

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

In the Matter of)	
)	
Petition for Waiver of Universal Service High-Cost Support Deadlines)	WC Docket No. 08-71
)	
Advantage Cellular Systems, Inc. Petition For Waiver of Section 54.307(c) of the Commission’s Rules)	CC Docket No. 96-45
)	
)	

To: Chief, Wireline Competition Bureau

PETITION FOR RECONSIDERATION

Advantage Cellular Systems, Inc. (“Advantage”), by its attorneys, and pursuant to Section 1.106 of the Rules and Regulations of the Federal Communications Commission (“FCC” or “Commission”), hereby petitions for reconsideration of the Order denying Advantage’s request for a waiver of the filing deadlines set forth in Section 54.307(c) of the Commission’s Rules for submission of high cost loop (“HCL”) and local switching support (“LSS”) quarterly line count reports to the Universal Service Administrative Company (“USAC”).¹ The requested waiver would have allowed Advantage to recover approximately \$321,948 in universal service support that would have enabled Advantage to continue to provide service to high-cost portions of Tennessee and to continue to build out its network in underserved portions of rural Tennessee.

As discussed below, the Order is based on erroneous conclusions of law. In concluding that Advantage failed to demonstrate “special circumstances” that would justify the requested waiver,

¹ *Petitions for Waiver of Universal Service High-Cost Filing Deadlines; Grande Communications Networks, Inc. Petition for Waiver of Section 54.307(c) of the Commission’s Rules; Advantage Cellular Systems, Inc. Petition for Waiver of Section 54.307(c) of the Commission’s Rules; Decatur Telephone Company Petition for Waiver of Section 54.904(d) of the Commission’s Rules; Range Telephone Cooperative, Inc. Petition for Waiver of the Commission’s Universal Service Rules, Order, WC Docket No. 08-71; CC Docket No. 96-45, DA 11-740, (rel. April 28, 2011) (“Order”).*

the Wireline Competition Bureau (“Bureau”) misapplied Commission precedent. In addition, the Bureau failed to address the harm to the public interest caused by Advantage’s considerable loss of high cost support, rendering its decision arbitrary and capricious in violation of the Administrative Procedure Act (“APA”). Advantage seeks reconsideration of the Order’s denial of Advantage’s waiver request and requests that the Commission grant the requested waiver and direct USAC to allocate Advantage HCL and LSS support for the period between January and June, 2005.

I. Introduction and Background.

Advantage is a small B block cellular carrier serving rural parts of Tennessee (Cannon, Tennessee RSA 2, CMA644). The FCC designated Advantage as an eligible telecommunications carrier (“ETC”) on October 22, 2004 in accordance with Section 214(e)(2) of the Communications Act.²

The FCC’s rules require that a competitive ETC report to USAC the number of working loops it serves in a rural incumbent local exchange carrier service area for the period ending six months prior to the reporting date in order to receive HCL support and LSS.³ The HCL and LSS line count data is due quarterly on March 30th for loops served as of September 30th of the previous year, July 31st for loops served as of December 31st of the previous year, September 30th for loops served as of March 31st of the same year, and December 30th for loops served as of June 30th of the same year. The HCL and LSS reports at issue were due September 30, 2004 and December 30, 2004 and were timely sent by Advantage to USAC’s New Jersey address via U.S. mail on September 24, 2004 and December 21, 2004 respectively.

² *In re Federal-State Joint Board on Universal Service, Advantage Cellular Systems, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the state of Tennessee*, FCC Docket No. 96-45, Order, DA 04-3357 (October 22, 2004) (“*Advantage ETC Order*”); 47 U.S.C. § 214(e)(2).

³ 47 C.F.R. § 54.307.

In early 2005, when Advantage did not receive HCL support and LSS, it contacted USAC, and after several months of discussions with USAC, determined that USAC did not appear to have Advantage's September and December 2004 reports on file. Advantage resubmitted its September and December 2004 line count reports, requesting that USAC promptly distribute to Advantage its unpaid universal service support. After USAC notified Advantage that it would pay Advantage universal service support for the period in question only if Advantage: (1) provides proof that USAC *received* its HCL and LSS line count data; or (2) obtains a waiver from the FCC, Advantage submitted its waiver petition to the FCC.

