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

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In the Matter of	)	
	)	
United Telephone Company of Kansas	)	
United Telephone Company of Eastern Kansas	)	CC Docket No. 96-45
	)	
and	)	
	)	
Twin Valley Telephone, Inc.	)	
	)	
Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36 of the Commission's Rules; Petition for Waiver of Section 69.3(e)(11) of the Commission's Rules	)	
	)	
Petition for Clarification or Waiver of Section 54.305 of the Commission's Rules	)	

ORDER

Adopted: February 1, 2010 **Released: February 2, 2010**

By the Commission:

I. INTRODUCTION

1. In this order, in response to a referral from the United States District Court for the District of Kansas pursuant to the primary jurisdiction doctrine,[1] we clarify the effective date of the Wireline Competition Bureau's (Bureau's) order granting Twin Valley Telephone, Inc. (Twin Valley) waivers of the study area boundary freeze and section 69.3(e)(11) of the Commission's rules.[2] We find that the waivers granted in the *Twin Valley Order* became effective upon release of that order.

II. BACKGROUND

2. On September 11, 2006, pursuant to its delegated authority the Bureau granted a joint request from Twin Valley and United Telephone Company of Kansas and United Telephone Company of

[1] *See* United Telephone Company of Kansas, United Telephone of Eastern Kansas, and Twin Valley Telephone, Inc., Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36 of the Commission's Rules; Petition for Waiver of Section 69.3(e)(11) of the Commission's Rules, Petition for Clarification or Waiver of Section 54.305 of the Commission's Rules, CC Docket No. 96-45, Notice of Referral (filed Nov. 16, 2007) (Referral Notice); *see also id.*, Appendix 1, *Twin Valley Telephone, Inc. v. Universal Service Administrative Co., et al.*, No. 07-2172-CM (D. Kan. Oct. 15, 2007) (*District Court Order*).

[2] *See United Telephone Company of Kansas, United Telephone of Eastern Kansas, and Twin Valley Telephone, Inc., Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36 of the Commission's Rules; Petition for Waiver of Section 69.3(e)(11) of the Commission's Rules, Petition for Clarification or Waiver of Section 54.305 of the Commission's Rules*, CC Docket No. 96-45, Order, 21 FCC Rcd 10111 (Wireline Comp. Bur. 2006) (*Twin Valley Order*).

Eastern Kansas (collectively, United) for a waiver of the study area boundary freeze codified in the Appendix-Glossary of Part 36 of the Commission's rules.[3] The study area waiver permitted United to remove thirteen exchanges comprising approximately 5,300 access lines from two of its Kansas study areas and permitted Twin Valley to add these exchanges to its existing Kansas study area.[4] The Bureau also granted Twin Valley a waiver of section 69.3(e)(11) of the Commission's rules to allow it to use the National Exchange Carrier Association (NECA) as its tariff pool administrator for the acquired exchanges before the effective date of the next annual access filing deadline.[5]

3. On October 10, 2006, Twin Valley filed a petition for clarification that March 1, 2006, the date Twin Valley and United closed on their contract for the purchase of the exchanges, is the effective date of the Bureau's order granting it waivers of the study area boundary freeze and section 69.3(e)(11).[6] On April 26, 2007, Twin Valley filed a request to withdraw the petition for clarification, which the Bureau granted.[7]

4. Twin Valley subsequently filed suit against the Universal Service Administrative Company (USAC) and NECA in federal district court in Kansas.[8] Twin Valley claims that the Bureau's order authorized retroactive waivers, and that USAC and NECA have improperly recognized the waivers only as of the date of the Bureau's order.[9] NECA filed a motion to refer the case to the Commission on primary jurisdiction grounds, and USAC moved to dismiss the complaint on primary jurisdiction grounds and the failure of Twin Valley to exhaust administrative remedies.[10] The court granted NECA's motion,

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[3] *See Twin Valley Order*, 21 FCC Rcd 10111; *see also* 47 C.F.R. Part 36 App.; Twin Valley Telephone, Inc., and United Telephone Company of Kansas, United Telephone of Eastern Kansas, Joint Petition for Waiver of the Definition of "Study Area" of the Appendix-Glossary of Part 36 of the Commission's Rules, CC Docket No. 96-45, (filed Oct. 26, 2005) (Study Area Petition). The petition also included a request by Twin Valley for waiver of section 69.3(e)(11) of the Commission's rules. Study Area Petition at 1-2, 7-8.

