

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

In the Matter of)	
)	
Valor Telecommunications of Texas, L.P.)	
Petition for Waiver of Section 54.305 of)	
the Commission's Rules)	
)	
Federal-State Joint Board on Universal)	CC Docket No. 96-45
Service)	

**WESTERN WIRELESS COMMENTS
IN OPPOSITION TO VALOR PETITION FOR WAIVER**

Western Wireless Corporation (“Western Wireless”) hereby submits comments in opposition to the petition for waiver filed by Valor Telecommunications of Texas, L.P. (“Valor”) on April 11, 2003. ^{1/} The Commission must reject Valor’s petition because the petition would have the effect of gutting Section 54.305, one of the most important of the Commission’s universal service rules. Valor’s arguments in favor of its petition do not withstand scrutiny. Moreover, the Valor petition should be denied because Valor’s claim of “rural” status could have anti-competitive impacts on competitive carriers including Western Wireless, which competes with Valor in portions of its Texas service area.

^{1/} Public Notice, *Wireline Competition Bureau Seeks Comment on Valor Telecommunications of Texas, L.P. Petition for Waiver of Section 54.305 of the Commission’s Rules*, DA 03-1458, CC Docket No. 96-45 (WCB rel. Apr. 30, 2003)

I. THE VALOR PETITION WOULD GUT SECTION 54.305 AND THEREFORE SHOULD BE REJECTED.

The FCC’s high-cost universal service rules irrationally treat so-called “rural” and “non-rural” incumbent local exchange carriers (“ILECs”) completely differently. So-called “rural” incumbent local exchange carriers (“ILECs”) are entitled to substantially more support than so-called “non-rural” ILECs even when both categories of carriers serve areas that are equally rural and high-cost. Reviewing courts have questioned this arrangement, 2/ and Commission has committed to undertake a comprehensive proceeding to reconcile the high-cost funding systems for rural and non-rural carriers. 3/

The root cause of the problematic and ultimately unsustainable divergence between the high-cost rules for “rural” versus “non-rural” carriers is the “rate of return” regulatory system that applies to “rural,” but not “non-rural,” ILECs, a system in which universal service support plays a critical role. Rate of return regulation is widely recognized as eliminating incentives for carriers to operate efficiently, improve productivity, or introduce innovative technologies and services. 4/ Rate of return regulation also has profoundly anti-competitive effects

2/ *Qwest Corp. v. FCC*, 258 F.3d 1191, 1204-05 (10th Cir. 2001).

3/ *Federal-State Joint Board on Universal Service*, Fourteenth Report and Order, 16 FCC Rcd 11244, 11310, ¶¶ 169-70 (2001) (“*RTF Order*”), recon., 17 FCC Rcd 11472 (2002).

4/ *See, e.g.*, Harvey Averch and Leland L. Johnson, “Behavior of the Firm under Regulatory Constraint,” 52 *Amer. Econ. Rev.* 1052 (1962); Alfred E. Kahn, *The Economics of Regulation: Principles and Institutions*, vol. 2, at 47-59 (1971); *Price Cap Performance Review for Local Exchange Carriers*, 10 FCC Rcd 8962, ¶ 27 (1995), *subsequent history omitted*; *Policy and Rules Concerning Rates for Dominant Carriers*, Second Report and Order, 5 FCC Rcd 6786, 6789-90, ¶¶ 22, 29-32 (1990), *subsequent history omitted*.

because competition on a level playing field is impossible when one competitor – the rural ILEC – is given a regulatory guarantee of recovery of all investments plus an assured return on those investments, while other competitors’ investments are at risk.

Fortunately, the Commission’s rules contain “firewalls” between the inefficient and anti-competitive “rural” ILEC rules and the less problematic rules that govern “non-rural” ILECs. For example, Section 61.41(d) provides that ILECs departing from the “rate of return” regulatory system are not permitted to rejoin it; the study area boundary definition in Part 36-Appendix of the rules precludes ILECs from manipulating those boundaries in an effort to maximize high-cost support; and the rule at issue here, Section 54.305, assures that ILEC exchanges remain subject to the “non-rural” universal service rules even if the exchanges are acquired by a “rural” ILEC. In adopting this rule, the Commission recognized that the relatively favorable treatment accorded to “rural” ILECs could “influence unduly a carrier's decision to purchase exchanges from other carriers,” and therefore adopted the rule “[i]n order to discourage carriers from placing unreasonable reliance upon potential universal service support in deciding whether to purchase exchanges from other carriers.” ^{5/} This firewall is thus intended to prevent the high-cost fund from growing excessively and to counteract incentives to engage in transactions that would move exchanges into the inefficient and anti-competitive “rural” ILEC regulatory system.

^{5/} *Federal-State Joint Board on Universal Service*, First Report and Order, 12 FCC Rcd 8776, 8942, ¶ 308 (1997), *subsequent history omitted*.