In its Order, the FCC denied Advantage's waiver petition based on its conclusion that: (1) Advantage provided no evidence that the line count filings in question were timely *received* by USAC; and (2) Advantage failed to show "special circumstances." In concluding that Advantage had not shown good cause for the requested waiver, the FCC stated that the assertion that loss of funding would result in delayed network upgrades and improvements is "not unique" to Advantage.

II. The Bureau's Denial of Advantage's Waiver Request Was Based on a Misapplication of Law and Misreading of Commission Precedent.

The Order summarily concludes, virtually without elaboration, that Advantage has not shown that "special circumstances" support its waiver request.⁴ The only reason put forth for this conclusion is that "[t]he assertion that loss of funding would result in delayed upgrades [sic] improvements is not unique to [Advantage's petition]."⁵ The Commission has misapplied the applicable legal standard.

There is no requirement that circumstances supporting the grant of a waiver be "unique" in order to justify grant of such waiver. Under the standards for rule waivers set forth in Section 1.925(a)(3) of the FCC's rules:

⁴ Order at ¶ 13.

⁵ *Id.*

The Commission may grant a request for waiver if it is shown that: (i) The underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; *or* (ii) In view of unique *or unusual* factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the application has no reasonable alternative.⁶

A waiver may be justified pursuant to a showing made under Section 1.925(a)(3)(i) *or* 1.925(a)(3)(ii). Although unique circumstances may justify a waiver under Section 1.925(a)(3)(ii), they are not necessary to do so. Section 1.925(a)(3)(ii) may be satisfied by a showing of unusual circumstances as well. Because Advantage demonstrated that it met both of the alternative prongs of Section 1.925(a)(3), either of which by itself would be sufficient to justify a waiver, the issue of whether or not its circumstances were unique (one of several bases for making a waiver showing under the second prong of Section 1.925(a)(3)) is relevant only if the Commission were to find that Advantage had not met any of the alternative waiver criteria set forth in Section 1.925(a)(3). Because the only justification for its waiver denial set forth in the Order was the absence of unique circumstances, which was not even a basis of Advantage's waiver request, the Commission clearly misapplied the applicable legal standard by failing to address and provide a reasoned basis for rejecting Advantage's additional waiver showings. It is well-settled that the Commission is required to give a waiver request a "hard look," and provide a reasoned explanation for its decision and that this obligation is not satisfied by a perfunctory denial.⁷ By failing to address the grounds for a waiver advanced by Advantage, and by denying the waiver for failing to meet criteria on which the waiver was not requested, the Commission has misapplied the appropriate legal standard and its decision should be reconsidered.

⁶ 47 C.F.R. § 1.925(a)(3) (emphasis added).

⁷ *WAIT Radio v. FCC*, 418 F.2d 1164 (D.C. Cir. 1969) *cert denied*, 409 U.S. 1027 (1972).

The Order also ignores precedent that the requisite special circumstances that would justify a waiver exist when carriers have acted reasonably and in good faith to ensure that filings are made by the deadline.⁸ In *Benton/Linn*, for example, the Bureau waived line count filing deadlines for a number of carriers whose mailed filings did not arrive at USAC on time. The Bureau concluded that, where an applicant tried to account for delays by mailing the required data a week in advance of the deadline, “[e]ven given unexpected delays, mailing the data when they did should have ensured that the filings arrived on time.” The Bureau found that such delays were not foreseeable, and thus constituted “special circumstances” justifying a waiver.⁹

Similarly, in *SouthEast Telephone, Inc.*¹⁰, which involved line count filings mailed on September 23, 2005, seven days in advance of the deadline, the Bureau continued to hold that unexpected mailing delays constitute good cause for waiver of line count reporting deadlines.

