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

PETITION FOR EXPEDITED
CLARIFICATION OR WAIVER

The National Exchange Carrier Association, Inc. ("NECA")[1] hereby requests expedited clarification, or in the alternative, waiver of the Commission's new rule 51.909(a)(4), which requires NECA to adjust its pool switched access rate caps to reflect changes when carriers enter or exit NECA's Traffic Sensitive Pool.[2] For the 2013-2014 Tariff Period, only two companies will change their pool participation status, resulting in a *de minimis* impact on rates of

[1] NECA is a non-stock, not-for-profit association formed in 1983 pursuant to the Commission's Part 69 access charge rules. *See generally*, 47 C.F.R. § 69.600 *et seq*. NECA is responsible for filing interstate access tariffs and administering associated revenue pools on behalf of over 1100 incumbent local exchange carriers ("ILECs") that choose to participate in these arrangements.

[2] 47 C.F.R. § 51.909(a)(4).

approximately 0.053%. Yet the rule would appear to require NECA to notify all companies in its Traffic Sensitive Pool by May 1 of this change, and in turn, require these companies to include such *de minimis* changes in their state access tariff revisions within a very short timeframe. Because the costs of strictly adhering to this new rule, which is not yet effective, clearly outweigh the benefits, NECA requests the Commission clarify that rule 51.909(a)(4) does not require adjustment to NECA's capped interstate switched access rates when pool participation changes result in *de minimis* rate impacts. Clarification along these lines would avert the need for waivers in 2013 and in future years when few companies enter or exit the NECA pool, or when offsetting pool participation changes do not have significant net impacts on rates.

In the alternative, the Commission may wish to waive rule 51.909(a)(4) for the 2013-2014 Tariff Period. Waiver would avoid the need for tariff revisions at the federal and state levels required to effectuate *de minimis* changes in rates associated with 2013 pool election changes.

I. Background

The rules adopted in the Commission's *USF/ICC Transformation Order* capped interstate and certain intrastate switched access rates for rate-of-return ("RoR") carriers at the rates that were in effect on December 29, 2011.[3] The *Transformation Order* created a new recovery mechanism whereby RoR carriers annually establish an amount they are eligible to recover from

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[3] *See 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, H*igh-Cost Universal Service Support*, WC Docket No. 05-337, *Developing an Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, F*ederal-State Joint Board on Universal Service*, CC Docket No. 96- 45, *Lifeline and Link-Up*, WC Docket No. 03-109, *Universal Service – Mobility Fund*, WT Docket No. 10-208, Report and Order and FNPRM, 26 FCC Rcd. 17663 (2011), *pets. for review pending, Direct Commc'ns Cedar Valley, LLC v. FCC*, No. 11-9581 (10th Cir. filed Dec. 18, 2011) (*USF/ICC Transformation Order).*

end users or Connect America Fund ("CAF") intercarrier compensation ("ICC") support in each year of the ICC transition. Eligible Recovery is determined in subsequent years by reducing a carrier's Base Period Revenue by an annual adjustment factor and by specified Expected Revenues for the upcoming tariff period. A RoR carrier recovers its Eligible Recovery first from a capped Access Recovery Charge ("ARC") assessed on end users and, if it is eligible, it may elect to recover any remaining amounts from CAF ICC support. The rules also contain a true-up procedure for RoR carriers to correct for variances between actual and projected demand both for access services and the ARC.

The *USF/ICC Transformation Order* contemplated a continuation of the NECA pooling process for switched access services, but did not provide procedures governing the switched access rate caps when carriers enter or exit the NECA Traffic Sensitive Pool. Prior to the *Transformation Order*, when carriers entered or exited the NECA pool, the pool switched access rates were adjusted to reflect changes to the pool. The rate caps codified in section 51.909(a), however, do not contain a mechanism for the pool switched access rate caps to increase or decrease when carriers enter or exit the pool.