[4] *See Twin Valley Order*, 21 FCC Rcd at 10111-12, para. 1 n.2. A study area is a geographic segment of an incumbent local exchange carrier's (LEC) telephone operations. Because the Commission froze all study area boundaries effective November 15, 1984, a carrier must apply to the Commission for a waiver of the study area boundary freeze if it wishes to exclude sold exchanges from, or include purchased exchanges in, its study area for purposes of calculating universal service support. *See id.* at 10112, para. 2.

[5] *See Twin Valley Order*, 21 FCC Rcd at 10115-16, paras. 10-11. To minimize the complexity of administering NECA's common line pool, any change in NECA common line tariff participation resulting from a merger or acquisition of telephone properties is effective on the next annual access tariff filing effective date following the merger or acquisition. *See* 47 C.F.R. § 69.3(e)(11).

[6] United Telephone Company of Kansas, United Telephone of Eastern Kansas, and Twin Valley Telephone, Inc., Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36 of the Commission's Rules, Petition for Waiver of Section 69.3(e)(11) of the Commission's Rules, CC Docket No. 96-45, Petition for Clarification (filed Oct. 10, 2006).

[7] *See* United Telephone Company of Kansas, United Telephone of Eastern Kansas, and Twin Valley Telephone, Inc., Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36 of the Commission's Rules; Petition for Waiver of Section 69.3(e)(11) of the Commission's Rules, CC Docket No. 96-45, Request to Withdraw Petition for Clarification (filed Apr. 26, 2007); *United Telephone Company of Kansas, United Telephone of Eastern Kansas, and Twin Valley Telephone, Inc., Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36 of the Commission's Rules; Petition for Waiver of Section 69.3(e)(11) of the Commission's Rules, Petition for Clarification or Waiver of Section 54.305 of the Commission's Rules*, CC Docket No. 96-45, Order, 22 FCC Rcd 9442 (Wireline Comp. Bur. 2007).

[8] *See* Referral Notice at 5.

[9] *See District Court Order* at 1.

[10] *See* Referral Notice at 5.

concluding that it was appropriate to stay the court's proceedings and refer the case to the Commission "for clarification of its order as to whether the waivers granted apply retroactively to the closing date."[11]

III. DISCUSSION

5. We find that the waivers of the study area boundary freeze and section 69.3(e)(11) of the Commission's rules granted to Twin Valley became effective September 11, 2006, the release date of the Bureau's *Twin Valley Order*, and do not apply retroactively. Pursuant to the Commission's rules, orders in non-rulemaking proceedings issued pursuant to delegated authority become effective the date the order is released.[12] In the limited number of cases in which the Bureau has granted study area waivers retroactively, it has done so explicitly and specifically identified an earlier effective date.[13] Consistent with that approach, when the Bureau has granted waivers of sections 36.611 and 36.612 of the Commission's rules to accelerate the provision of high-cost loop support to new carriers initiating or extending service in predominantly unserved areas, it likewise has specified the date when the carrier should begin receiving support, if the date predates the release date of the order.[14] In the *Twin Valley Order* there is no reference by the Bureau to retroactive effect and no mention of a specific date on which Twin Valley should begin receiving universal service support; therefore, by operation of the Commission's rules the effective date of the waivers is the release date of the order.

6. Twin Valley contends that it requested and the Commission granted a waiver of section 69.3(e)(11) of the Commission's rules effective March 1, 2006.[15] In support of this contention, Twin

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[11] *See District Court Order* at 5. The court denied as moot USAC's motion to dismiss without prejudice. *See id.* at 6.

[12] *See* 47 C.F.R. § 1.102(b)(1).

[13] *See e.g., ALLTEL Service Corporation on behalf of Texas ALLTEL, Inc. and ALLTEL Texas, Inc., Petition for Waiver of the Definition of "Study Area" contained in Part 36, Appendix-Glossary, of the Commission's Rules*, AAD 94-29, Memorandum Opinion and Order, 9 FCC Rcd 4450, 4451, para. 8 (Com. Car. Bur. 1994) (finding that "ALLTEL has shown good cause for the requested retroactive effective date of January 1, 1994"); *Petition for Waiver Filed by Vermont Telephone Company, Inc. Concerning the Definition of "Study Area" in the Part 36 Appendix-Glossary of the Commission's Rules*, AAD 95-30, Order on Reconsideration, 14 FCC Rcd 826, 828, para. 6 (Com. Car. Bur. 1998) (finding that "Vermont Telephone has shown good cause for the requested retroactive effective date of January 1, 1996"); *Petitions for Waiver and Reconsideration Concerning Sections 36.611, 36.612, 61.41(c)(2), 69.605(c), 69.3(e)(11) and the Definition of Study Area Contained in Part 36 Appendix-Glossary of the Commission's Rules, Filed by Copper Valley Telephone Inc., et al.*, AAD 93-93, AAD 95-72, AAD 95-30, AAD 97-21, AAD 97-23, AAD 97-117, AAD, 98-44, AAD 98-53, Memorandum Opinion and Order, 1999 WL 700555, para. 25 (Com. Car. Bur. 1999) (granting request that "study area changes be made effective on January 1, 1996, instead of June 14, 1996, the release date of the *Memorandum Opinion and Order* granting the study area waivers"). As part of a Commission restructuring in 2002, the Common Carrier Bureau was renamed the Wireline Competition Bureau. *Federal Communications Commission's Common Carrier Bureau Reorganized Along Functional Lines*, News Release (Mar. 8, 2002), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-220644A1.pdf.

