

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

In the Matter of)	
)	
Connect America Fund)	WC Docket No. 10-90
)	
A National Broadband Plan for our Future)	GN Docket No. 09-51
)	
Establishing Just and Reasonable Rates for Local Exchange Carriers)	WC Docket No. 07-135
)	
High-Cost Universal Service Support)	WC Docket No. 05-337
)	
Developing an Unified Intercarrier Compensation Regime)	CC Docket No. 01-92
)	
Federal-State Joint Board on Universal Service)	CC Docket No. 96-45
)	
Lifeline and Link-Up)	WC Docket No. 03-109
)	
Universal Service Reform – Mobility Fund)	WT Docket No. 10-208

**Reply Comments of Cimarron Telephone Company, L.L.C.,
Cross Telephone Company, L.L.C., and
The Pottawatomie Telephone Company, L.L.C.**

I. Introduction.

Petitioners submit these reply comments in connection with their Petition for Limited Waiver.¹ In the Petition, the Petitioners requested a limited waiver of the Commission’s rules to include in their 2011 baseline revenues² amounts billed to an access arbitrageur, Halo Wireless, who refused to pay and then filed for bankruptcy .³ If granted, Petitioners’ baseline revenues will

¹ *Wireline Competition Bureau Seeks Comment on Petition for Limited Waiver of the Commission’s Rules Filed by Cimarron Telephone Company, Cross Telephone Company, and Pottawatomie Telephone Company*, Public Notice, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, WT Docket No. 10-208 (rel. Dec. 3, 2012).

² See Petition for Limited Waiver of 47 C.F.R. § 51.917(c), Petition of Cimarron Telephone Company, Cross Telephone Company, and The Pottawatomie Telephone Company, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, WT Docket No. 10-208 at 1, n.3 (filed Nov. 19, 2012) (“Petition) (citing to the Commission’s rules defining baseline revenues).

³ See Petition at 2.

reflect the amount of intrastate access revenues Petitioners would have collected *but for* the access arbitrage scam and subsequent bankruptcy. If denied, Petitioners' eligible recovery amounts will be set artificially low just because the scam coincided with the Commission's baseline period – a result that is inconsistent with the Commission's goals and which will harm consumers in Petitioners' rural Oklahoma service areas. Accordingly, the Commission should grant the Petition.

II. Petitioners and Other Commenters Have Established That Good Cause Exists to Grant the Requested Waiver.

As explained in the Petition, good cause⁴ exists to grant the waiver and the requested waiver would serve the policy underlying the rule.⁵ Moreover, the unique circumstances of the Halo scheme and subsequent bankruptcy would make strict compliance with the rule inconsistent with the public interest.⁶ The commenters opposing the waiver attempt to dissuade the Commission from granting the waiver by mischaracterizing the relief requested and ignoring the uniqueness of the situation and limitations of the requested relief. Those attempts fail. Accordingly, the Commission should grant the waiver.

A. Granting the waiver would not undermine the policy served by the rule.

Not only would granting the waiver not undermine the policy served by the rule, it would actually promote the policy. As Petitioners and others have shown, granting the waiver would

⁴ 47 C.F.R. § 1.3. Requests for waiver of the baseline access revenues are subject to the Commission's "good cause" waiver standard. *In the Matter of Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing an Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform – Mobility Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 ¶ 898, n.1745. (2011) ("Order").

⁵ See *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

⁶ *AT&T Corp. v. FCC*, 448 F.3d 426, 433 (D.C. Cir. 2006) ("A waiver is permissible where particular facts would make strict compliance inconsistent with the public interest.") (internal quotation omitted).

promote the Commission's goals of avoiding disruption to network investment and encouraging broadband deployment.⁷

Granting the waiver would also promote the Commission's goal of preventing distortions in the access recovery mechanism.⁸ As the United States Telecom Association notes, the requested relief "promotes the policy of the rule by enabling an accurate reflection of the appropriate revenues for inclusion in the base period, instead of having those revenues significantly understated due to a unique situation"⁹

Granting the waiver will also preserve the balance the Commission struck in reforming its universal service and intercarrier compensation rules. As stated in the Petition, the Commission carefully crafted its transition rules to avoid flash cuts and give carriers time to adapt to the reforms.¹⁰ Granting the waiver will preserve that balance by avoiding a flash cut caused by the combination of an access arbitrage scheme with the strict application of the Commission's baseline rules. Accordingly, granting the waiver would promote the policies served by the rules.

