

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

In the Matter of )  
)  
Federal-State Joint Board on Universal Service ) CC Docket No. 96-45  
)  
Alliance Communications Cooperative, Inc. and )  
Hills Telephone Company, Inc. )  
Petition for Waiver of Section 54.301 Local )  
Switching Support Data Submission Reporting Date )  
To Extent Applicable to Average Schedule Companies )

To: Chief, Wireline Competition Bureau

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Federal Communications Commission  
Office of the Secretary

**PETITION FOR EXPEDITED WAIVER  
OR RELEASE OF LOCAL SWITCHING SUPPORT**

**ALLIANCE COMMUNICATIONS COOPERATIVE, INC  
HILLS TELEPHONE COMPANY, INC.**

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Dated: May 20, 2004

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**SUMMARY**

Alliance Communications Cooperative, Inc. ("Alliance") and Hills Telephone Company, Inc. ("Hills") request waiver of Section 54.301 of the Rules, to the extent (if any) it imposes projected Local Switching Support data filing requirements, deadlines, and late-filing penalties upon average schedule companies. Good cause exists for the requested waiver because: (1) the unique circumstances the January 1, 2003 cooperative merger that created Alliance and its July 7, 2003 acquisition of Hills resulted in reorganizations and reassignments that disrupted the functioning of the small Alliance-Hills accounting staff during 2003; (2) the Universal Service Administrative Company ("USAC") website did not provide adequate or timely notice of its asserted October 1, 2003 filing deadline for projected Local Switching Support data; (3) the "late" filing (in February 2004) by Alliance and Hills of projected 2004 access line, exchange and access minute data that can be revised and trued-up at any time before December 31, 2005 will not have any significant adverse impact upon USAC's administration of the Local Switching Support program; (4) the loss of approximately \$951,804 in Local Switching Support for 2004 will adversely affect the rates that Alliance and Hills charge their rural South Dakota and Iowa customers, impair their ability to invest in new and upgraded telecommunications infrastructure, and/or cause them to limit or reduce employment positions and opportunities; and (5) the loss of approximately \$951,804 in Local Switching Support constitutes an excessive penalty for what was, at the very worst, a harmless and inadvertent clerical oversight.

In the alternative, Alliance and Hills request that the Bureau issue an order clarifying that Section 54.301, as presently worded, does not clearly impose Local Switching Support filing requirements, filing deadlines and late-filing penalties upon average schedule companies, and

that neither the Communications Act nor the Commission's Rules have delegated to USAC the authority to adopt and enforce such filing requirements, filing deadlines and late-filing penalties.

Grant of either the requested waiver, or the requested clarification, will enable Alliance and Hills to receive approximately \$951,804 in Local Switching Support that they are presently being denied for Calendar Year 2004.

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**PETITION FOR EXPEDITED WAIVER  
OR RELEASE OF LOCAL SWITCHING SUPPORT**

Alliance Communications Cooperative, Inc. ("Alliance") and Hills Telephone Company, Inc. ("Hills"), by their attorney and pursuant to Section 1.3 of the Commission's Rules, request waiver of Section 54.301(b) and any other provision of Section 54.301 of the Rules, to the extent (if any) they are deemed to impose an October 1 filing requirement and filing deadline for projected Local Switching Support data (access lines, exchanges and access minutes) upon eligible telecommunications carriers ("ETCs") that are average schedule companies, and to the extent (if any) they are deemed to impose a penalty (in the amount of the loss of all of their Local Switching Support for the following calendar year) upon ETCs that file such data with the Universal Service Administrative Company ("USAC") after October 1. In the alternative, Alliance and Hills request, pursuant to Section 1.41 of the Rules, that the Bureau issue an order clarifying that Section 54.301, as presently worded, does not clearly impose Local Switching Support filing requirements, filing deadlines and late-filing penalties upon ETCs that are average schedule companies, and that USAC has not been delegated authority to adopt and implement

such filing requirements, filing deadlines and late-filing penalties, and ordering USAC to distribute the Local Switching Support that is due for Calendar Year 2004 to Alliance and Hills. Grant of either the requested waiver, or the requested clarification and order, will enable Alliance and Hills to receive approximately \$951,804 in Local Switching Support that they are presently being denied for Calendar Year 2004.

