

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

<b>In re</b>	)	
	)	
<b>CELLULAR SOUTH LICENSES, INC.</b>	)	
	)	<b>CC Docket No. 96-45</b>
<b>Petition for Waiver of</b>	)	
<b>Sections 54.802 of the</b>	)	
<b>Commission's Rules</b>	)	

**SUPPLEMENT TO PETITION FOR WAIVER**

Cellular South Licenses, Inc. ("Cellular South") by counsel, hereby supplements its Petition for Waiver, filed on February 10, 2004 ("Petition"). In the Petition, Cellular South requested a waiver of the December 31, 2003 deadline for Interstate Access Support ("IAS") line count data for Mississippi, which may have been omitted from a group of contemporaneously filed line count submissions by Cellular South's counsel. Cellular South presents this supplement in order to provide the Commission with a more detailed explanation of the facts in this case, and the reasons why there is "good cause" for the waiver granted as provided by 47 C.F.R § 1.3.<sup>1</sup>

**I. BACKGROUND**

On December 23, 2003, Cellular South, by counsel, submitted to the National Exchange Carrier Association ("NECA") via Federal Express several filings containing line count data to enable the company to receive various types of universal service support in Alabama and Mississippi. Although Cellular South's line count filings were not due until December 31, 2003, Cellular South's group of submissions was, out of an abundance of caution, made eight days prior to the deadline.

---

<sup>1</sup> No formal motion regarding this supplement is being transmitted. Applicable rules do not limit supplements to waiver request of this nature. Moreover, the staff has been advised informally that this supplement would be forthcoming and expressed a tentative willingness to entertain it.

Cellular South's data submissions included a clear and unmistakable request that NECA date-stamp and return a copy of each filing, and each filing was accompanied by a self-addressed, stamped envelope and an extra copy of the filing. After submitting the filings, Cellular South fully expected to receive date-stamped copies from NECA as confirmation that the filings had been received. Consistent with the FCC's time-honored practice of confirming receipt with a date-stamp from the Secretary's Office, NECA's contractors had an established practice of honoring such requests.<sup>2</sup> In fact, that is the only practical way in which non-electronic filings can be proven to have been made as of a given date.<sup>3</sup>

In mid-December, NECA had selected a new contractor to collect and process the line count filings submitted by competitive carriers. Prior to the change in contractors, counsel for Cellular South had submitted numerous line count filings on behalf of other companies, and all requests for date-stamped copies were honored. *See* Declaration of B. Lynn F. Ratnavale, Esq., attached hereto as Exhibit A. After the change, however, notwithstanding Cellular South's explicit request for date-stamped copies of its December 23 filings, NECA's new contractor provided no information in response to the request.

In fact, it was not until January 14, 2004 that NECA's contractor informed counsel by telephone that it believed the IAS filing here at issue was not received. Had Cellular South's request for date-stamped copies been promptly honored, Cellular South would have noticed any omitted filings and it would have had time to re-submit them by the December 31 deadline.

---

<sup>2</sup> Indeed, NECA did return stamp-receipt copies of other filings made by undersigned counsel's firm that were filed earlier in December of 2003.

<sup>3</sup> At the Commission's open meeting on June 10, 2004, in Docket 04-226 regarding the utility of electronic filings there proposed, staff explained to the Commission the public interest benefit of filers receiving verification that the submissions they were making were indeed received by the Commission. That same benefit applies to return of date-stamped filings.

Immediately upon receipt of the telephone call from NECA, Cellular South acted to remedy the situation. The IAS filing at issue was re-submitted and a request for wavier was filed.

Because Cellular South has not received confirmation of receipt for any of the filings submitted December 23, Cellular South cannot be certain whether the IAS filing here at issue was or was *not* in fact received by NECA. Cellular South's counsel followed its usual procedures for line count filings and has confirmed that all of the filings were duly prepared. *See* Declaration of Steven M. Chernoff, Esq., attached hereto as Exhibit B. The uncertainty as to the IAS filing at issue exists only because of a new NECA contractor's failure to adhere to the established practice of honoring requests for date-stamped copies. Because of this uncertainty, and because waivers of late universal service data and certification filings had been granted more or less routinely as of that time, Cellular South elected not to dispute the NECA contention of an incomplete submission. Based on the recent *Fibernet*<sup>4</sup> and *Smithville*<sup>5</sup> orders, Cellular South now takes this opportunity to provide additional explanation and argument demonstrating why special circumstances for a waiver exist in this case.