⁷ Petition at 11-12; see also *In the Matter of Petition of Cimarron Telephone Company, Cross Telephone Company, and Pottawatomie Telephone Company for Limited Waiver of 47 C.F.R. 51.917(c)*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, WT Docket No. 10-208, Comments of the United States Telecom Association at 4 (filed Jan. 2, 2013) ("US Telecom Comments"); see also *In the Matter of Petition of TDS Communications Corporation for Limited Waiver of 47 C.F.R. 51.917(c)*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, WT Docket No. 10-208, Comments of the National Exchange Carrier Association, Inc.; National Telecommunications Cooperative Association; Organization for the Promotion and Advancement of Small Telecommunications Companies; Eastern Rural Telecom Association; Western Telecommunications Alliance; and the United States Telecom Association at 4 (filed Oct. 1, 2012) (supporting a petition seeking relief similar to the relief Petitioners seek).

⁸ Petition at 12-13.

⁹ US Telecom Comments at 4.

¹⁰ Petition at 13-14.

B. The circumstances are unique.

Sprint opposes the waiver, arguing that the circumstances are not unique because all service providers deal with unpaid invoices.¹¹ Yet, this was not the case of a few unpaid invoices or common bad debt that all carriers might experience. Rather, as explained below, this was a scheme that diverted large amounts of traffic through a contrived, and false, loophole in an attempt to escape access charges. When the Commission¹² and state regulators¹³ slammed the door on the scheme, Halo filed for bankruptcy, halting Petitioners' collection efforts.

The uniqueness of the circumstances standard hinges on whether the unique facts of the situation would make strict compliance with the rule inconsistent with the public interest.¹⁴ Sprint's "everyone has unpaid invoices" argument is based on the false premise that the uniqueness of the circumstances test should include selectively ignoring certain circumstances – specifically, those giving rise to the revenue shortfall which is the basis for the waiver request. The application of the uniqueness of the circumstances test necessarily includes an examination of the circumstances in their totality. Here, the uniqueness of the circumstances makes strict compliance with the rule inconsistent with the public interest.

¹¹ *In the Matter of Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing an Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform – Mobility Fund*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, WT Docket No. 10-208, Comments of Sprint Nextel Corporation at 3 (filed Jan. 2, 2013) ("Sprint Comments").

¹² Order ¶¶ 979, 1005-06.

¹³ *See In the Matter of Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing an Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform – Mobility Fund*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, WT Docket No. 10-208, Notice of *Ex Parte* Presentation of TDS Telecommunications Corp. at 1 (filed Dec. 20, 2012) ("TDS Ex Parte") ("[E]very state that has ruled publicly on this issue has determined that Halo has failed to pay appropriate intrastate access charges to TDS Telecom or another carrier.").

¹⁴ *AT&T Corp. v. FCC*, 448 F.3d 426, 433 (D.C. Cir. 2006) ("A waiver is permissible where particular facts would make strict compliance inconsistent with the public interest.") (internal quotations omitted).

First, Halo was an access arbitrageur who routed large amounts of traffic through its network.¹⁵ That traffic represented normal traffic that would have otherwise come through Petitioner's networks from another carrier that would have paid the access invoices.¹⁶ Instead, Halo routed the traffic through its network and refused to pay access invoices, hiding behind a meritless legal theory.¹⁷ That legal theory was rejected, not only by the Commission,¹⁸ but also by every state regulatory authority that reviewed it.¹⁹

Second, once its scheme fell apart, Halo filed for bankruptcy, shielding itself from Petitioners' collection efforts.²⁰ Significantly, even though the Commission would have allowed Petitioners to request inclusion of access charges collected after the cut-off as the result of a decision of a court or regulatory agency, the bankruptcy stay pre-empted this option for Petitioners.²¹

Third, Halo's access arbitrage activity coincided with the Commission's baseline period.²² Consequently, applying the baseline rules strictly would lock in the harms caused by Halo's activity for years to come.²³ And that harm would be inflicted on consumers in the rural Oklahoma areas served by Petitioners. None of these circumstances is present in the case of a

¹⁵ Petition at 4-6.