Good cause exists for the requested waiver of Section 54.301 because: (1) the unique circumstances of the January 1, 2003 cooperative merger that created Alliance and its July 7, 2003 acquisition of Hills resulted in reorganizations and reassignments that disrupted the functioning of the small Alliance-Hills accounting staff during 2003; (2) the USAC website did not provide adequate or timely notice of the asserted October 1, 2003 deadline for the filing of projected Local Switching Support data; (3) the "late" filing (in February 2004) by Alliance and Hills of projected 2004 access line, exchange and access minute data that can be revised and trued-up at any time before December 31, 2005 will not have any significant adverse impact upon USAC's administration of the Local Switching Support program; (4) the loss of approximately \$951,804 in Local Switching Support for 2004 will adversely affect the rates that Alliance and Hills charge their rural South Dakota and Iowa customers, impair their ability to invest in new and upgraded telecommunications infrastructure, and/or cause them to limit or reduce employment positions and opportunities; and (5) the loss of approximately \$951,804 in Local Switching Support appears to be an excessive penalty for what was, at the very worst, a harmless and inadvertent clerical oversight.

In the alternative, the requested clarification is based upon the premises that: (a) Sections 54.301(b) and 54.301(f) of the Rules do not contain any clear Local Switching Support filing requirements or filing deadline for average schedule companies, and do not specify or imply any

penalty for the late filing of Local Switching Support data by any ETC; and (b) neither the Communications Act nor the Commission's Rules have delegated to USAC the authority to adopt and enforce penalties for the late-filing of Local Switching Support data or forms.

## I

### Alliance and Hills

Alliance is a South Dakota rural telephone cooperative that was formed by the merger of two South Dakota rural telephone cooperatives -- Splitrock Telecom Cooperative, Inc. ("Splitrock") (approximately 4,093 member-owners) and Baltic Telecom Cooperative ("Baltic") (approximately 2,556 member-owners) -- on January 1, 2003. Alliance is located at 612 Third Street (P.O. Box 349) in Garretson, South Dakota 57030. It has approximately 6,650 owner-members. It provides local exchange and exchange access services to two South Dakota study areas: (a) the former Splitrock study area (Study Area No. 391657), which is now known as the Alliance Communications-Splitrock study area and which serves five exchanges (approximately 6,990 access lines); and (b) the former Baltic study area (Study Area No. 391642), which is now known as the Alliance Communications-Baltic study area and which serves five exchanges (approximately 3,118 access lines).

Hills is a Minnesota corporation that was acquired by Alliance on July 7, 2003, and is presently a wholly-owned subsidiary of Alliance. Hills is located at 612 Third Street in Garretson, South Dakota 57030. It provides local exchange and exchange access services to its Iowa study area (Study Area No. 351405), which serves seven local exchanges (approximately 2,123 access lines), and to a Minnesota study area (Study Area No. 361405), which serves three exchanges (approximately 631 access lines).

Alliance and Hills are both "rural telephone companies" under the definition in Section 3(37) of the Communications Act and Sections 51.5 and 54.5 of the Commission's Rules, and have filed the required self-certifications with the Commission. Alliance and Hills are also both rate-of-return carriers that operate on an average schedule basis.

Alliance, Hills and their predecessors, have been designated ETCs by the South Dakota Public Utilities Commission ("SDPUC"), Iowa Utilities Board ("IUB") and Minnesota Public Utilities Commission ("MPUC") since 1998.

The Alliance Communications-Splitrock and Alliance Communications-Baltic study areas are not in the National Exchange Carrier Association ("NECA") Traffic Sensitive Pool. Rather, Alliance issues its own traffic sensitive interstate access service rates in Alliance Tariffs F.C.C. No. 1 (for the Alliance Communications-Splitrock study area) and F.C.C. No. 2 (for the Alliance Communications-Baltic study area). Likewise, the Hills Iowa study area is not in the NECA Traffic Sensitive Pool, and Hills issues its own traffic sensitive interstate access service rates for its Iowa study area in Hills Tariff F.C.C. No. 1. However, the Hills Minnesota study area has remained in the NECA Traffic Sensitive Pool, and issues all of its interstate access service rates in NECA Tariff F.C.C. No. 5. Because of this tariff and pooling situation, NECA makes many of the USAC filings (including Local Switching Support forms) for the Hills Minnesota study area, but does not do so for the Alliance study areas or the Hills Iowa study area.