## **II. SUPPORT FOR WAIVER**

### **A. Authority and Criteria.**

The Commission has authority to waive its rules whenever there is "good cause" to do so. 47 C.F.R. § 1.3. Among other things, the Commission may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest. *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969). As further explained in *WAIT Radio*, the Commission is charged with administration of its responsibilities consistent with the "public

---

<sup>4</sup> *FiberNet, LLC*, DA 04-1287 (rel. May 6, 2004) ("*FiberNet*").

<sup>5</sup> *Smithville Tel. Co., Inc.*, DA 04-1393 (rel. May 18, 2004) ("*Smithville*").

interest.” That an agency may discharge its responsibilities by promulgating rules of general application which, in the overall perspective, establish the “public interest” for a broad range of situations, does not relieve it of an obligation to seek out the “public interest” in particular, individualized cases. In fact, the Commission’s authority to waive its rules is not unlike an obligation in that it is a *sine quo non* to its ability to promulgate otherwise rigid rules. It is the necessary “safety valve” that makes the system work. *See WAIT Radio*, 418 F.2d at 1157, 1159.

**B. But For the Lack of a Stamp-Receipt Copy, Cellular South Would Have Been on Notice of the Need to Re-submit the Filing Here at Issue.**

As Cellular South has discussed above, the time-honored technique of requesting (and receiving) stamp-receipt copy of its line count filings did not work here. Despite multiple requests from counsel, stamp-receipt copies have not been provided, even as of this date, for any of the December 23, 2003 submissions. But for this clear departure from prior practice, any confusion associated with the December 23 filing would have been largely of academic interest. In view of Cellular South’s determination to file early, had NECA timely asserted that the submission of December 23 was incomplete, the material at issue could have simply been re-submitted without raising any question regarding timeliness. Regrettably, the failure to provide prompt stamp-receipt copies resulted in Cellular South not learning that its filing had not been received until some 21 days after its submission by Federal Express delivery service.

Cellular South understands in early December of 2003, a newly retained contractor began to handle, among other things, the processing of line count filings for NECA. This change in contractor is the only material change in the NECA intake process about which Cellular South has knowledge. It thus appears that this change of contractor was the reason that no stamp-receipt copy was ever received – which was a stark departure, without warning or notice of any nature, from long-standing precedent. The fact that NECA provided stamp receipt copies of

submissions made on behalf of other clients earlier in December of 2003, but not in late December, is one indicator of a potential intake problem. These problems have added significance where, as is here the case, intake is undertaken not by the FCC, but rather by an independent contractor under the general supervision of NECA.

As stated above, counsel prepared the line count filings in accordance with his standard practice. While counsel cannot say for certain that the filing was or was not included in the filing package submitted to USAC, counsel kept a checklist of completed filings and placed a checkmark next to the IAS filing in question. While not entirely dispositive, this evidence strongly suggests that the filing was made. *See* Exhibit B. Nonetheless, it is possible that, despite its consistent track record to date, Cellular South's counsel did not include the IAS filing here at issue in the Cellular South filing package, which contained multiple filings – perhaps as a result of an error in the process of copying or transmitting the document. Even if the Commission concludes that this is more likely than not the cause, NECA's failure to either provide a stamp receipt or to acknowledge receipt of the document for 21 days provides “special circumstances” – indeed, “highly unique” circumstances<sup>6</sup> – and therefore good cause to grant the relief requested. These circumstances clearly were not the result of either Cellular South's, or its counsel's, lack of diligence.<sup>7</sup>

In assessing whether the error here occurred during the submission process (by Cellular South) or in the intake process (by NECA) the following must be kept in mind: Neither Cellular

---

<sup>6</sup> *See Smithville, supra*, at ¶ 5.

<sup>7</sup> *Contrast Puerto Rico Tel. Co.*, DA 03-4041 (W.C.B. rel. Dec. 19, 2003) (“*Puerto Rico Tel. Co.*”) (waiver of high-cost certification filing deadline was justified by Petitioner's misunderstanding of its certification status due to informational error on USAC website) *with FiberNet, supra*, at ¶¶ 3, 5 (request for waiver of line count filing deadlines denied where failure to meet filing deadline was explained only by “sheer volume of new information associated with universal service fund eligibility”).

