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

|  |   |                     |
|--|---|---------------------|
| In the Matter of                               | ) |                     |
|  | ) |                     |
| Accipiter Communications, Inc.                 | ) | CC Docket No. 96-45 |
|  | ) |                     |
| and  | ) |                     |
|  | ) |                     |
| Qwest Corporation                              | ) |                     |
|  | ) |                     |
| 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  | ) |                     |
|  | ) |                     |

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**ORDER**

Adopted: September 1, 2010

Released: September 1, 2010

By the Chief, Wireline Competition Bureau:

**I. INTRODUCTION**

1. In this order, we deny a joint request from Accipiter Communications (Accipiter) and Qwest Corporation (Qwest) (collectively, the Petitioners) for a waiver of the study area boundary freeze codified in the Appendix-Glossary of Part 36 of the Commission's rules.<sup>1</sup> The Petitioners requested a waiver that would permit Qwest to remove a territory from its Arizona study area and permit Accipiter to add that territory to its existing Arizona study area.<sup>2</sup> We find that the Petitioners have not demonstrated that a waiver of the Commission's rules would serve the public interest.

**II. STUDY AREA WAIVER**

**A. BACKGROUND**

2. *Study Area.* A study area is a geographic segment of an incumbent local exchange carrier's (LEC) telephone operations. The Commission froze all study area boundaries effective

<sup>1</sup> See 47 C.F.R. Part 36 App.; Accipiter Communications, Inc., and Qwest Corporation, 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 June 20, 2006) (Petition).

<sup>2</sup> Petition at 1. Accipiter also requested a waiver, if necessary, of section 69.3(e)(11) of the Commission's rules to continue to allow it to use the National Exchange Carrier Association (NECA) as its tariff pool administrator. See Petition at 6; 47 C.F.R. § 69.3(e)(11). See *infra* para. 13.

November 15, 1984.<sup>3</sup> The Commission took this action to prevent incumbent LECs from establishing separate study areas made up only of high-cost exchanges to maximize their receipt of high-cost universal service support. A carrier must therefore apply to the Commission for a waiver of the study area boundary freeze if it wishes to transfer or acquire additional exchanges.<sup>4</sup>

3. Universal Service Support. Section 54.305(b) of the Commission's rules provides that a carrier acquiring exchanges from an unaffiliated carrier shall receive the same per-line levels of high-cost universal service support for which the acquired exchanges were eligible prior to their transfer.<sup>5</sup> This rule is meant to discourage a carrier from acquiring an exchange as a way to increase its share of high-cost universal service support.<sup>6</sup>

4. The Petition for Waiver. Accipiter and Qwest filed a joint petition for a waiver of the study area boundary freeze on June 20, 2006.<sup>7</sup> On July 10, 2006, the Wireline Competition Bureau (Bureau) released a public notice seeking comment on the Petition.<sup>8</sup> The requested waiver, if approved, would permit Accipiter to include the portion of the Vistancia development in northwest Maricopa County in its Arizona study area, and would allow Qwest to remove the same territory from its Arizona study area.<sup>9</sup> The Petitioners argue that grant of the waiver is in the public interest.<sup>10</sup> The Petitioners state

<sup>3</sup> See *MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board*, CC Docket Nos. 78-72, 80-286, Decision and Order, 50 Fed. Reg. 939 (1985) (*Part 67 Order*). See also 47 C.F.R. Part 36, App.

<sup>4</sup> *Part 67 Order* at para. 1.

<sup>5</sup> 47 C.F.R. § 54.305(b). This rule applies to high-cost loop support (HCLS) and local switching support (LSS). A carrier's acquired exchanges may receive additional support pursuant to the Commission's "safety valve" mechanism. See 47 C.F.R. § 54.305(d)-(f). A carrier acquiring exchanges also may be eligible to receive interstate common line support (ICLS), which is not subject to the limitations set forth in section 54.305(b). See 47 C.F.R. § 54.902.