During 2003, Alliance received \$398,832 of Local Switching Support for its Alliance Communications-Splitrock study area, and \$291,852 of Local Switching Support for its Alliance Communications-Baltic study area. During 2003, Hills received \$261,120 of Local Switching Support for its Iowa study area. Alliance and Hills expected to receive approximately the same amounts of Local Switching Support for the three study areas during calendar year 2004. The

aggregate amount of such expected 2004 Local Switching Support for the three study areas is \$951,804.

## II

### Good Cause Exists for Waiver of Section 54.301 of the Rules

Section 1.3 of the Rules permits the Commission's rules to be waived for good cause shown. The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest. *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990). In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of public policy on an individual basis. *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

#### **A. One-time Merger and Acquisition**

The special circumstances supporting grant of the requested waiver of Section 54.301 begin with the merger of the former Splitrock and Baltic cooperatives to form Alliance on January 1, 2003. This was a substantial undertaking for the two small rural telephone cooperatives, and required the reorganization of various administrative functions and the reassignment of specific duties among their administrative personnel. Then, on July 7, 2003, the recently created Alliance acquired Hills as the result of the dissolution and distribution of the assets of an entity in which Splitrock had been a minority owner. This transaction entailed yet further administrative staff reorganizations and work reassignments.

As a result of the merger and acquisition, Calendar Year 2003 was uniquely busy, difficult and disruptive year for the Alliance-Hills organization. With many members of the five-person accounting staff of Alliance and Hills taking on additional or different duties, the companies were

forced to rely very much during 2003 upon the FCC, NECA, USAC, and state commission websites and calendars for information about regulatory filing requirements and deadlines.

### **B. Inadequate Notice on USAC Website**

Unfortunately, USAC's website did not adequately notify ETCs during 2003 of any obligation to file USAC Form LSSa on or before October 1, 2003, or of the penalty that USAC intended to impose for failure to make a timely filing. To the extent that USAC is deemed to act for the Commission, traditional concepts of due process incorporated into administrative law preclude it from penalizing Alliance, Hills and others for "violating a rule" without first providing adequate notice of the substance of the rule. *Satellite Broadcasting Co., Inc. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987); *High Plains Wireless, L.P. v. FCC*, 276 F.3d 599, 607 (D.C. Cir. 2002); *Unity Broadcasters v. FCC*, 2003 U.S. App. LEXIS 7996 (D.C. Cir. April 25, 2003).

**USAC High Cost Calendar.** From July 30, 2003 to at least April 30, 2004, the "Timetable/Deadlines" portion of the High Cost section of USAC's website contained a calendar setting forth the "General High Cost Filing Requirements" (attached as Exhibit 1 hereto). The introduction to this calendar stated:

The following timeline outlines the filing requirements necessary to become eligible to receive high cost support. View the FAQs for more detailed information about what each of these filing requirements entails.

For October 2003, the sole entry on the USAC "General High Cost Filing Requirements" calendar was: "October 1: Annual state certifications for HCL, LSS, HCM and interim hold harmless due." (Id.)

In other words, USAC's "General High Cost Filing Requirements" calendar for 2003 contained no reference to any October 1 filing deadline for USAC Form LSSa (Local Switching Support Reporting Worksheet for Average Schedule Companies) or for USAC Form LSSc

(Local Switching Support Reporting Worksheet for Cost Companies). The only October 1 filing deadline that it listed was that for the filing of state certifications.

USAC High Cost FAQs. The “Frequently Asked Questions (FAQs) about the High Cost Mechanism” portion of the USAC website (attached as Exhibit 2 hereto) that was referenced in the introduction to the calendar during 2003 contains a section on “Local Switching Support” (Exhibit 2, pages 9 to 11). The second question and response in that section indicate that “[a]n average schedule company serving fewer than 50,000 line [sic] must submit Form LSSa in order to qualify for local switching support” (*Id.*, p. 10). However, the USAC FAQ provides no deadline for submission of Form LSSa, and indicates no specific penalty or other consequences for failure to file Form LSSa by the end of whatever date or period it may be deemed to be “due.”