South nor its counsel is new to the IAS filing process. Since 2002, Cellular South has submitted approximately eight filings every quarter. Counsel for Cellular South has submitted approximately 300 filings per year for the last two years, many for Cellular South and many more for other clients. Notably, in no other instance has there been any question regarding timely filing. In other words, both have perfect records in all line count submissions other than the one at issue. In contrast, it appears that the NECA contractor involved has precious little experience with the intake of such filings.

**C. Because Amendments to Line Count Filings Are Routinely Accepted, There Can Be No Genuine Concern that a Grant of the Instant Waiver Would Undermine the Efficiency of the Process.**

Counsel for Cellular South is familiar with the practices and procedures adopted by NECA for processing line count filings. Over the past several years, NECA has accepted amendments to line count filings on a large number of occasions.<sup>8</sup> The ability to amend line count filings is especially important for competitive ETCs. For example, new data, such as changed wire center boundaries of rural ILECs, is sometimes made available necessitating an amendment. By accepting amendments, NECA encourages and helps to ensure that competitive ETCs are submitting the most accurate data possible into the system so that high-cost support can be accurately tracked and distributed.

NECA routinely accepts amended line count filings weeks or even months after the deadline for filing. Given that the current time interval between submission and payment is nine to twelve months, it is clear that timely filing of line count data is not essential to enable NECA

---

<sup>8</sup> See, e.g., Easterbrooke Cellular Corp., Amended Line Counts for Interstate Access Support – June 30, 2003 deadline (West Virginia) (dated July 15, 2003); Wireless Alliance, LLC, Amended Line Counts for High Cost Loop Support – March 31, 2003 deadline (Minnesota) (dated Nov. 10, 2003); RCC Minnesota, Inc., Amended Line Counts for Interstate Access Support – Dec. 31, 2002 deadline (Minnesota) (dated April 3, 2003).

to distribute support to competitive ETCs. In addition, it is difficult to conclude that Cellular South's filing, even though not deemed to be received until January 14, 2004, was significantly late to cause disruption to NECA's processing. Indeed, it does not appear that NECA catalogued the filings until January 14 and upon discovery, Cellular South supplied a replacement photocopy by facsimile on the same date.

**D. Cellular South Has Never Received Proper Notice Regarding the Sanctions for Late Filings and in Material Changes in the NECA Intake Process.**

It is axiomatic that before an administrative agency can sanction an entity, it must provide clear notice of the rule at issue, how it is being enforced and what is the sanction for any infraction. *See, e.g., Salzer v. FCC*, 778 F.2d 869, 877 (D.C. Cir. 1985). Here, rigid enforcement of the rule would present a number of notice issues. Nowhere in 47 C.F.R. Section 307(c) is any sanction provided for late filing. Without such notice, due process would be violated were the most severe sanction possible (*i.e.*, loss of all rights to payment for the question at issue) imposed. Similarly, rigid enforcement would constitute a stark revision of the prior policy of granting waivers upon a showing of special circumstances such as those set forth in the Petition and this Supplement.<sup>9</sup> These notice informalities add yet additional reasons for grant of the waiver request here at issue.

**III. CONCLUSION**

Cellular South filed its line count submissions significantly in advance of the deadline to ensure timely delivery. Counsel never received the requested stamp-receipt copy of any of the

---

<sup>9</sup> *See, e.g., Smithville, supra; Puerto Rico Tel. Co., supra; Connecticut Dept. of Pub. Util. Control*, DA 02-3406 (W.C.B. rel. Dec. 11, 2002) ("*Conn. DPUC*") (petitioner and rural ILEC were not "aware of the new section 54.314 certification requirements"); *West Virginia Pub. Serv. Comm'n*, FCC 01-86 (rel. March 13, 2001) ("*West Virginia PSC*") (failure to file high-cost certification on time was "inadvertent" and due to fact that USF requirements were not yet calculated); *Smith Bagley, supra* (inadvertent failure to file June 30 IAS certification justified waiver where disruption of IAS could significantly delay system construction and upgrades).

submissions made on that date, and therefore was not on notice that anything was believed by NECA to be missing until the latter called counsel in mid-January. Because NECA apparently did not review the filing until January 14, it is clear that the short delay did not disrupt NECA processing and no harm has resulted. Were support to Cellular South to be denied, the people of rural Mississippi would be harmed, however, because projects planned with support must be significantly delayed as a result.<sup>10</sup> Thus, the special circumstances demonstrated above and in the Petition “outweigh any administrative difficulties that NECA and USAC may face as a result of the late-filed . . . data.” *Qwest Corp.*, 18 FCC Rcd 18,346 (W.C.B., 2003) (“*Qwest*”). Therefore, Cellular South respectfully requests the Commission to grant its Petition at the earliest possible date.<sup>11</sup>

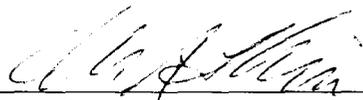
---

<sup>10</sup> See *Smith Bagley*, *supra*, at ¶ 7 (“Strict application of the filing deadline in this instance may jeopardize the provision of service and delay system construction and upgrades in [the areas it serves]”).