The Wireline Competition Bureau's *March 27, 2013 Order* recognized this omission and noted, absent such a mechanism, pool switched access rates will not realize revenues at the level that would provide pool settlements to the remaining pooling carriers at the level they would have received if carriers had not exited the pool.[4] The Bureau also recognized that Eligible

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[4] *Connect America Fund*, WC Docket No. 10-90, *Developing an Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, *Joint Petition of Price Cap Holding Companies for Conversion of Average Schedule Affiliates to Price Cap Regulation and for Limited Waiver Relief*, WC Docket No. 12-63, *Consolidated Communications Companies Tariff F.C.C. No. 2,* Transmittal No. 41, *Frontier Telephone Companies Tariff F.C.C. No. 10*, Transmittal No. 28, *Windstream Telephone System Tariff F.C.C. No. 7*, Transmittal No. 57, Order, DA 13-564, ¶ 11 (rel. Mar. 27, 2013) (*March 27, 2013 Order*).

Recovery for pooling carriers would increase or decrease by the revenue difference between that produced by the preexisting rate caps and the adjusted rate caps, reflecting the effects of pool entry or exit. The Bureau noted such funding is outside the scope of contemplated CAF ICC support, which was intended to help mitigate the effects of ICC reforms and not to offset the revenue effects of changes in NECA pool participation. Thus, without a method for adjustments to reflect pool entry and exit, the section 51.909(a) rate caps would result in an unintended shift in recovery between switched access charges and CAF ICC support.

The Bureau revised the Commission's rules in the *March 27, 2013 Order* to require NECA to adjust its switched access rate caps when a carrier enters the NECA pool to account for the difference between the entering carrier's revenues for the preceding calendar year based on the entering carrier's switched access rates and what the entering carrier's revenues for the preceding calendar year would have been if calculated using NECA switched access rates. The Bureau also revised the Commission's rate cap rules to include a methodology that NECA must use to adjust its switched access rate caps when carriers exit the NECA pool.[5]

The Bureau indicated these rule revisions effectuate the Commission's intent that NECA pooling remain available during the ICC transition, consistent with its historical operation, and ensure the balance between interstate switched access revenues and CAF ICC support is maintained and does not affect a RoR carrier's decision to enter or exit the NECA pool. These rule revisions are also intended to ensure that no party entering or exiting the NECA pool will receive a windfall as a result of its election.

The new rule, 51.909(a)(4), adopted in the *March 27, 2013 Order*, states "[t]he Association shall proportionately adjust its June 30 switched access rate caps by the percentage

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[5] *Id.*, Appendix at 20-22.

amount determined in paragraph (a)(4)(iii)(B) of this section," and shall provide support in its annual access tariff filing to justify the revised interstate switched access rate caps, the ARC that will be assessed, and the amount of CAF ICC support each carrier will be eligible to receive.[6]

As explained in NECA's March 28, 2013 annual notification letter to the Commission, one carrier has notified NECA it will enter NECA's Traffic Sensitive Pool for the July 2013 – June 2014 Tariff Period and one carrier has notified NECA it will exit the pool.[7] Per section 51.909(a)(4), NECA has calculated the net impact of these changes would be a mere 0.053% increase in NECA's switched access rate caps. About 60% of the pool's switched access revenue comes from the Local Switching charge. Required changes to the interstate local switching access rates for any of NECA's tariff rate bands would be reflected, at most, in the 5th decimal place of NECA's local switching rates.[8] Grant of the requested clarification would cause, at most, an estimated increase in CAF ICC of approximately $138,500 for all carriers in NECA's pool for the 2013/2014 Tariff Period.

The *March 27, 2013 Order* also amended the Commission's rules so as to require pooling carriers to reduce or increase their intrastate access rates if NECA's interstate switched access rates decrease or increase as a result of carriers entering or exiting the pool, consistent with the framework established in the *USF/ICC Transformation Order*.[9] As a result of the changes NECA is required to make to its capped interstate switched access rates, companies may be

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[6] *Id.* at 21.