In stark contrast, the very next question in the USAC FAQs goes into great and specific detail about the filing deadline and the late-filing penalties for the annual certification that the appropriate state public utilities commission must file with the Commission and USAC in order for a rural carrier to receive Local Switching Support. The FAQ response states expressly that “[i]f a state fails to certify a carrier [by the initial October 1, 2001 deadline], that carrier will not be eligible to receive high cost support for the first quarter of 2002” (*Id.*). The response then goes into significant detail regarding the consequences to the carrier’s Local Switching Support in future years when state certification is received by the Commission and USAC after October 1 (i.e., lose 1<sup>st</sup> Quarter Local Switching Support if state certification received on or before January 1; lose 1<sup>st</sup> and 2<sup>nd</sup> Quarter Local Switching Support if state certification is received on or before April 1; lose 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Quarter Local Switching Support if state certification is received on

or before July 1; lose Local Switching Support for entire year if state certification is received after July 1).

**State Certifications.** In September 2003, the SDPUC and the IUB both made timely certifications for Calendar Year 2004 to the Commission and USAC that Alliance and Hills were eligible to receive Local Switching Support and other high cost support for the entire year. As indicated by Exhibits 3, 4 and 5 attached hereto, the USAC website indicates that the requisite October 1, 2003 certifications for both of Alliance's South Dakota study areas were received from the SDPUC on September 25, 2003, and that the requisite October 1, 2003 certification for Hills' Iowa study area was received from the IUB on September 25, 2003. Hence, the Alliance South Dakota study areas and the Hills Iowa study area were in compliance with the only Local Switching Support filing deadlines listed on USAC's "General High Cost Filing Requirements" calendar for 2003 and the accompanying FAQs.

**USAC Local Switching Support Description.** From July 16, 2003 to at least April 30, 2004, the "Local Switching Support" portion of the High Cost section of USAC's website (attached as Exhibit 6) provided the very same information as the FAQs. That is, it referenced the Form LSSa without specifying a clear filing deadline or any penalty for "untimely" filing, and detailed the October 1 state certification requirement and the explicit penalties for late filing after certain milestone dates.

**USAC Forms.** The "High Cost Forms" section of the USAC website (attached as Exhibit 7) references USAC Form LSSa, but again indicates no filing deadline. The USAC Form LSSa itself (attached as Exhibit 8) contains no filing deadline on its face and indicates no penalty for "late" filing. At Page ii of the accompanying USAC Form LSSa instructions (attached as Exhibit 9), USAC indicates that filers should "[r]eturn the completed form(s) via

email, fax or mail not later than October 1, 2001” (*Id.*, p. ii). In addition to the stated “deadline” being more than two years old, the USAC Form LSSa instructions neither specify nor imply any penalty for a late filing or even outright failure to file. The USAC Form LSSa instructions are very confusing for average schedule companies because they do not appear to have been updated since the initial October 2001 filing period, and because their emphasis upon cost accounts makes them appear to pertain solely or primarily to cost companies rather than to average schedule companies. In fact, the USAC Form LSSa instructions for average schedule companies appear to be identical to the USAC Form LSSc instructions for cost companies, even though the forms themselves request very different information.

**USAC September 12, 2003 Notice.** On or about September 12, 2003, USAC posted in the “What’s New” portion of the High Cost section of its website a notice that “Incumbent Eligible Telecommunications Carriers (ETCs) Serving Study Areas with 50,000 or Fewer Access Lines Must File Projections for Local Switching Support (LSS) No Later Than October 1, 2003 to Receive LSS in Calendar Year 2004” (Exhibit 10). That notice stated that:

Your LSS projections must be received by USAC no later than October 1, 2003 for LSS eligibility in calendar year 2004. If your LSS projections are not timely filed, you will not be eligible to receive LSS in 2004, absent a waiver from the FCC.

The USAC notice is the only USAC or Commission publication of which Alliance and Hills are aware that specified a filing deadline for USAC Form LSSa as of any date during 2003, or that specified a penalty for failure to file the form “on time.” The USAC notice furnishes no indication as to when, why or under what authority the specified filing deadline and penalty were adopted and implemented.

No representative of Alliance or Hills visited the “What’s New” section of USAC’s website between September 12 and October 1 of 2003, or otherwise became aware of USAC’s

September 12, 2003 notice until March 2004. Rather, after checking the “General High Cost Filing Requirements” calendar (Exhibit 1) earlier in the year, the Alliance and Hills accounting staff reasonably believed that the only High Cost filings due on or about October 1, 2003, were the SDPUC, IUB and MPUC certifications that were in fact timely filed on behalf of Alliance and Hills.

