

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC**

In the Matter of)
)
Petition for a Waiver of Section 54.301(e)) **CC Docket No. 96-45**
of the Commission's Rules)
)

**WINDSTREAM COMMUNICATIONS, INC. PETITION FOR A WAIVER OF
SECTION 54.301(E)(1) OF THE COMMISSION'S RULES**

Pursuant to Section 1.3 of the Commission's Rules,¹ Windstream Corporation, on behalf of Windstream Communications Southwest, requests a waiver of the December 31, 2007 deadline set forth in Section 54.301(e)(1)² for the submission of true-up data used to adjust Local Switching Support ("LSS"). Windstream asks for this waiver to correct timely submitted LSS true-up data, which Windstream subsequently learned was inaccurate due to a one-time error generated during a change in Windstream's accounting systems. Uncorrected, this inadvertent error has resulted in a shortfall of \$471,149 in LSS for Windstream's sparsely populated and high-cost New Mexico service areas. Windstream has consistently made timely and otherwise accurate LSS submissions to the Universal Service Administrative Company ("USAC"). Granting Windstream's request is an appropriate response to the special circumstances giving rise to the Petition, and will promote the public interest by ensuring adequate support for telephone service provided to extremely rural regions in New Mexico.

¹ 47 C.F.R. § 1.3.

² 47 C.F.R. § 54.301(e)(1).

FACTS

Section 54.301(e)(1) of the Commission's Rules directs carriers receiving LSS to provide USAC annual reports on the historical costs for serving qualified study areas.³ Windstream, with the exception of the one instance at issue in this Petition, has never failed to meet this filing requirement. Windstream recognizes that the Commission and USAC place a high priority on compliance with LSS reporting provisions, and it deeply regrets the inadvertent accounting error that gave rise to its one-time submission of inaccurate LSS true-up data.

On December 27, 2007, Windstream timely and in good faith filed 2006 true-up data for its New Mexico service territories. Unfortunately, due to an accounting error, the data was not accurate. In making modifications to its accounting systems, Windstream inadvertently misallocated depreciation expenses between its two New Mexico study areas. This misallocation produced data that caused Windstream to report a LSS true-up amount greater than twice the amount actually warranted. Windstream had concluded that it received LSS payments in New Mexico of \$843,588 above its projected revenue requirement for 2006, when in reality it only received payments of \$372,439 above its revenue requirement.

Upon discovery of this error, Windstream promptly corrected its New Mexico accounts, and it sought guidance from USAC on how to revise its 2006 LSS true-up submission. Windstream personnel sent e-mails seeking advice from USAC during the months of March, April, and June of this year. Each time USAC staff assured Windstream that its query was being investigated. Finally, just last month, USAC

³ *Id.*

personnel informed Windstream that it must file a petition with the Commission to correct its 2006 true-up data. Windstream immediately began work on collecting facts necessary to support its Petition. This task was complicated by the departure of the Windstream employee who filed the true-up data at issue in this Petition.

To ensure future submissions are timely and accurate, Windstream implemented new procedures and safeguards for data filed with USAC. Windstream has assigned new employees to review and confirm the accuracy of LSS submissions. Staffing has been supplemented so that an analyst, manager, and director now review each USAC filing. Moreover, members of this filing team follow new procedures for producing LSS data. Work on USAC filings begins earlier than previously was the case. Filing team members now review not only data for the year at issue, but also consider year-over-year comparisons for data submitted. These measures help ensure ready identification of any undue discrepancies that should be corrected prior to filing.

DISCUSSION

The Commission's rules may be waived for "good cause."⁴ The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.⁵ It also may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.⁶ Such conditions justifying a waiver are present in this Petition.

LSS, the universal service support at issue in the Petition, provides much-needed support to enable carriers to provide adequate switching capability in high-cost areas with

⁴ 47 C.F.R. § 1.3.