The *Benton/Linn* and *SouthEast* decisions involve the same circumstances that form the basis of Advantage’s waiver request, yet the Commission’s Order, with little or no explanation, ignores its own precedent. It is well-settled that agencies “may not . . . depart from a prior policy

⁸ The Order initially concludes that Advantage did not provide sufficient evidence that its submissions “were timely filed.” Order at par. 1. However, the Bureau does not explain what it means by “timely filed.” The Bureau does not challenge the accuracy of the affidavits submitted by Advantage demonstrating that the line count filings were mailed six and nine days, respectively, in advance of the deadlines. Accordingly, Advantage must assume that the Bureau meant that the filings were not “timely received” by USAC. To the extent that the Bureau has based its decision on a conclusion that the filings were not timely submitted by Advantage, it has failed to provide any evidence in support of such a conclusion. Moreover, any such conclusion would be inconsistent with Commission precedent holding that affidavits from employees stating that they placed documents in a mailbox are sufficient to establish that such documents were mailed. See, e.g., *Federal-State Joint Board on Universal Service; Benton/Linn Wireless, LLC Petition for Waiver of Section 54.307(c) of the Commission’s Rules*, Order, CC Docket No. 96-45, DA 05-311, rel. Nov. 29, 2005 (“*Benton/Linn*”) (waiving line count deadline where carrier submitted employee affidavits stating that line count filing had been mailed). See also *Schikore v. BankAmerica Supplemental Retirement Plan*, 269 F.3d 956, 964 (9th Cir. 2001) (a sworn statement is credible evidence of mailing).

⁹ *Benton/Linn* at ¶¶ 18-20.

¹⁰ *SouthEast Telephone, Inc. Expedited Petition for Waiver of Deadlines in Sections 54.307(c)(2) and 54.802(a) of the Commission’s Rules*, Order, CC Docket No. 96-45, DA 06-1860, rel. Sept. 12, 2006 (“*SouthEast*”).

*sub silentio.*¹¹ Accordingly, the *Benton/Linn* and *SouthEast* decisions dictate that Advantage's mailing of its line count filings six and nine days in advance of its respective deadlines also constitutes "special circumstances" justifying a waiver.¹²

III. The Bureau's Failure to Consider the Harm to Both Advantage and the Public Interest that Would Result from Denial of the Waiver Request, and the other Evidence of Good Cause Proffered by Advantage was Arbitrary and Capricious.

The FCC has stated that, in ruling on a request for waiver, it may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.¹³ In fact, the FCC has granted a number of requests for waiver of universal service filing deadlines based on considerations of hardship and equity.¹⁴ For example, the FCC granted a

¹¹ *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009). While it is true that the Commission indicated in *Benton/Linn* that carriers would need to ensure on a going forward basis that their filings were actually received by USAC by the applicable submission deadline, the submissions for which Advantage requested a waiver were made long before the Commission clarified its new policy and should have been entitled to a waiver for the same reasons the waivers were granted in *Benton/Linn* and *Southeast Telephone*.

¹² *Benton/Linn* noted that subsequent to the occurrence of the circumstances underlying the petitions at issue in that case, USAC updated its procedures to allow carriers to file by email or facsimile. Although the Bureau stated in *Benton/Linn* that "[g]iven the options that are now available for filing, we doubt circumstances as described by these petitioners will be considered 'special circumstances' in the future," *Benton/Linn* was not issued until November 29, 2005, long after Advantage submitted the filings at issue. Moreover, as noted in the Supplement filed to Advantage's petition, the filing alternatives mentioned in *Benton/Linn* were, to Advantage's knowledge, not available or made known to carriers in 2004, when the filings at issue were made. Supplement to Advantage Cellular Systems, Inc. d/b/a DTC Wireless Petition for Waiver, WC Docket No. 08-71, CC Docket No. 96-45, filed November 24, 2008. Significantly, in the *SouthEast Telephone* decision, the Bureau did not hold carriers making line count filings in September of 2005 to the *Benton/Linn* standard, continuing to instead grant waivers of such deadlines where carriers continued to rely on the U.S. mail as their filing vehicle.

