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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
Petition for Wavier of Universal Service High-Cost Filing Deadlines	)	WC Docket No. 08-71
SureWest Telephone Petition for a Waiver of Section 54.314(d) Filing Deadlines for Submission of State Certification of Federal High-Cost Support	)	

To: The Commission

APPLICATION FOR REVIEW

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SUMMARY

SureWest Telephone applies for review and reversal of the Wireline Competition Bureau Order ("*Bureau Order*") denying SureWest's request for a waiver of the filing deadlines for submission of a state certification of federal high-cost support. The decision should be reversed to allow SureWest to receive all of its frozen high-cost support for the first and second quarters of 2013, because the *Bureau Order* gave insufficient weight to material facts that distinguish SureWest's case from precedent and is in conflict with Commission precedent and policy. If allowed to stand, SureWest will lose approximately $2.5 million for an unintentional error that was remedied without any harm to the Universal Service Fund ("Fund").

SureWest timely filed with the Commission and USAC -- just three months before the state certification was due -- a certification that Interstate Common Line Support ("ICLS") support will be used for its intended purposes during the 2012-2013 program year, including the first and second quarters of 2013. (SureWest did not receive any high-cost USF support, other than ICLS, during the relevant periods.) This material fact distinguishes SureWest's situation from the precedents that the Bureau cited, which denied (1) waivers of quarterly line count data submission deadlines, where USAC needed this data to calculate funding amounts, and (2) waivers of annual certification deadlines, where the petitioner had not provided any certification covering the applicable quarters. Instead, SureWest's situation is analogous to one the Bureau did not consider, in which the Commission granted a waiver of an annual certification deadline where the petitioner had provided a certification just three months before the missed deadline and continued to comply with the commitments made in the prior certification.

The timing of the state certification submission for SureWest did not harm the Fund and had no impact on any calculation of high-cost funding available to SureWest. The state certification for SureWest was not filed with the Commission until February 19, 2013, but the

Commission's objective to avoid a certification coverage gap was met by SureWest's ICLS certification covering the first and second quarters of 2013. Unique circumstances arising from the transition to new certification rules produced this situation, and such circumstances cannot recur in the future under the current rules.

Granting the waiver request would be consistent with the public interest. The Commission has placed a priority on accelerating broadband deployment to all Americans and ensuring robust, scalable broadband that is capable of enabling key applications. SureWest's ability to update its network and help achieve the Commission's goals may be impaired or significantly delayed without the funding. These public interest considerations should be evaluated when deciding whether to grant the waiver.

The loss of approximately $2.5 million in high-cost funding is a disproportionate and excessive penalty to assess against SureWest for the state certification being filed after the deadline. The late submission was unintentional and harmless as noted above. The effective penalty is more than 400 times a typical forfeiture for similar omissions under other rules. Under the Commission's forfeiture policies, a base forfeiture of $3,000 is common for instances where a report or information is untimely filed. Moreover, the gravity of the offense is minimal in comparison to the penalty. In these circumstances, a $2.5 million penalty would violate the Excessive Fines Clause of the Eighth Amendment.

The Commission should grant the waiver request and allow SureWest to receive all of its high-cost support for the first and second quarters of 2013. As an alternative, SureWest is willing to accept a reasonable reduction in support for the first and second quarters of 2013 because the state certification was late-filed. Any such reduction should be proportionate to the inadvertent, one-time error by SureWest, consider that no harm to the Fund would result, and weigh important public interest considerations.

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APPLICATION FOR REVIEW

SureWest Telephone ("SureWest"), by its undersigned counsel and pursuant to Section 5(c)(4) of the Communications Act of 1934, 47 USC § 155(c)(4), and Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, applies for review and reversal of the Wireline Competition Bureau ("Bureau") Order denying SureWest's request for a waiver of the filing deadlines for submission of a state certification of federal high-cost support as set forth in section 54.314(d)(1) and (2) of the Commission's rules.[1] Commission review is appropriate in this case, and the *Bureau Order* should be reversed to allow SureWest to receive all of its frozen high-cost support for the first and second quarters of 2013, because the *Bureau Order* fails to give sufficient weight to material facts that distinguish SureWest's case from precedent and is in conflict with Commission precedent and policy. As an alternative, SureWest is willing to accept

[1] *Petition for Waiver of Universal Service High-Cost Filing Deadlines, SureWest Telephone Petition for a Waiver of Section 54.314(d) Filing Deadlines for Submission of State Certification for Federal High-Cost Support*, Order, WC Docket No. 08-71, DA 13-2093 (rel. October 29, 2013) ("*Bureau Order*"); 47 C.F.R. §54.314(d)(1), (2).

a reasonable reduction in funding for the first and second quarters of 2013 for the late filing of the state certification, in lieu of a disproportionate penalty of approximately $2.5 million for an unintentional error that did not harm the Universal Service Fund ("Fund") and was remedied without any certification gap. SureWest suggests that a reduction of $3,000 per quarter, or a total of $6,000, would be appropriate and proportionate in comparison to the severity of the omission and the consequences imposed by the Commission for similar errors in other circumstances.