Alliance and Hills ask the Commission to note and consider that it is very difficult and time-consuming for the small administrative staffs of small ETCs to frequently and repeatedly check USAC and other websites for filing requirements and deadlines. Rather, all High Cost program filing deadlines should be listed on USAC’s “General High Cost Filing Requirements” calendar at the beginning of each year, or (where new requirements are added during the year) as soon as possible after they are adopted and become effective. Omitting filing deadlines from the general High Cost calendar, and instead placing notices on the website a couple of days or weeks before the deadlines, is a recipe for ensuring that some small ETCs will miss one of the increasing number of USAC filing deadlines when there is some disruption in their administrative operations – whether by death or retirement of key employees, internal reorganizations, mergers, acquisitions, and other situations.

USAC’s September 12, 2003 notice – posted on its website a mere nineteen days before the asserted October 1, 2003 “filing deadline” – was wholly inadequate and insufficient to alert Alliance and Hills to the “deadline” and to the onerous penalty for failure to comply with it. Alliance and Hills are aware of no judicial or Commission decision that recognizes the posting of a September 12 website notice for an October 1 deadline as adequate or sufficient notice for due process purposes.

### **C. No Adverse Impact on USF Administration**

In February, 2004, Alliance and Hills realized that they had not yet received any Local Switching Support for 2004. They called Brenda Cartwright, their NECA Regional representative, and asked what had happened to their Local Switching Support payments. They were informed at this time that they needed to file projections for their 2004 access lines, exchanges and access minutes on USAC Form LSSa for the two Alliance South Dakota study areas and the Hills Iowa study area.

Alliance and Hills filed USAC Forms LSSa for each of the three study areas (attached as Exhibits 11, 12 and 13) with USAC as soon as possible. The forms were mailed on or about February 23, 2004 and received by USAC on or about February 27, 2004.

However, on or about April 5, 2004, Alliance and Hills were advised verbally by the USAC staff that these February 2004 filings were too late, and that they would receive no Local Switching Support at all for Calendar Year 2004 unless they sought and obtained a waiver from the Commission. As of this date, USAC has not issued any letter or other official document confirming the informal advice given by its staff to Alliance and Hills.

Alliance's and Hills' submission of their USAC Form LSSa projections in February 2004 rather than on October 1, 2003 did not significantly disrupt USAC's estimation of its Local Switching Support funding requirements for Calendar Year 2004, or its collection and distribution of Local Switching Support for the year. Even if Alliance and Hills had filed projected 2004 access line, exchange and access minute data on October 1, 2003, they appear to be permitted (or, perhaps, required) by USAC to revise their 2004 projections via true-ups using actual 2004 data and to file such true-ups sometime before December 31, 2005.

If, as appears both permissible and possible, carriers may revise their initial October 1, 2003 projections upward or downward by thousands of access lines and/or access minutes via true-ups filed as much as 27 months after October 1, 2003, it does not appear unduly disruptive to USAC or to the overall administration of the Local Switching Support program for USAC to consider the February 23, 2004 projections of Alliance and Hills, as well as any future true-ups they may file on or before December 31, 2005.

#### **D. Adverse Impacts upon Local Rates, Investment and Jobs**

In contrast, the loss of all Local Switching Support for 2004 would be a severe blow to Alliance and Hills, as well as to their employees and their customers. The \$690,684 in Local Switching Support received by the two Alliance study areas during 2003 constituted approximately 7.10 percent of Alliance's total 2003 revenues of \$9,724,206 for the study areas. Likewise, the \$261,120 in Local Switching Support received by Hills for its Iowa study area during 2003 constituted approximately 12.24 percent of its total 2003 revenues of \$3,195,950.

Revenue losses of 7.10 percent and 12.24 percent are extremely onerous and disruptive for small companies like Alliance and Hills, particularly when they are not accompanied by any offsetting local switching or other cost reductions. Alliance and Hills will have no choice but to increase their revenues or reduce their cash outlays substantially in order to offset such major Local Switching Support losses.