¹³ *WAIT Radio v. FCC*, *supra*.

¹⁴ *In the Matter of Federal-State Joint Board on Universal Service, Western Wireless Corporation Petition for Waiver of Section 54.314 of the Commission's Rules and Regulations*, CC Docket No. 96-45, Order, DA 03-2364 (July 18, 2003) (finding it onerous to deny an ETC receipt of USF support for almost two quarters). See *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*, CC Docket No. 96-45, Order, DA 04-1393 (May 18, 2004) (*Smithville Order*) (waiving the LSS line count deadline where denial of USF support for a year would be onerous); *Federal-State Joint Board on Universal Service, Alliance Communications Cooperative, Inc. and Hills Telephone Company, Inc. East Ascension Telephone Company, Petitions for Waiver of Section 54.301 Local Switching Support Data Submission Report Date*, CC Docket No. 96-45, DA 05-3024 at ¶ 8 (November 22, 2005) (granting waiver of

waiver to Smithville Telephone Company, Inc. because denial of local switching support would undermine the FCC’s goal of quality service available at just, reasonable and affordable rates and, more importantly, loss of LSS “may affect the rates that Smithville charges to customers.”¹⁵ In another case, the FCC granted a waiver to North River Telephone Cooperative because a loss of \$46,000 in ICLS funding due to filing the wrong certification could cause significant hardship in the rural and high-cost areas served by North River.¹⁶ The FCC also granted MCI, Inc. a waiver of its interstate access support (“IAS”) deadlines because a loss of \$1.5 million in IAS funding could impact the rural and high-cost areas served by MCI.¹⁷

In another case, the FCC found that good cause warranted granting NPCR, Inc.’s request for waiver of the IAS data reporting deadline.¹⁸ As with the orders discussed *supra*, the Commission again considered how the loss of funding would impact high cost areas.¹⁹ Specifically, the FCC

the FCC’s LSS line count deadline where denial of LSS for a year would cause substantial hardship); *Federal-State Joint Board on Universal Service, Citizens Communications and Frontier Communications Petition for Waiver of Section 54.802(a) of the Commission’s Rules*, CC Docket No. 96-45, Order, DA 05-2829 (October 27, 2005) (waiving its IAS deadline where enforcement of the deadline would result in the loss of \$9.6 million in universal service support to a carrier serving 1.4 million customers); *Federal-State Joint Board on Universal Service, FiberNet, LLC Petition for Waiver of FCC Rule Section 54.307(c)(4)*, 20 FCC Rcd 20316 (December 25, 2005) (waiving its line count deadline where enforcement of the deadline could cause significant hardship in the rural, insular, high-cost, areas served by FiberNet); *Federal-State Joint Board on Universal Service, Verizon Communications Inc. Petition for Waiver of 54.802(a) of the Commission’s Rules*, CC Docket No. 96-45, Order, DA 06-1861 (September 12, 2006) (waiving its IAS deadline where enforcement of the deadline could undermine Verizon’s investment in its network).

¹⁵ *Smithville Order* at ¶ 6.

¹⁶ *Federal-State Joint Board on Universal Service, North River Telephone Cooperative, Petition for Waiver of the Deadline in 47 C.F.R. §54.904(d)*, CC Docket No. 96-45, Order, DA 06-2584 at par. 6 (December 28, 2006) (“*North River Order*”)

¹⁷ *Federal-State Joint Board on Universal Service, MCI Inc., Petition for Waiver of Sections 54.802(a) and 54.809(c) of the Commission’s Rules*, CC Docket No. 06-45, Order, DA 06-2581 at par. 8 (December 28, 2006) (“*MCI Order*”).

¹⁸ *See Federal-State Joint Board on Universal Service, NPCR, Inc. Petition for Waiver of Section 54.802(a) of the Commission’s Rules*, CC Docket No. 06-45, Order, DA 07-110 (January 18, 2007) (“*NPCR Order*”).