<sup>11</sup> Cellular South notes that petitioners in similar circumstances have generally had their waiver petitions acted upon in 90 days or less. See, e.g., *Puerto Rico Tel. Co.*, *supra* (waiver granted within 11 days of filing); *Qwest*, *supra* (waiver granted within 38 days of filing); *West Virginia PSC*, *supra* (waiver granted within 43 days of filing); *Smithville*, *supra* (waiver granted within 82 days of filing); *Smith Bagley*, *supra* (waiver granted within 30 days of filing). Particularly in view of the potential for delay in constructing and upgrading its network, Cellular South requests similarly expedited treatment in this case. See *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965) (the Commission must treat similarly situated parties alike in the absence of reasons for differential treatment in light of the purposes of the Communications Act).

Respectfully submitted,

CELLULAR SOUTH LICENSES, INC.

By: 

David A. LaFuria  
B. Lynn F. Ratnavale  
Steven M. Chernoff  
Its Attorneys

Lukas, Nace, Gutierrez and Sachs, Chartered  
1111 19th Street, Suite 1200  
Washington, D.C. 20036  
(202) 857-3500

June 24, 2004

**EXHIBIT A**

**A F F I D A V I T**

In the City of Washington    )  
  ) SS.  
District of Columbia         )

I, B. Lynn F. Ratnavale, do hereby declare under penalty of perjury as follows:

1. I am an Associate Attorney with Lukas, Nace, Gutierrez & Sachs, Chartered.
2. This Declaration is submitted in support of the Petition for Waiver ("Petition") and the Supplement thereto filed by Cellular South Licenses, Inc. ("Cellular South").
3. I am one of the persons primarily responsible for preparing and filing, upon our client's request, all certifications and line count submissions that are required as a result of our various clients' ETC designations.
4. Since 2002, I have had significant experience in preparing and submitting line counts for a variety of entities, including Cellular South Licenses, Inc., designated as ETCs. During this time it has been our firm's practice to submit line count filings, when possible at least one to two weeks in advance of the deadline for submission.
5. Based upon my experience, until the last two weeks of December 2003 when USAC changed line count processing vendors, our firm always received from USAC and NECA stamped-receipt copies of all filings within the first seven to ten days following a line count submission.
6. After we failed to receive stamped-receipt copies for many of the December filings, I made repeated verbal requests for date-stamped copies of the various filings and those requests continue to be unanswered.



**EXHIBIT B**

**A F F I D A V I T**

In the City of Washington    )  
  ) SS.  
District of Columbia         )

I, Steven M. Chernoff, being duly sworn, do hereby declare as follows:

1. I am an attorney employed by Lukas Nace Gutierrez & Sachs, Chartered.
2. I was responsible for preparing and submitting line count submissions to the National Exchange Carrier Association ("NECA") on or before December 31, 2003, on behalf of Cellular South Licenses, Inc. ("Cellular South").
3. As part of my work, I prepared several universal service filings, including an Interstate Access Support ("IAS") line count filing for the purpose of enabling NECA to calculate and distribute IAS to Cellular South in Mississippi.
4. On December 23, 2003, I completed and saved on the office network all of the Cellular South line count filings that were due at the end of the month, including Cellular South's IAS filing. I have verified that the Mississippi IAS filing is saved on our office network as of that date. On the same day, I directed my administrative assistant to print out all of the Cellular South filings for my signature. I then directed my administrative assistant to transmit the filings I had signed to NECA via Federal Express.
5. It is our practice to provide a separate Federal Express Package to NECA for each client's filings, and we adhered to that practice in this case.
6. Prior to December 31, 2003, our support staff confirmed that the Federal Express package was received by NECA.
7. Because there were many filings to be completed in December on behalf of multiple clients, I kept a checklist of filings as a backup, and the IAS filing at issue is checked off as having been completed.
8. At this date, I cannot state with absolute certainty that the IAS filing at issue was not included in the package transmitted to NECA, nor can I state with absolute