The Commission has waived the study area boundary rule and Section 61.41(d) so frequently and routinely, 6/ however, that certain aspects of this supposed firewall are becoming “more honored in the breach than in the observance.” As a result, the rules are failing to have their intended effect of discouraging inefficient transactions driven by the lure of increased universal service funding and the irrational differences between “rural” and “non-rural” support. Thus, notwithstanding the existence of these “firewall” rules, there has been a flood of transactions involving non-rural ILECs selling exchanges to smaller carriers.

Possibly the largest of these transactions was GTE’s 2000 sale of exchanges to the investors who established Valor. The Commission’s approval of transaction was specifically predicated, in part, on the continued application of Section 54.305 to Valor, to prevent increased demands on the universal service support mechanism. 7/ Valor’s waiver petition would undermine the basis for the FCC decision permitting the establishment of the company.

6/ See, e.g., *Nemont Telephone Cooperative, Inc., et al. Joint Petition for Waiver of the Definition of the Study Area*, 18 FCC Rcd 838 (Wireline Comp. Bur. 2003); *Dickey Rural Telephone Cooperative, et al. Joint Petition for Waiver of the Definition of “Study Area,”* 17 FCC Rcd 16881 (Wireline Comp. Bur. 2002); *Pioneer Telephone Cooperative, Inc., Panhandle Telephone Cooperative, Inc., EagleNet, Inc. Joint Petition for Waiver of the Definition of “Study Area,”* 16 FCC Rcd 6757 (CCB Accounting Policy Div., 2001); *Citizens Telecommunications Company of Illinois, GTE South Inc. and GTE North Inc. Joint Petition for Waiver of the Definition of “Study Area,”* 15 FCC Rcd 23706 (CCB Accounting Policy Div. 2000). The Commission has issued dozens of such waiver orders over the past few years.

7/ *Valor Telecommunications of Texas, LP and GTE Southwest Inc. Joint Petition for Waiver of the Definition of “Study Area,”* 15 FCC Rcd 15816, ¶ 9 & n.26 (CCB Accounting Policy Div., 2000) (“*Valor/GTE Study Area Waiver*”).

Section 54.305 is the only one of the Commission’s “firewall” rules that is not frequently waived. To date, the Commission has waived that rule only once, and on that occasion, involving 950 lines purchased by a newly-established, tribally-owned carrier operating on a reservation where the subscribership rate was less than 50%, the Commission warned, “We will not, however, routinely grant waiver of this rule and those seeking a waiver of section 54.305 will bear a heavy burden.” 8/

Valor fails to carry that heavy burden here. Valor makes the implausible assertion that, because its purchase of exchanges from GTE took place over three years ago, Section 54.305 has served its purpose of ensuring that the prospect that Valor could receive increased universal service support was not a major factor in the transaction. But Valor provides no evidence to substantiate this claim; to the contrary, there is good reason to suspect that both GTE and Valor’s extraordinarily sophisticated investors had an expectation that there was a fairly good chance the FCC would waive Section 54.305 and give Valor favorable “rural” ILEC treatment at some future point. 9/ Three years is certainly not such a long time frame as to be “too speculative and too remote” to affect investor

8/ *Mescalero Apache Telecom, Inc., Waiver of Section 54.305 of the Commission’s Rules*, 16 FCC Rcd 1312, ¶ 13 (2001). *See also Blackduck Tel. Co. and Arvig Tel. Co. Joint Petition for Waiver*, 17 FCC Rcd 24602 (WCB Telecom. Access Policy Div. 2002) (denying waiver of Section 54.305); *RTF Order*, 16 FCC Rcd at 11284 (modifying Section 54.305 to permit “safety valve” mechanism for increased investment under specified circumstances, after purchase of exchange).

9/ Western Wireless would strongly encourage the Commission to require Valor to produce detailed data on the circumstances of the GTE exchange sale transaction, in order to verify Valor’s questionable claim in this regard.

expectations. ^{10/} To avoid rewarding the parties to this enormous transaction, and more importantly, to prevent such harmful manipulation in the future, the Commission should decline to waive Section 54.305.

II. THE “SPECIAL CIRCUMSTANCES” VALOR CITES AND ITS CLAIMED PUBLIC INTEREST BENEFITS FAIL TO JUSTIFY THE PROPOSED WAIVER.

Waiver proponents must show that their proposals are justified by “special circumstances” and that the proposed waiver would benefit the “public interest.” ^{11/} Valor fails to meet this standard. Valor puts forward a number of unpersuasive arguments intended to show that the waiver is justified by the high costs it is experiencing in operating its Texas exchanges. Valor’s claims are based on a long list of routine costs of business that carriers routinely must cover. For example, Valor cites the need for costly network modernization in the exchanges Valor purchased, the rural and high-cost nature of its service area, the capital

^{10/} *Contra*, Valor Petition at 6. In support of its assertion that three years is long enough to “prevent inflation of the sale price of exchanges based upon anticipated increases in high-cost loop support,” *id.* at 6 n.16, Valor cites two orders in which the Common Carrier Bureau removed caps that it had previously imposed upon rural ILECs that had purchased exchanges three years or more in the past. *Petitions for Waiver, Copper Valley Tel., Inc.*, 1999 FCC LEXIS 4381, DA 99-1845 (CCB 1999); *Petitions for Waiver, Accent Communications, Inc.*, 15 FCC Rcd 23491 (CCB 2000). But those orders do not support the proposition for which Valor cites them, since the orders relate to conditions imposed in individual pre-1996 Act FCC decisions waiving the study area boundary rule, *not* the Section 54.305 firewall rule, which is motivated by a slightly different concern – the need to retain a firewall between the universal service disbursements to exchanges subject to the relatively efficient “non-rural” high-cost support rules, versus exchanges eligible for substantial greater support amounts under the irrational and uneconomic “rural” rules.