<sup>6</sup> See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Red 8776, 8942-43, para. 308 (1997) (subsequent history omitted).

<sup>7</sup> Qwest is an incumbent LEC and has approximately 1,421,000 access lines in one study area in the state of Arizona. Accipiter is an incumbent LEC and has approximately 289 access lines in one study area in Arizona. See *Universal Service Administrative Company, Federal Universal Service Support Mechanism, Fund Size Projection for the Fourth Quarter 2010*, Tables HC12 and HC09 (Aug. 2, 2010).

<sup>8</sup> See *Wireline Competition Bureau Seeks Comment on the Petition of Accipiter Communications, Inc., and Qwest Corporation to Waive the Study Area Boundary Freeze, as Codified in Part 36*, CC Docket No. 96-45, Public Notice, 21 FCC Red 7814 (Wireline Comp. Bur. 2006). AT&T filed comments opposing the Petitioners' request for a study area waiver because it "would perpetuate the flaws in the existing high-cost support framework but also exploit them to obtain 'rural' high-cost support to serve customers in an area that is anything but 'rural.'" AT&T also states that another provider, Cox Communications, is already providing service to Vistancia without receiving universal service support. See *Comments of AT&T, Inc.*, CC Docket No. 96-45 (filed July 24, 2006) at 1,4. In reply to AT&T's comments, the Petitioners argue that AT&T's objections to the Petition reflect AT&T's views on the Commission's high-cost support rules in general, and have no relevance to the Petition filed pursuant to the existing rules and Commission precedent. See *Reply Comments of Joint Petitioners Accipiter Communications, Inc. and Qwest*, CC Docket No. 96-45 (filed July 31, 2006) at 2.

<sup>9</sup> See Petition at 1. Specifically, the area subject to this transaction consists of all of Sections 25, 26, and 35, Township 5 North, Range 1 West, and Section 30, Township 5 North, Range 1 East, of the Gila and Salt River Base and Meridian, Maricopa County, Arizona. See Petition at 3, note 5.

<sup>10</sup> See Petition at 6. See also *infra* para. 10.

that the Arizona Corporation Commission (Arizona Commission) issued an order approving the transfer of the subject area as requested in the Petition.<sup>11</sup>

5. Accipiter currently receives, for its existing 289 lines, approximately \$3.5 million or \$12,111 per line annually (or \$1,009 per line monthly) in high-cost universal service support, which is among the highest in the nation.<sup>12</sup> According to Accipiter's own estimates of how much additional support it would receive if we granted the requested study area waiver, each additional line within the affected area could receive as much as \$838 annually in universal service high-cost support.<sup>13</sup>

6. *Standard for Waiver.* Generally, the Commission may waive its rules for good cause shown.<sup>14</sup> The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.<sup>15</sup> In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.<sup>16</sup> Waiver of the Commission's rules is therefore appropriate only if special circumstances warrant a deviation from the general rule, and such deviation will serve the public interest. In evaluating petitions seeking a waiver of the rule freezing study area boundaries, the Commission applies a three-part standard: (1) the change in study area boundaries must not adversely affect the universal service fund; (2) the state commission having regulatory authority over the transferred exchanges does not object to the transfer; and (3) the transfer must be in the public interest.<sup>17</sup> In evaluating whether a study area boundary change will have an adverse impact on the universal service fund, the Commission analyzes whether a study area waiver will result in an annual aggregate shift in an amount equal to or greater than one percent of high-cost support in the most recent calendar year.<sup>18</sup>

## B. Discussion

7. We find that good cause does not exist to waive the study area boundary freeze to permit Qwest to alter the boundaries of its existing Arizona study area by removing the territory described

<sup>11</sup> See Petition at 2-3; *Application of Accipiter Communications, Inc. to Extend Its Certificate of Convenience and Necessity in Maricopa County*, Docket No. T-02847A-02-0641, Opinion and Order, Arizona Corporation Commission (Feb. 15, 2005) (Arizona Order). Further, the Petitioners provided a letter from the Arizona Commission indicating its support for the requested study area waiver. See Letter from Ernest G. Johnson, Arizona Corporation Commission, to Marlene H. Dortch, Secretary, Federal Communication Commission, CC Docket No. 96-45 (filed March 5, 2007) (attaching Arizona Order).