[7] Letter from Jennifer Leonard, Director-Access, Tariffs & Costs, NECA, to Julie Veach, Chief, WCB (filed Mar. 28, 2013). Geneseo Telephone Company will enter the pool and Emery Telephone will exit the pool.

[8] Currently, NECA's local switching rate is taken out to the 6th decimal place.

[9] In all cases, these new or revised rates will become the capped switched access rates set pursuant to 51.909(a)(1) for purposes of applying other rules relying on such rates or rate caps. In addition, the revised rate caps will be used to establish a carrier's Eligible Recovery going forward.

required to implement changes to their intrastate access rates by comparably miniscule amounts to equalize them with interstate rates. These changes could entail significant expense for individual carriers not otherwise required to make rate adjustment filings, as well as for state commissions reviewing such tariff filings.

II. The FCC Should Clarify Adjustments Are Not Necessary For De Minimis Changes in NECA's Rates Due to Pool Composition Changes

The Commission should clarify that procedures specified in 51.909(a)(4) do not need to be followed when changes in NECA's pool participation result in *de minimis* changes in NECA's interstate switched access rates.

Strict compliance with new section 51.909(a)(4) is not necessary nor in the public interest. For tariff periods where changes in NECA's pool composition cause *de minimis* changes to NECA's switched access rate caps, strict compliance would generate much greater costs associated with implementing the rate changes at both the interstate and intrastate levels. As noted above, during the 2013-2014 Tariff periods, pool composition changes will result in changes of about 0.053% to NECA's switched access rate caps, and any potential impacts on the CAF ICC Recovery Mechanism associated with such changes would also be minor, estimated at approximately $138,500 for the upcoming tariff year. Yet, strict adherence to the rule would require NECA pool participants to make corresponding changes to their intrastate rates in any year where rate changes associated with pool entry and exit occur, however small such changes may be. The costs of making intrastate tariff filings to effectuate such changes would be significant.

The Communications Act acknowledges the need for certain exceptions to Commission rules based on a *de minimis* standard. For example, the Act grants the Commission authority to exempt a carrier or class of carriers from the obligation to make USF contributions if their contributions would be *de minimis*.[10] In its rules, the Commission has defined such amounts as less than $10,000 per contributor in any given year.[11]

While it is unclear what changes in pool participation will occur over the course of the FCC's ICC transition time horizon and beyond, a *de minimis* exception to 54.909(a)(4) would be expected to have no significant impact on rates or CAF ICC payments in any given year. If pool participation levels remain stable, such that few companies choose to enter or exit the pools (or if changes result in offsetting impacts), a *de minimis* exception would simply avoid the need for minor adjustments in pool rates and corresponding minor adjustments in carriers intrastate tariffs. If, on the other hand, pool participation changes result in significant changes, the exception would not apply, and NECA and its member companies would make adjustments as required by section 54.909.

III. In The Alternative, The Commission Should Waive Rule 51.909(a)(4) for the 2013-2014 Tariff Period

Section 1.3 of the Commission's rules states that "rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown."[12] The "good cause shown" standard has been interpreted to grant the Commission discretion to waive application of its rules in situations where strict compliance would not be in the public interest. More specifically, the Commission may exercise its discretion to waive a rule where, due to special circumstances, deviation from the general rule would better serve the public interest than strict adherence to the general rule.[13] In addition, the Commission may take into account

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[10] 47 U.S.C. § 254(d).

[11] 47 C.F.R. § 54.708

[12] 47 C.F.R. § 1.3.

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

consideration of hardship, equity, or more effective implementation of overall policy on an individual basis.[14] As demonstrated herein, the relief requested by NECA is necessary to prevent undue hardship and would better serve the public interest.

