157 (rel. June 4, 1997), *affirmed in part*, *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) (*affirming Universal Service Order in part and reversing and remanding on unrelated grounds*), *cert. denied*, *Celpage, Inc. v. FCC*, 120 S. Ct. 2212 (May 30, 2000), *cert. denied*, *AT&T Corp. v. Cincinnati Bell Tel. Co.*, 120 S. Ct. 2237 (June 5, 2000), *cert. dismissed*, *GTE Service Corp. v. FCC*, 121 S. Ct. 423 (November 2, 2000); *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*, CC Docket Nos. 96-45, 96-262, 94-1, 91-213, and 95-72, Fourth Order on Reconsideration in CC Docket No. 96-45, Report and

would have been a petition for reconsideration in response to either of these Commission Orders.²¹ The opportunity for filing petitions for reconsideration of these Orders has lapsed. The Pennsylvania PUC may still seek the modification of the Commission's rules through a petition for rulemaking.²²

8. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed February 2, 1998, by the Pennsylvania Public Utilities Commission IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Carol E. Matthey
Deputy Chief, Common Carrier Bureau

Order in CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, 13 FCC Rcd 5318 (1997) (*Fourth Reconsideration Order*).

²¹ In both Orders, the Commission found that entities must be "telecommunications carriers" in order to receive direct reimbursement from universal service mechanisms, and the term "telecommunications carrier" is limited to those carriers that offer telecommunications on a common carriage basis. *Universal Service Order* at 9177-78, 9084-90; *Fourth Reconsideration Order* at 5413-14.

²² See 47 C.F.R. § 1.401.