¹⁶ Petition at 5.

¹⁷ Petition at 4-6.

¹⁸ Order ¶¶ 979, 1005-06.

¹⁹ TDS Ex Parte at 1.

²⁰ Petition at 6-8 (discussing the bankruptcy stay's impact on Petitioners' efforts to collect on Halo's unpaid access invoices).

²¹ Petition at 8 (discussing the bankruptcy stay's impact on Petitioners' efforts to collect on Halo's unpaid access invoices); *see also* TDS Ex Parte at 1 (state regulatory commissions were "unable to order Halo to pay the intrastate access charges owed due to Halo's filing for bankruptcy protection...").

²² Petition at 5; *see also* US Telecom Comments at 4.

²³ Petition at 14-15.

typical unpaid access invoice; all of these circumstances are present here. Accordingly, this situation is unique.

C. Strict compliance with the rule would be inconsistent with the public interest.

Strict compliance with the rule – disallowing the Halo uncollectible amounts from Petitioners’ baseline revenues – would be contrary to the public interest. Strict compliance with the rule would slash Petitioners’ support, harming their ability to invest in broadband network upgrades and disadvantaging the consumers in the rural areas they serve for years to come. Granting the waiver, on the other hand, would avoid that flash-cut, and thereby promote network investment²⁴ and avoid penalizing rural Oklahomans “because of the actions of a provider gaming the system.”²⁵

III. NCTA and Sprint’s Arguments in Opposition of the Petition are Unavailing.

Sprint and NCTA make a handful of other arguments in opposition to the Petition. Each of the arguments is unavailing.

A. The Petition does not seek indemnification of Halo-related losses.

Contrary to NCTA’s²⁶ and Sprint’s²⁷ assertions, the Petition does not seek to have the Commission or other contributors to the USF “indemnify” Petitioners for the Halo-related losses. Indeed, the Petition made this clear:

²⁴ Petition at 11-12; US Telecom Comments at 5.

²⁵ US Telecom Comments at 4.

²⁶ *In the Matter of Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing an Unified Inter-carrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform – Mobility Fund*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, WT Docket No. 10-208, Opposition of the National Cable & Telecommunications Association to Petition for Waiver Filed by Cimarron Telephone Company Cross Telephone Company, and Pottawatomie Telephone Company at 2-3 (filed Jan. 2, 2013) (“NCTA Comments”) (“[T]he amount of high-cost support to be disbursed could increase significantly if the Commission does not make clear that universal service support and Access Recovery Charges are not meant to indemnify incumbent LECs against bankruptcy losses incurred in the normal course of business.”).

In this Petition, the Petitioners are not asking the Commission to assist in recovering revenues lost because of the scam and subsequent Halo bankruptcy. Rather, the purpose of this request is to prevent the harm caused by Halo's scam from being multiplied several fold over the coming years merely because it occurred during the base period established for the USF reform access recovery calculations.²⁸

B. Inability to recover the Halo revenue is not a basis to deny the waiver.

NCTA argues that Petitioners are not entitled to a waiver because the rules require revenues to have been recovered, not just billed, to be included in the baseline revenues.²⁹

NCTA's position is, in essence, that Petitioners are not entitled to a waiver because the Order does not allow the inclusion of the revenues. This is not a reason to deny the waiver request; it is the basis of the need for the waiver. The Order did not address the situation presented here, where an access arbitrageur engaged in a blatant access arbitrage scheme, was ultimately shut down by regulators, but shielded itself from efforts to collect the access revenues.

Similarly, Sprint argues against allowing the use of billed rather than received revenues.³⁰ These arguments miss the point of the Petition. Petitioners *could not recover* the amounts owed by Halo – even though all state regulators dealing with the issue found Halo liable for access charges – because (1) Halo refused to pay during the course of its scheme, and (2) the bankruptcy stay prevented collections actions after the regulators shut the scheme down. As stated in the Petition:

[E]ven though the *USF/ICC Transformation Order* contemplates that carriers may request the inclusion of access charges collected after the March 31, 2012 cut-off as the result of a decision of a court or regulatory agency of competent jurisdiction, Halo's liquidation in bankruptcy forestalls this option for the Petitioners. Petitioners seek this waiver to allow them to include the Halo intrastate access revenues within their 2011 Base Period Revenues because the

²⁷ Sprint Comments at 2 (“[C]ontributors to the USF should not be forced to make Joint Petitioners whole by covering for access invoices unpaid by Halo.”).