[14] *See, e.g., Mescalero Apache Telecom, Inc., GTE Southwest Incorporated, and Valor Telecommunications of New Mexico, LLC, Joint Petition for Waiver of the Definition of "Study Area" Contained in the Part 36, Appendix Glossary of the Commission's Rules, Mescalero Apache Telecom, Inc., Waiver of Sections 61.41(c)(2), 69.3(e)(11), 36.611, and 36.612 of the Commission's Rules*, CC Docket No. 96-45, Order, 16 FCC Rcd 3813, 3825, para. 30 (Com. Car. Bur. 2001) (granting Mescalero a waiver "to permit it to receive high-cost loop support for the period January 1, 2001 through December 31, 2002"); *Adak Eagle Enterprises, LLC d/b/a Adak Telephone Utility, Petition for Waiver of Sections 36.611, 36.612, 54.301(b), 54.314(d), 54.903(a)(3), 69.2(hh) and 69.3(e)(6) of the Commission's Rules*, CC Docket No. 96-45, Order, 20 FCC Rcd 20543, 20547, para. 10 (Wireline Comp. Bur. 2005) (granting Adak Telephone a waiver "to permit it to receive high-cost loop support for the period beginning May 25, 2005").

[15] Referral Notice at 5.

Valley points to a sentence in the background section of the order stating that the requested waiver "would enable Twin Valley to include the acquired access lines in the NECA carrier common line tariff upon the closing date of its acquisition transaction with United."[16] Although this statement accurately reflects the waiver that Twin Valley requested before it knew whether the transaction would close before or after the Commission granted its study area waiver, the order does not specifically grant a waiver effective on the actual closing date.[17] Moreover, study area and related waivers typically become effective upon release of the order granting them, and the discussion of the section 69.3(e)(11) waiver in those orders typically refers to the next applicable July 1 annual access filing date following the effective date of the waiver.[18] In the *Twin Valley Order* the Bureau stated that "the next annual access filing effective date . . . is July 1, 2007."[19] We therefore find that the Bureau, by identifying the next applicable annual access filing date as July 1, 2007 and not July 1, 2006, clearly did not intend for the waiver to apply retroactively. If it had so intended, the Bureau could have mentioned the actual closing date, referencing July 1, 2006 as the applicable annual access filing effective date, or otherwise made its intent known.[20]

7. Twin Valley argues that it had obtained "the primary regulatory approvals" for the acquisition in the section 214 process and that, between the closing date and release date of the order, it invested significant money to upgrade the acquired exchanges "in reliance upon receipt of USF funds."[21] An application for transfer of control pursuant to section 214 of the Communications Act of 1934, as amended, and a petition for waiver of the definition of "study area" in part 36 of the Commission's rules

[16] *Twin Valley Order*, 21 FCC Rcd at 10115, para. 10; Referral Notice at 5-6. Twin Valley also points to language in its waiver petition requesting to add the newly-acquired exchanges "to its current study area" and include them in the NECA tariff "upon the closing date of this acquisition." *Id.* at 6.

[17] In fact, the order does not mention the actual closing date. In an August 2006 *ex parte* meeting, Twin Valley requested that the Commission take action on its study area waiver as soon as possible and "that it be effective as of the March 1, 2006 acquisition of the exchanges." Letter from David Cosson, Counsel to Twin Valley Telephone, Inc., to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-45, 1 (dated Aug. 24, 2006) (August 24, 2006 *Ex Parte* Letter).