As noted above, requiring strict compliance with new section 51.909(a)(4) is not in the public interest when *de minimis* changes to NECA's switched access rate caps occur. During the upcoming 2013-2014 period, such changes are demonstrably small. Thus, in the event the Commission does not find it reasonable to clarify the rule as requested above, it should at a minimum grant waiver of the rule for the 2013-2014 Tariff Period.

The Commission has previously granted waivers of its rules when the effects of such waivers are *de minimis*. For example, in June 2000, the Commission granted CenturyTel's request for waiver of section 69.3(g)(2) to permit access lines acquired from GTE to re-enter NECA's common line pool because it would not have a substantial adverse effect on the pool's revenue requirement and would not increase the LTS obligations of non-pooling LECs.[15] In 1994, the Commission granted United Utilities a Part 36 study area waiver to incorporate four locations in Alaska into its existing study area based in part on the fact that the estimates of the impact on the USF would be *de minimis.*[16] More recently, the Commission granted Eastex a waiver of the Part 36 freeze on cost categories for purposes of jurisdictional separations also

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

[14] *WAIT Radio*, 418 F.2d at 1159; *Northeast Cellular*, 897 F.2d at 1166.

[15] *CenturyTel of Northwest Arkansas, CenturyTel of Central Arkansas, and GTE Arkansas, GTE Midwest, GTE Southwest Joint Petition for Waiver of Definition of "Study Area" Contained in the Part 36 Appendix-Glossary of the Commission's Rules*, CC Docket No. 96-45, *CenturyTel Petition for Waiver of Sections 61.41(c) and 69.3(g)(2) of the Commission's Rules*, Memorandum Opinion and Order, 15 FCC Rcd. 25437 (2000).

[16] *United Utilities, Inc. Petition* for *Waiver of the Definition of "Study Area" Contained in Part 36, Subpart H, Appendix-Glossary of the Commission's Rules,* AAD 94-58, Memorandum Opinion and Order, 9 FCC Rcd. 7793 (1994).

based in part on the conclusion that the net shift of allocated costs would have only a *de minimis* effect on NECA's overall pool costs and therefore have little effect on switched or special access rates.[17]

Waiver on an expedited basis is particularly justified in 2013 as the Order creating this new rule was not released until March 27, 2013. The rule has not yet been published in the Federal Register, and will not become effective until 30 days thereafter. This rule would appear to require NECA to notify companies in its Traffic Sensitive Pool by May 1 of rate changes, and in turn requires hundreds of companies to make additional minor changes to tariffs within a very short timeframe. Thus, grant of the requested waiver on an expedited basis for the 2013-2014 period will better serve the public interest than strict enforcement of the rule.

IV. Conclusion

NECA respectfully requests the Commission clarify, on an expedited basis, that procedures specified in 51.909(a)(4) do not need to be followed when changes in NECA's pool participation result in *de minimis* changes in NECA's interstate switched access rates. As explained herein, the costs of strictly adhering to this new rule, which is not yet even effective, clearly outweigh the benefits, and such clarification would have *de minimis impacts*. In the alternative, the Commission should consider granting expedited waiver of its new rule

[17] *Petition by Eastex Telephone Cooperative, Inc. Pursuant to 47 C.F.R Sections 36.3, 36.123–126, 36.141, 36.152–157, 36.191, and 36.372–382 for Commission Approval to Unfreeze Part 36 Category Relationships*, CC Docket No. 80-286, Order, 27 FCC Rcd. 6357 (2012).

54.909(a)(4) for the 2013-2014 Tariff Period, as waiver will better serve the public interest than strict enforcement for the upcoming year.

Respectfully Submitted,

NATIONAL EXCHANGE CARRIER
ASSOCIATION, INC.

April 9, 2013

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CERTIFICATE OF SERVICE

I hereby certify that a copy of NECA's Petition for Expedited Clarification or Waiver was served this 9th day of April, 2013 by electronic filing and e-mail to the persons listed below.

By: /s/ Elizabeth R. Newson
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