¹⁹ *NPCR Order* at ¶ 7.

expressed concern that the loss of funding might undermine NPCR's investments in its networks and its consequent ability to ensure that its customers have and maintain access to adequate services.²⁰

Advantage made comparable, if not more compelling, hardship and equity arguments in its *Waiver Petition* than NPCR and other carriers granted similar waivers did. For example, Advantage noted that if it were denied HCL and LSS support for the January to June 2005 period, it would lose approximately \$35.77 per customer line, over five times the amount of per-line support the loss of which the Commission has recognized is likely to cause significant hardship.²¹ Advantage outlined its planned upgrades and its reliance on its universal service support to implement such upgrades.²² As Advantage noted throughout its *Waiver Petition*, the loss of high cost support has delayed Advantage's planned expansion of its network, denying better coverage to Advantage's rural customers, including customers in areas that would be unserved if not for Advantage.²³ Advantage also argued that it needs the universal service support to continue to provide quality service to rural Tennessee at affordable rates.²⁴ As a small, rural carrier, Advantage's loss of approximately \$321,948 in universal service support is a clear case of customer hardship. Accordingly, Advantage requests that the FCC reconsider its decision to deny Advantage's waiver request.

Advantage's demonstrated harm to its customers due to the loss of universal service support warrants a deviation from the general rule since such a deviation will serve the public interest.²⁵ In

²⁰ *Id.*

²¹ *Waiver Petition* at 9.

²² *Waiver Petition* at pp. 8-9; *Supplement* at pp. 5-6.

²³ *Waiver Petition* at 7-9.

²⁴ *Id.* at p. 9.

²⁵ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

denying Advantage's petition, the Bureau argued that "because USAC processes such a large amount of data each year, it is necessary that carriers meet the requisite filing deadlines, absent special circumstances."²⁶ Advantage's demonstrated hardship and equity are the sort of special circumstances that outweigh whatever administrative inconvenience USAC may encounter when calculating and disbursing Advantage's universal service support. The FCC has granted requests for waivers even when significant delays were involved that may have inconvenienced USAC. For example, North River incorrectly filed its June 30, 2003 ICLS certification and did not file a corrected version until October 2003,²⁷ more than three months after the annual certification was due. In addition, MCI failed to meet three consecutive quarterly IAS line count deadlines and its annual IAS certification deadline.²⁸ The FCC even notes that MCI did not file in time for USAC to incorporate the projected line count data into its quarterly calculations.²⁹ Therefore, the FCC's reliance on administrative necessity in its denial of Advantage's request for waiver is contrary to FCC precedent and, upon reconsideration, should be reversed, especially in light of the public interest considerations discussed *supra*.

By ignoring Advantage's public interest arguments, the Bureau's decision abandons FCC precedent without providing a reasonable basis for deviating from established precedent and policy. In addition, the Bureau ignored Advantage's arguments regarding the inconsistency of strict enforcement of the deadline with the underlying purpose of the FCC's universal rules, the burden placed on Advantage by a denial of high-cost support, and Advantage's lack of a reasonable alternative, as well as Advantage's argument that USAC would not be administratively burdened by

²⁶ *Order* at ¶ 5.

²⁷ *North River Order* at ¶ 4 and footnote 8.

²⁸ *MCI Order* at ¶ 5-6.

²⁹ *MCI Order* at ¶ 9.

its request for support.³⁰ Thus, the Order is arbitrary and capricious, and otherwise not in accordance with the law, in violation of the APA.³¹ To satisfy the APA, an agency must “examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”³² In the instant case, the Bureau ignored the relevant facts concerning consumer harm due to the loss of high cost support and abandoned its own precedent, while failing to provide any rational or satisfactory explanation for its choice to deny Advantage high cost support it needs to provide universal service in rural Tennessee.

IV. Conclusion.

For the foregoing reasons, the Bureau’s Order is arbitrary and capricious, and otherwise contrary to law, and should therefore be reconsidered as requested herein.

Respectfully submitted,

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³⁰ *Id.* at 12.

³¹ 5 U.S.C. 706(2)(A). *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971).

³² *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).