⁵ *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

⁶ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

few subscribers.⁷ As recognized by the Commission, the loss of LSS for service to rural regions, like Windstream's properties in New Mexico, has a much greater impact on a carrier's "capacity to ensure that consumers have and maintain access to service . . . than the loss of other types of universal service support."⁸ While carriers can file line counts and certifications on a quarterly basis for most other types of universal service support, a loss of LSS encompasses an entire calendar year.

If its Petition is denied, Windstream will have no ability to collect \$471,149 of this significant type of universal service support. This denial would be contrary to the statutory goal of ensuring the provision of high-quality services at affordable and reasonably comparable rates to rural customers.⁹ LSS is important to Windstream's

⁷ See *Federal-State Joint Board on Universal Service*, Report and Order, FCC 97-157, CC Docket No. 96-45 (rel. May 8, 1997), ¶ 224 (concluding that the LSS mechanism "will provide support for carriers to make prudent upgrades to their switching equipment needed to maintain, if not improve, the quality of service to their customers"); *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*; *Federal-State Joint Board on Universal Service; Access Charge Reform for Incumbent Local Exchange Carriers Subject to Rate-of-Return Regulation; Prescribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers*, Second Report and Order and Further Notice of Proposed Rulemaking, Fifteenth Report and Order, and Report and Order, FCC 01-304, CC Docket Nos. 00-256, 96-45, 98-77, 98-166 (rel. Nov. 8, 2001), ¶ 22, n.56 (finding that LSS "assists the states in ensuring that intrastate rates remain affordable and reasonably comparable").

⁸ *Federal-State Joint Board on Universal Service; Dixon Telephone Company; Lexcom Telephone Company; Citizens Telephone Company of Higginsville, Missouri; Petitions for Waiver of Section 54.301 Local Switching Support Data Submission Reporting Date*, Order, DA 06-418, CC Docket No. 96-45 (rel. Feb. 23, 2006) (*Dixon Order*), ¶ 8. See also *Federal-State Joint Board on Universal Service; Alliance Communications Cooperative, Inc. and Hills Telephone Company, Inc.; East Ascension Telephone Company, LLC; Columbus Telephone Company; Petitions for Waiver of Section 54.301 Local Switching Support Data Submission Reporting Date*, Order, DA 05-3024, CC Docket No. 96-45 (Wireline Competition Bureau, rel. Nov. 22, 2005) (*Alliance Order*), ¶ 8 (making a similar finding in support of its conclusion that "denial of the LSS could result in substantial hardship"); *Federal-State Joint Board on Universal Service; Smithville Telephone Company, Inc. Petition for Waiver of Section 54.301 Local Switching Support Data Submission Reporting Date for an Average Schedule Company*, Order, DA 04-1393, CC Docket No. 96-45 (Wireline Competition Bureau, rel. May 18, 2004) (*Smithville Order*), ¶ 6 (providing that denial of LSS for the entire calendar year would undermine the goal of just, reasonable, and affordable rates under the circumstances at issue).

⁹ See 47 U.S.C. § 254(b)(3) ("Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services . . . that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.").

ability to offer affordable, high-quality service in rural regions like New Mexico – where Windstream provides service to areas that on average contain less than *five* subscribers per square mile. It is in the public interest for Windstream to receive the New Mexico LSS that it had received and to which it otherwise is entitled to for calendar year 2006.

The Commission underscored the significance of ensuring universal service calculations are based upon accurate data in its decision granting Qwest a waiver of the loop cost data filing deadline.¹⁰ When granting an extension while Qwest’s accounting systems were being updated, the Commission held that it “is essential for . . . cost data filed by carriers to be as accurate as possible The use of inaccurate data could impact the integrity of . . . universal service support calculations.”¹¹

Moreover, strictly enforcing the filing deadline would disproportionately penalize Windstream in light of its past history and actions to remedy its error. As noted above, Windstream until now has had a flawless record in submitting timely and accurate LSS data to USAC. Indeed, even the LSS true-up data for 2006 was timely. Windstream’s only failure was that it unknowingly reported inaccurate data caused by a change in its New Mexico accounting systems. This accounting error has since been remedied, and Windstream made additional improvements to its data filing process to ensure future filings are timely and accurate. In light of these good faith efforts, it would be unjust and unreasonable to effectively levy a \$471,149 penalty against Windstream due to an

¹⁰ *Federal-State Joint Board on Universal Service; Qwest Corporation Petition for Waiver of Section 36.611 of the Commission’s Rules and Regulations*, DA 03-2834, CC Docket No. 96-45, Order (Wireline Competition Bureau, rel. Sept. 5, 2003).