One option is to increase the rates paid by the rural customers of Alliance and Hills. The approximate \$398,832 in Local Switching Support to be lost by Alliance for its Alliance Communications-Splitrock study area represents an average of \$57.06 for each of the 6,990 access lines in the study area. For the Alliance Communications-Baltic study area, the approximate \$291,852 to be lost constitutes an average of \$93.60 for each of the 3,118 access

lines in the study area. For the Hills Iowa study area, the approximate \$261,120 at risk comprises an average of \$123.00 for each of the 2,123 access lines in the study area. Monthly rate increases of up to approximately \$5.00 to \$10.00 per access line are a steep penalty to the rural customers of Alliance and Hills for a “late” USAC Form LSSa, and do not advance the fundamental Universal Service principle of just, reasonable and affordable rates.

In the alternative, the approximate \$951,804 in aggregate Local Switching Support that may be lost by Alliance and Hills will impair their ability to invest in infrastructure additions and upgrades for years to come, thus impairing the future services and quality of service available to their rural customers. In addition to eliminating \$951,804 in potential cash reserves available for equipment purchases and down payments, the late-filing penalty will make it significantly more difficult for Alliance and Hills to obtain infrastructure investment loans at reasonable interest rates by reducing the assets and financial ratios used by bankers to evaluate and price such loans.

Another alternative to offset a loss of \$951,804 in Local Switching Support is to reduce operating expenses. Whereas rural telephone companies like Alliance and Hills take very seriously their responsibilities as significant employers in rural communities, it may not be possible for companies of their size to weather a \$951,804 reduction in expected revenues without cutting jobs or salaries. In rural communities like Garretson, South Dakota (2000 population: 1,165), a loss of telephone company jobs will almost certainly be followed by losses of revenues and jobs in the retail and service sectors to the detriment of the entire community and surrounding area.

#### **E. Excessive and Onerous Penalty**

Penalties and forfeitures are not favored by the law, and should be enforced only when they are within both the spirit and letter of the law. *United States v. One Ford Coach*, 307 U.S.

219, 226 (1939). In determining whether penalties and fines are excessive, courts have examined whether they are “so disproportionate to the offense as to shock public sentiment” or “contrary to the judgment of reasonable people concerning what is proper under the circumstances.” *Hindt v. State*, 421 A.2d 1325, 1333 (Del. 1980).

A penalty of approximately \$951,804 for an inadvertent failure to file three one-page forms containing projected 2004 data until February 23 or 27, 2004 (even assuming *arguendo* that the initial October 1, 2003 filing was clearly required with adequate notice) is plainly disproportionate to the alleged “offense” and would be deemed “excessive” in the judgment of virtually all reasonable people. In this respect, it should be noted that Section 503(b)(2)(B) of the Act imposes a maximum penalty of only \$100,000 upon a common carrier for a willful violation of a law or regulation.

To the extent that eligible telecommunications carriers do not timely file with USAC data that the Commission has required for the calculation of their universal service support payments, USAC can refuse to distribute the support payments until the data is submitted and reviewed. Delayed distributions are reasonable and sufficient incentives and sanctions to encourage carriers to file their data in timely fashion and to punish carriers that file late. Alliance and Hills have already suffered a substantial cash flow penalty in that they have received no distributions of Local Switching Support for almost five months of calendar year 2004. However, complete denial of approximately \$951,804 of Local Switching Support for Calendar Year 2004 goes far beyond any reasonable and effective carrot or stick, and imposes a very excessive and unnecessary sanction upon Alliance and Hills, as well as upon their customers and employees.

## F. Conclusion

The unique disruptions caused by Alliance's merger and acquisition of Hills during 2003, coupled with the absence of adequate notice on USAC's website, establish good cause for the waiver of any filing requirements, deadlines and penalties in Section 54.301 of the Rules that are applicable to average schedule companies like Alliance and Hills. In addition, the penalty of the loss of approximately \$951,804 in aggregate Local Switching Support for Calendar Year 2004 would impose severe hardships upon the customers, employees and investment plans of Alliance and Hills, as well as constituting an inequitable penalty for an inadvertent delay of less than four months in the submission of three very brief and simple forms. Finally, Alliance and Hills have not significantly impaired USAC's ability to administer Local Switching Support of other High Cost programs, particularly since they appear to have the right to revise their initial projected access lines, exchanges and access minutes for Calendar Year 2004 until December 31, 2005.