²⁸ Petition at 8 (emphasis added).

²⁹ NCTA Comments at 2.

³⁰ See Sprint Comments at 2.

bankruptcy stay and subsequent Chapter 7 liquidation foreclosed their ability to obtain a judgment to collect the amounts owed.³¹

In short, the bankruptcy stay cutoff Petitioners' ability to recover the unpaid access revenues from Halo. Indeed, if the revenues had been recoverable, the Petitioners would have had no reason to seek a waiver; they could have availed themselves of the process for requesting inclusion of post-cutoff revenues resulting from a court or regulatory decision.

C. This proceeding is not the place to challenge the policies underlying the Commission's reforms.

NCTA argues that the waiver would give Petitioners an unfair competitive advantage over cable operators and others who cannot get "replacement" funding.³² This argument seems aimed at the policies underlying universal service reform. The Commission has already made its policy decisions, and, in any event, those policies are not the subject of this proceeding.

D. The requested waiver would not affect the fund, but denying the waiver would.

Contrary to Sprint's assertion,³³ the requested waiver will not increase the size of the fund or pull support from other recipients. The waiver would not increase the size of the fund. Instead, the waiver would only affect the Petitioners' recovery within the limits of the fund. Moreover, the waiver would only put Petitioners in the position they would have been in if Halo's scam had not coincided with the Commission's baseline period.³⁴

On the other hand, a denial of the waiver would pull support that Petitioners otherwise would have received and reallocate it to other recipients, presumably including Sprint – a result

³¹ Petition at 8.

³² NCTA Comments at 2.

³³ Sprint Comments at 2 ("[G]rant of the requested relief would either draw support away from other USF recipients or increase the size of the CAF recovery fund.").

³⁴ Petition at 9, 13.

that would allow Sprint and other recipients to benefit from Halo's bad acts to the detriment of consumers in the rural Oklahoma areas served by Petitioners. In short, granting the waiver would put Petitioners and other fund recipients in the position they would have been in had Halo's activity not coincided with the Commission's baseline period, but denying the waiver would distort the fund's distributions and undercut the Commission's goals.

E. Petitioners do not seek to challenge the reforms' affect on their ability to earn a return on their investment.

Sprint argues that the Commission should deny the waiver since Petitioners have another option to "request additional support."³⁵ This argument is unavailing. The "Total Cost and Earnings Review" option Sprint cites is for challenging the rebuttable presumption that the Commission's reforms allow carriers to earn a reasonable return on investment, a complicated undertaking.³⁶ Quite simply, Petitioners are not challenging the presumption that the reforms allow them to earn a reasonable return on investment. Instead, Petitioners ask the Commission to put them in the position the reforms would have put them in if not for Halo's scheme coinciding with the baseline period.³⁷

IV. Conclusion.

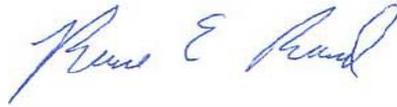
As shown by Petitioners and US Telecom, there is good cause to grant the waiver. The arguments of Sprint and NCTA in opposition to the waiver are unavailing. Accordingly, the Commission should waive 47 C.F.R. § 51.917(c) to allow the Petitioners to include in their baseline revenues the revenues billed, due, and owing from Halo for intrastate usage during the baseline period.

³⁵ Sprint Comments at 4 ("[T]he Commission established a 'Total Cost and Earnings Review,' through which a carrier may petition the Commission to '...request additional support.'... It is simply not in the public interest to grant Joint Petitioners' requested relief when other options exist that would better evaluate the need for the additional subsidization Joint Petitioners have requested.").

³⁶ Order ¶ 924.

³⁷ Petition at 9, 13.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Bruce E. Beard", written over a horizontal line.

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