[18] *See, e.g., Partner Communications Cooperative and Iowa Telecommunications Services, Inc., d/b/a Iowa Telecom; Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary of the Commission's Rules, Petition for Waiver of Sections 69.3(e)(11) and 69.605(c) of the Commission's Rules*, CC Docket No. 96-45, Order, 21 FCC Rcd 4404, 4410, para. 17 (Wireline Comp. Bur. 2006); *Lost Nation-Elwood Telephone Company and Iowa Telecommunications Services, Inc., d/b/a Iowa Telecom Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary of the Commission's Rules, Petition for Waiver of Section 69.3(e)(11) of the Commission's Rules*, CC Docket No. 96-45, Order, 21 FCC Rcd 4417, 4422, para. 16 (Wireline Comp. Bur. 2006); *Rural Telephone Service Company, Inc., Nex-Tech, Inc., United Telephone Company of Kansas, and United Telephone Company of Eastern Kansas, Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary of the Commission's Rules; Petition for Waiver of Section 69.3(e)(11) of the Commission's Rules*, CC Docket No. 96-45, Order, 21 FCC Rcd 11964, 11970, para. 15 (Wireline Comp. Bur. 2006); *Gorham Telephone Company, Inc., and Rural Telephone Service Company, Inc., Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary of the Commission's Rules, Petition for Waiver of Section 69.3(e)(11) of the Commission's Rules*, CC Docket No. 96-45, Order, 21 FCC Rcd 11972, 11976, para. 12 (Wireline Comp. Bur. 2006); *SRT Communications, Inc. and North Dakota Telephone Company, Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary of the Commission's Rules; Petition for Waiver of Sections 69.3(e)(11) and 69.605(c) of the Commission's Rules*, CC Docket No. 96-45, Order, 22 FCC Rcd 6699, 6704, para. 13 (Wireline Comp. Bur. 2007).

[19] *Twin Valley Order*, 21 FCC Rcd at 10115, para. 10.

[20] For example, if the Bureau had intended to grant Twin Valley's request for an effective date of March 1, 2006, it could have cited to that specific request in the August 24, 2006 *Ex Parte* Letter, which was filed shortly before the Bureau's order was released. *See supra* note 17; *see also supra* para. 5 and notes 13-14.

[21] Referral Notice at 2-3, 4.

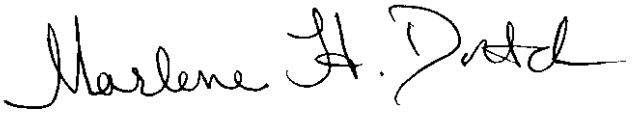
are separate proceedings under the Commission's rules.[22] In evaluating petitions seeking a waiver of the rule freezing study area boundaries, the Commission applies a three-prong standard, the first of which is that the change in study area boundaries must not adversely affect the universal service fund.[23] Twin Valley therefore had no reasonable basis for relying upon the receipt of universal service support before the Commission had considered the effect of the acquisition on the universal service fund in the study area waiver proceeding.[24]

IV. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 5(c), 214, and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 155(c), 214, and 254, that this order IS ADOPTED.

9. IT IS FURTHER ORDERED that, pursuant to sections 1.103(a) and 1.4(b)(2) of the Commission's rules, 47 C.F.R. §§1.103(a), 1.4(b)(2) this order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION



Marlene H. Dortch
Secretary

[22] *See* 47 U.S.C. § 214; 47 C.F.R. §§ 63.03, 63.04 and Part 36, App. (defining study area).

[23] *Twin Valley Order*, 21 FCC Rcd at 10113, para. 5 (citing *US WEST Communications, Inc., and Eagle Telecommunications, Inc., Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary of the Commission's Rules*, AAD 94-27, Memorandum Opinion and Order, 10 FCC Rcd 1771, 1772, para. 5 (1995)).

[24] Twin Valley is aware that under the Commission's current procedures "the Section 214 application is typically granted well before the determination of a waiver request." Referral Notice at 8. Twin Valley also claims, however, that the Commission suggested that study area waivers should be granted within 60 days. Referral Notice at 7 n.13. To support this claim, Twin Valley cites the Commission's 1990 proposal to adopt streamlined procedures for allowing changes in study area boundaries that result from sales of exchanges. After notification that the state commission has approved or does not object to the changes, under that proposal the change in study area boundaries would have taken effect if the Bureau "does not stay, reject, modify, or condition such change within 60 days from receiving notice of the proposal." *Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, CC Docket No. 80-286, Notice of Proposed Rulemaking, 5 FCC Rcd 5974, 5976, para. 19. This proposal was referred to the Federal-State Joint Board on Separations but was never adopted by the Commission.