The Bureau has recently granted a waiver of Section 54.301(b) to another average schedule company in similar circumstances where its administrative functions were disrupted during 2003. *Smithville Telephone Company*, DA 04-1393, released May 18, 2004. Alliance and Hills also note that the Commission has repeatedly waived the explicit filing deadline and penalty provisions of Section 54.314(d) of the Rules to allow wireless carriers whose state certifications were not submitted on or before October 1 to receive universal service support that the explicit Section 54.314(d) penalty schedules would otherwise deny. *See, e.g., Western Wireless Corporation*, DA 03-2364A1, released July 18, 2003; *Northeast Colorado Cellular, Inc.*, 18 FCC Rcd 15597 (July 25, 2003); *Guam Cellular and Paging, Inc.*, 18 FCC Rcd 7138 (April 17, 2003); and *RFB Cellular, Inc.*, 17 FCC Rcd 24387 (December 4, 2002).

Hence, good cause and the public interest require that Alliance and Hills receive the full amounts of Local Switching Support to which they are entitled during Calendar Year 2004, and that USAC accept and consider the projected 2004 Local Switching Support data submitted by them on February 23, 2004, as well as any true-ups they may submit on or before December 31, 2005.

### III

**The Commission Has Not Clearly Required  
An October 1 LSS Filing by Average Schedule Companies  
Or Delegated to USAC the Authority to Establish  
Such Filing Deadline or Late-Filing Penalties**

Alliance and Hills have reviewed Sections 54.301 and 54.702 of the Rules, and have serious doubts whether USAC presently has any basis or authority to require average schedule companies to file USAC Form LSSa on October 1 of each year, or deny ETCs Local Switching Support for an entire calendar year for failing to file their form by October 1.

**A. Section 54.301 Does Not Clearly Require  
An October 1 LSS Filing by Average Schedule Companies**

It is a well-established principle of administrative law that an agency is bound by its own rules as long as they are in force, and may depart from them only by amending them. *U.S. v. Nixon*, 418 U.S. 683, 695-96 (1974); *Service v. Dulles*, 354 U.S. 363, 388 (1957).

There is no Commission Rule that clearly requires average schedule companies like Alliance and Hills to file USAC Form LSSa or any similar projected Local Switching Support data with USAC by October 1 of each year. More important, there is no Commission Rule that indicates, implies or in any way puts average schedule companies directly or indirectly on notice that they will be penalized (much less, that they will be denied all Local Switching Support for

the entire following calendar year) if they fail to file USAC Form LSSa or any similar projected Local Switching Support data with USAC by October 1 or any other "deadline."

Whereas the USAC staff has indicated that Sections 54.301(b) and 54.301(f) of the Rules are the basis for its decision to deny Alliance and Hills Local Switching Support for Calendar Year 2004, a fair reading of these provisions provides no support for the USAC position.

Section 54.301(b) of the Rules states:

(b) Submission of data to the Administrator. Each incumbent local exchange carrier that has been designated an eligible telecommunications carrier and that serves a study area with 50,000 or fewer access lines shall, for each study area, provide the Administrator with the projected total unseparated dollar amount assigned to each account listed below for the calendar year following each filing. This information must be provided to the Administrator no later than October 1 of each year. The Administrator shall use this information to calculate the projected annual unseparated local switching revenue requirement pursuant to paragraph (d) of this section.

[39 Line Items listing approximately 51 asset, expense and other Accounts omitted]

Section 54.301(b) does not have any clear applicability to average schedule companies like Alliance and Hills. The information required to be provided to USAC "no later than October 1 of each year" is solely and expressly the "projected unseparated dollar amount" assigned to each of the 39-to-51 asset, expense and other accounts listed at the end of Section 54.301(b). These accounts apply only to cost companies, and are not required to be used by average schedule companies. Therefore, Section 54.301(b) does not appear to impose any October 1 filing requirement for projected access line, exchange, access minute or other data upon average schedule companies.

The only portion of Section 54.301 that clearly applies to average schedule companies is Section 54.301(f). That provision states:

(f) Calculation of the local switching revenue requirement for average schedule companies.

(1) The local switching revenue requirement for average schedule companies, as defined in Section 69.605(c) of this chapter, shall be calculated in accordance with a formula approved or modified by the Commission. The Administrator shall submit to the Commission and the Common Carrier Bureau for review and approval a formula that simulates the disbursements that would be received pursuant to this section by a company