¹¹ *Id.* at ¶ 6.

isolated accounting error, which was promptly remedied upon discovery. Considerations of hardship and equity weigh heavily in favor of granting Windstream's Petition.¹²

Granting a waiver to Windstream also is consistent with Commission precedent.¹³ Of particular note, the Commission just last month waived a filing deadline when Aventure Communications Technology, LLC ("Aventure") "mistakenly input" the amount of its company revenues in a form submitted to USAC.¹⁴ There the Commission determined that a waiver was warranted "[b]ased on the amount of overpayment at issue and the length of time that would elapse before Aventure would be reimbursed"¹⁵ Without a waiver, Aventure would have to overpay \$261,000 and would need to wait one year before being reimbursed for that expense.¹⁶

When the factors supporting the Aventure decision are applied to the instant case, there is no doubt that Windstream's Petition should be granted. Here Windstream, which likewise mistakenly input information on a USAC report, stands to lose an even greater amount than Aventure (\$471,149) and would *never* be reimbursed for this shortfall. The

¹² To the extent there is any burden on USAC and the administration of universal service, this burden likely is minimal. Total LSS support in 2006 was \$448 million. *Universal Service Monitoring Report*, CC Docket No. 98-202 (rel. Dec. 27, 2007), tbl 3.1. Regardless, like in prior cases where waivers for similar filings were warranted, "circumstances outweigh any processing difficulties that USAC may face as a result of the late-filed certifications." *Smithville Order* at ¶ 5 (waiving the filing deadline for LSS projections). See also *Federal-State Joint Board on Universal Service MCI Inc.; Petitions for Waiver of Sections 54.802(a) and 54.809(c) of the Commission's Rules*, Order, DA 06-2581, CC Docket No. 96-45 (Wireline Competition Bureau, rel. Dec. 28, 2006), ¶ 9 (waiving several interstate access service filing deadlines and finding that "special circumstances outweigh any processing difficulties that USAC may face as a result of the late-filed data").

¹³ The Commission has waived filing deadlines for LSS data in multiple instances. See, e.g., *Dixon Order*; *Alliance Order*; *Smithville Order*.

¹⁴ *Federal-State Joint Board on Universal Service; Universal Service Contribution Methodology; Aventure Communications Technology, LLC, Form 499 Filer ID: 825749 Request for Review of USAC Rejection Letter and Request for Waiver of USAC 45 Day Revision Deadline*, Order, DA 08-1514, CC Docket No. 96-45, WC Docket No. 06-122 (Wireline Competition Bureau, rel. June 26, 2008), ¶ 2.

¹⁵ *Id.* at ¶ 7.

¹⁶ *Id.* at ¶ 6.

case for granting Windstream's Petition is even stronger than the case for granting Aventure's. Thus, the only fair and reasonable result would be for the Commission to grant Windstream the same waiver granted to Aventure.

CONCLUSION

If its Petition is denied, Windstream will have no means of recovering \$471,149 of LSS that it should have retained and to which it otherwise is entitled to for calendar year 2006. This result would be contrary to the public interest. It also would disproportionately penalize Windstream in light of its past history of compliance and actions to remedy its error. Commission precedent indicates a waiver is justified in these special circumstances. Accordingly, the Commission should expeditiously grant Windstream's Petition for waiver of the December 31, 2007 deadline for the submission of true-up data used to adjust LSS.

Respectfully submitted,

Windstream Communications Southwest

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