<sup>12</sup> See Universal Service Administrative Company, Federal Universal Service Support Mechanism, Fund Size Projection for the First Quarter 2010, Table HC01 (Aug. 2, 2010).

<sup>13</sup> See Letter from David Cosson, Counsel for Accipiter, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 96-45 (filed Dec. 17, 2007) (Accipiter December 17 *Ex Parte* Letter).

<sup>14</sup> See 47 C.F.R. § 1.3.

<sup>15</sup> See *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

<sup>16</sup> See *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972); *Northeast Cellular*, 897 F.2d at 1166.

<sup>17</sup> See, e.g., *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) (*PTI/Eagle Order*).

<sup>18</sup> See *id.* at 1774, paras. 14-17; see also *US WEST Communications, Inc., and Eagle Telecommunications, Inc., Joint Petition for Waiver of "Study Area" Contained in Part 36, Appendix-Glossary of the Commission's Rules, and Petition for Waiver of Section 61.41(c) of the Commission's Rules*, AAD 94-27, Memorandum Opinion and Order on Reconsideration, 12 FCC Rcd 4644 (1997).

herein, and to permit Accipiter to add the same territory to its existing Arizona study area.<sup>19</sup> We conclude that the Petitioners have not demonstrated that a waiver would serve the public interest.

8. *Impact on the Universal Service Fund.* Section 54.305(b) of the Commission's rules limits high-cost loop support and local switching support for the acquired exchanges to the same per-line support levels for which the exchanges were eligible prior to their transfer.<sup>20</sup> Consistent with the Commission's finding in the *Skyline Order*, however, section 54.305(b) of the Commission's rules would not apply in this instance because no facilities or customers are being transferred between the parties.<sup>21</sup> In Accipiter estimated that it would be eligible for annual net increases of as much as \$176,480, \$480,885, and \$664,314 in universal service high-cost support for the first three years, respectively, after acquiring the subject territory.<sup>22</sup> Recently, however, Accipiter offered to forego *any* additional universal service high-cost support that might otherwise be available as a result of the waiver.<sup>23</sup> In this case, the waiver would not impact the fund,<sup>24</sup> but as more fully discussed below, we find that Petitioners have not established that granting a study area waiver in this instance would serve the public interest.

9. *Position of State Commission.* The Arizona Commission has previously issued an order approving the territory transfers.<sup>25</sup> The Arizona Commission also provided a letter indicating its support of the requested study area waiver.<sup>26</sup> Thus, the state commission with regulatory authority over the transferred area does not oppose the transfer.

10. *Public Interest Analysis.* Petitioners state that the transfer of the area from Qwest to Accipiter will provide customers with new services from a locally-based carrier specializing in meeting the needs of the rural community it serves and that Accipiter intends to provide quality basic and advanced voice and broadband services to the new exchange, including the installation of fiber-to-the-home or another technology, if its studies show a comparable service level can be provided in the most cost-effective manner.<sup>27</sup>

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<sup>19</sup> 47 C.F.R. Part 36 App.

<sup>20</sup> 47 C.F.R. § 54.305(b).

<sup>21</sup> See Petition at 5; *M&L Enterprises, Inc., d/b/a Skyline Telephone Company, Petition for Waiver of Sections 36.611, 36.612, and 69.2 (h) of the Commission's Rules*, CC Docket No. 96-45, Order, 19 FCC Rcd 6761, 6767, para. 16 (2004) (*Skyline Order*).

<sup>22</sup> See Accipiter estimates that potential annual ICLS for the subject area would range between \$166,000 and \$216,000 by year three of operation depending on the degree of build-out and market penetration. See Accipiter December 17 *Ex Parte* Letter at 6-7.