I. BACKGROUND AND JURISDICTION

A. Background

SureWest is a rural incumbent local exchange carrier that serves approximately 42,000 access lines in California, in Study Area Code 542334. Until mid-2013, SureWest was regulated by the Commission as a rate-of-return carrier. For the last several years, the only high-cost support that SureWest received was Interstate Common Line Support ("ICLS"). Except for the filing that is the subject of this Petition, SureWest has not missed any Universal Service Fund certification deadlines.

For over a decade, the Commission required recipients of ICLS funding to file an annual certification directly with the Commission and the Universal Service Administrative Company ("USAC") by June 30 each year, stating that ICLS would be used in the coming program year (*i.e.*, July 1 through June 30) "only for the provision, maintenance, and upgrading of facilities and services for which the support is intended."[2] In November 2011, the Commission issued an order that, among other things, eliminated the ICLS certification requirement pursuant to Section

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[2] 47 C.F.R. §54.904.

54.904 as of July 2013.[3] Instead, all carriers that receive any form of high-cost support, including ICLS, were required beginning in 2012 to certify pursuant to Section 54.314, which involves the submission of a state certification covering January 1 through December 31, that all such support will be used in the coming calendar year "only for the provision, maintenance, and upgrading of facilities and services for which the support is intended."[4] The Commission also required carriers receiving ICLS to file a final certification pursuant to Section 54.904 by June 30, 2012, to ensure there would be no gap in the coverage of certifications attesting to the use of ICLS for intended purposes.[5]

SureWest timely filed with the Commission and USAC its final ICLS certification.[6] The certification, filed on June 21, 2012, attested that SureWest would use ICLS funding "only for the provision, maintenance, and upgrading of facilities and services for which the support is intended" and covered July 1, 2012 through June 30, 2013. SureWest has continued to comply with the commitments it made in the June 21, 2012 certification.

On July 2, 2012, only ten days after it filed the final ICLS certification, ownership of SureWest was acquired by Consolidated Communications Holdings, Inc. ("Consolidated"). Consolidated is a holding company whose subsidiaries include several ILECs regulated as price-cap carriers. Accordingly, pursuant to Section 54.305(b) of the rules (adopted as part of the *USF/ICC Transformation Order*), SureWest became a price-cap carrier affiliate, and its universal

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3 *Connect America Fund et al.*, Report and Order and Further Notice of Proposed Rulemaking, WC Docket No. 10-90 et al., 26 FCC Rcd 17663, para. 614 (2011) ("*USF/ICC Transformation Order*").

4 *Id.*; 47 C.F.R. §54.314(d).

5 *Id.*

6 *See* SureWest Telephone, Petition for a Waiver of Section 54.314(d) Filing Deadlines for Submission of State Certification of Federal High-Cost Support, WC Docket No. 08-71 (filed Jan. 24, 2013) ("Petition"). A copy of the ICLS certification is attached hereto as Exhibit A.

service support was frozen at 2011 levels going forward.[7] As a practical matter, this change in SureWest's status became effective in October, 2012, because USAC had already calculated SureWest's support payments for the third quarter of 2012 under its old status as a rate-of-return carrier.

As a result of confusion stemming both from the change in the ICLS certification requirements, and the change in SureWest's high-cost support status caused by the Consolidated acquisition, SureWest did not provide a certification to the California Public Utilities Commission that it would use high-cost support for its intended purposes in advance of the October 1 deadline set forth in Section 54.314(d)(1).[8] SureWest acknowledges that this was an error, and that the rule requires all eligible telecommunications carriers to provide certification to their state commissions, but the error was inadvertent and resulted from the near-simultaneous occurrence of several independent changes in requirements applicable to the company.

After USAC staff contacted SureWest on January 17, 2013, about the absence of a California certification, SureWest promptly took steps to have a state certification submitted. On January 24, 2013, SureWest petitioned the FCC for a waiver of the filing deadlines of Section 54.314(d)(1) and (2), and explained that SureWest would not receive approximately $2.5 million of high-cost support for the first and second quarters of 2013 without the requested waiver.[9] On the same date, SureWest also asked the California Public Utilities Commission ("CPUC") to file a Section 54.314 certification for SureWest with the Commission. The CPUC filed the requested certification with the Commission on February 19, 2013.

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7 47 C.F.R. § 54.305(b); *USF/ICC Transformation Order* at para. 271.