^{11/} *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972); 47 C.F.R. § 1.3.

expenditures it had to invest due to allegedly incomplete cost information from GTE at the time of the acquisition, the extraordinary costs associated with an ice storm in December 2000, and the cost of providing specialized telecommunications services to federal agencies operating at President Bush's ranch. 12/

But contrary to Valor's claims, not one of these circumstances is extraordinary, not one of them is truly beyond its control, and not one of them justifies a waiver of Section 54.305. Valor knew or should have known of the need for network modernization in the exchanges it purchased and the rural nature of those exchanges, and its purchase price it paid GTE should have taken account of these inevitable and foreseeable obligations. If GTE gave Valor incomplete cost information in connection with the transaction, then Valor may be able to justify a claim against GTE/Verizon – but *not* a claim against the consumers across the country who pay contributions to the universal service support mechanisms. Prudent carriers insure themselves against the risk of adverse weather conditions such as ice storms, and carriers that provide specialized services to demanding telecommunications consumers (including government agencies) typically recover the costs of those services from those consumers – not from other carriers' consumers who contribute to universal service mechanisms. Valor's failure to anticipate or address these circumstances does not justify forcing universal service ratepayers to cover for its mistakes or misfortunes.

12/ Valor Petition at 8-11.

Moreover, Valor submits that the public interest benefits of its proposed waiver are that the waiver would enable Valor to fund network upgrades, improved service to consumers, and deployment of advanced broadband telecommunications capability. ^{13/} But again, Valor has no right to look upon the fund as its private piggy-bank and demand subsidies for these endeavors from consumers across the country who pay into the universal service fund. Rather than putting its hand into ratepayer's pockets, Valor should do what most businesses do: raise money through the capital markets. Valor could also consider seeking increases in the rates paid by its own end-user customers. A waiver of an important universal service rule is by no means the only way for Valor to finance these asserted costs.

Finally, Valor claims that the waiver it proposes would have only a minimal impact on the high-cost fund. ^{14/} But the true impact of the proposed waiver is not the impact of the funding to Valor alone, but the impact of destroying the Section 54.305 firewall by waiving it and creating a legitimate expectation that it will be waived again in the future. If the Commission grants the waiver, then it would set the stage for many more exchange sale transactions motivated not by economic efficiency, but by a desire to maximize high-cost funding by exploiting the discrepancy between "non-rural" and "rural" support. If significant numbers of other investors follow Valor's example and purchase exchanges from non-rural

^{13/} *Id.* at 13-15.

^{14/} *Id.* at 15-16.

ILECs in an effort to maximize universal service support, the impact on the fund would be anything *but* “minimal.”

III. THE COMMISSION SHOULD REJECT VALOR’S ANTI-COMPETITIVE SELF-CHARACTERIZATION AS A “RURAL” CARRIER

In July 2000, Western Wireless filed a petition asking the Commission to reject a Valor’s characterization of itself as a “rural” carrier. ^{15/} Western Wireless showed that Valor does not qualify as a “rural” ILEC under Section 153(37)(D) of the Act because Valor was not a local exchange carrier on the date of enactment of the Telecommunications Act of 1996 and did not have “less than 15 percent of its access lines in communities of more than 50,000” on that date, and because Valor’s predecessor – GTE – clearly did not qualify for “rural” ILEC status. Western Wireless also demonstrated that permitting Valor to claim “rural” status could have anti-competitive effects on competing carriers because that status arguably would entitle Valor to exemptions from certain interconnection obligations (under Section 251(f) of the Act) and could enable Valor to impose additional procedural hurdles on competitive applicants for eligible telecommunications carrier status in Valor’s service area (under Section 214(e)(2)).

^{15/} Western Wireless Petition to Reject Rural Telephone Company Self-Certification, CC Docket No. 96-45 (filed July 27, 2000) (“Western Wireless Petition”); see Public Notice, *Western Wireless Corporation Petition to Reject Rural Telephone Company Self-Certification filed by Valor Telecommunications Southwest, LLC*, 15 FCC Rcd 15123 (CCB 2000); *Valor/GTE Study Area Waiver*, ¶ 1 n.2.

The current Valor waiver petition would compound the harm that Western Wireless complained of in 2000. 16/ The Commission should prohibit Valor and similarly situated parties from abusing the purchase of exchanges from non-rural ILECs as an illegitimate basis for claiming additional universal service funds and invoking regulatory provisions that inhibit competitive entry.

For the foregoing reasons, the Commission should reject Valor's petition for waiver.

Respectfully submitted,

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16/ See Western Wireless Petition.