<sup>23</sup> In March 2010, Accipiter submitted an *ex parte* letter in which it offered to forgo high-cost loop and local switching support. See Letter from David Cosson, Counsel for Accipiter, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 96-45 (filed Mar. 1, 2010) (Accipiter March 1 *Ex Parte* Letter). Subsequently, on August 30, 2010, Accipiter submitted an *ex parte* letter stating that Accipiter would accept a grant of its petition conditioned upon the subject area being ineligible for all forms of universal service high-cost support including ICLS. See Letter from David Cosson, Counsel for Accipiter, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 96-45 (filed Aug. 30, 2010).

<sup>24</sup> See *supra* note 21.

<sup>25</sup> See *supra* note 11.

<sup>26</sup> See *id.*

<sup>27</sup> See Petition at 6.

11. We are not persuaded that granting the requested relief would serve the public interest. Vistancia is a planned community located in the greater metropolitan area of Phoenix, Arizona.<sup>28</sup> Accipiter is currently offering fiber-to-the-home telecommunications and broadband internet service to the Vistancia community.<sup>29</sup> Cox Communications (Cox) is also providing wireline telecommunications and broadband services to customers in the area without receiving any universal service support.<sup>30</sup>

12. Petitioners have not met their burden of proving that special circumstances warrant a waiver of our rules in this instance. Accipiter has not shown a compelling need to receive additional high-cost support, such as high basic local service rates or low telephone penetration levels. Indeed, in light of its recent offer to forgo additional high cost support, it is not clear in the record before us why it continues to seek a study area waiver at all. Accipiter has not presented any evidence that suggests universal service is threatened in the subject area, nor has Accipiter demonstrated that special circumstances warrant a waiver of our rules. We find no circumstances of hardship or inequity that would warrant granting such a waiver.<sup>31</sup> Accordingly, we conclude that special circumstances do not exist that warrant a grant of the requested waiver.

13. Petition for Waiver of Section 69.3(e)(11). Accipiter also requests a waiver, if necessary, of section 69.3(e)(11) of the Commission's rules to continue to allow it to use NECA as its tariff pool administrator.<sup>32</sup> Section 69.3(e)(11) requires that any changes in NECA common line tariff participation resulting from a merger or acquisition of telephone properties are to be made effective on the next annual access tariff filing effective date following the merger or acquisition.<sup>33</sup> Because we deny Accipiter's request to add the subject territory to its existing study area, Accipiter's requested waiver of section 69.3(e)(11) is dismissed without prejudice as moot.

### III. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 5(c), 201, 202 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 155(c), 201, 202, and 254, and sections 0.91, 0.291, and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 1.3, that the joint petition for waiver of the study area boundary freeze as codified in Part 36, Appendix-Glossary, of the Commission's rules, filed by Accipiter Communications, Inc., and Qwest Corporation on June 20, 2006, IS DENIED, as described herein.

<sup>28</sup> See [www.vistancia.com](http://www.vistancia.com).

<sup>29</sup> See <http://www.zonacommunications.com/residential/internet>. Accipiter now operates under the trade name of Zona Communications.

<sup>30</sup> See Petition at 2; AT&T Comments at 4; Letter from David Cosson, Counsel for Accipiter, to Marlene H. Dorch, Secretary, Federal Communications Commission, CC Docket No. 96-45 (filed Aug. 9, 2007) (stating that although the number of subscribers served by Cox is not available to Accipiter, there are approximately 1,300 homes in the subject area and there is a potential for 2,500 to 3,000 residential units).

<sup>31</sup> See *supra* para. 5.

<sup>32</sup> See 47 C.F.R. § 69.3(e)(11).

<sup>33</sup> *Id.*

15. IT IS FURTHER ORDERED that, pursuant to section 1.102(b)(1) of the Commission's rules, 47 C.F.R. §1.102(b)(1), this order SHALL BE effective upon release.

FEDERAL COMMUNICATIONS COMMISSION

Sharon E. Gillett  
Chief  
Wireline Competition Bureau