8 47 C.F.R. §54.314(d)(1).

9 *See* Petition.

B. The Bureau Order

On October 29, 2013, the *Bureau Order* was issued denying SureWest's waiver request. The *Bureau Order* concludes that "the Commission intended for [the] new deadlines to be strictly enforced" and that the loss of support for the time periods of non-compliance is "appropriate rather than unduly harsh."[10] But the *Bureau Order* does not allege any adverse impact on the Fund from the unintentional mistake. It does not mention that SureWest had already provided an ICLS certification that funding would be used for intended purposes for the first and second quarters of 2013. It also glosses over the substantial harm to customers and other public interest considerations if SureWest does not receive high-cost support for the first and second quarters of 2013. SureWest uses this support to update its network and improve services to customers. Those plans will be undermined if the Commission does not reverse course. Currently, over 6,000 customers have been impacted by the withheld funding and a majority of the company's capital expenditure projects for 2013 were cancelled.

Next, the *Bureau Order* determines that SureWest's confusion regarding the new rules is not sufficient to establish good cause and that SureWest failed to quickly cure its error.[11] The Bureau relies on inapposite precedent as support for its decision.[12] Most of the cited decisions arose from requests for waiver of quarterly line count data submission deadlines.[13] Waivers of

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10 *Bureau Order* at para. 6.

11 *Id.*

12 *Id.* at nn. 21 and 22.

13 *See, e.g.*, *Federal-State Joint Board on Universal Service; South Slope Cooperative Telephone Company, Petition for Waiver of Filing Deadline in 47 C.F.R. Section 54.307(c)*, Order, CC Docket No. 96-45, 19 FCC Rcd 17493, 17494, para. 5 (Wireline Comp. Bur. 2004); *Federal-State Board on Universal Service; NPCR, Inc. Petition for Waiver of Section 54.802(a) of the Commission's Rules*, Order, CC Docket No. 96-45, 22 FCC Rcd 560 (Wireline Comp. Bur. 2007); *Federal-State Board on Universal Service; Citizens Communications and Frontier Communications Petition for Waiver of Section 54.802(a) of the Commission's Rules*, Order, CC

quarterly line count data submissions raise different issues than waivers of annual certifications because USAC needs the line count data to calculate funding amounts and any lengthy delays in the receipt of such data can adversely impact the administration of the Fund. Only a few cited decisions consider an annual certification deadline waiver request, and in those cases the petitioners, unlike SureWest, had not previously provided a certification to the FCC or USAC attesting that the funds would be used for intended purposes during the applicable quarters.[14] The decisions taken on those waiver petitions also did not result in the loss of *millions* of dollars.[15]

The *Bureau Order* did not cite a highly relevant precedent in which the Commission granted a waiver of an annual certification deadline where the petitioner had provided a certification just three months before the missed deadline -- just like SureWest.[16] In that case, an eligible telecommunications carrier filed its first interstate access service certification with the

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Docket 96-45, 20 FCC Rcd 16761 (Wireline Comp. Bur. 2005); *Federal-State Joint Board on Universal Service, Cedar Valley Communications, Inc. Petition for Waiver of 47 C.F.R. §§ 54.307(d), 54.314(a), and 54.904(d)*, Order, CC Docket 96-45, 23 FCC Rcd 114 (Wireline Comp. Bur. 2008).

[14] *See, e.g., 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 et al.*, WC Docket No. 08-71, Order, CC Docket No. 96-45, 26 FCC Rcd 6187, 6191, para. 12 (Wireline Comp. Bur. 2011); *NPI-Omnipoint Wireless, LLC Petition for Waiver of Sections 54.307(c), 54.802(a), and 54.903 of the Commission's Rules*; *SouthEast Telephone, Inc. Petition of Waiver of Deadlines in 47 C.F.R. § 54.809(c); SEI Data, Inc. Petition for Waiver of Filing Deadline in 47 C.F.R. Section 54.802(a)*, Order, CC Docket 96-45, 22 FCC Rcd 4946 (Wireline Comp. Bur. 2007).

[15] *See Decatur Telephone Company Petition for Waiver of Section 54.904(d) of the Commission's Rules*, CC Docket No. 96-45 (filed August 23, 2007) (stating the loss of ICLS funding would be approximately $57,276 for six months); *SouthEast Telephone, Inc. Petition of Waiver of Deadlines in 47 C.F.R. §54.809(c)*, CC Docket No. 96-45 (filed December 17, 2003) (explaining SET was newly qualified to receive Interstate Access Service funding and would lose funding for one quarter without the waiver).

[16] *See Federal-State Joint Board on Universal Service; Smith Bagley, Inc. Petition for Waiver Section 54.809(c) of the Commission's Rules and Regulations*, Order, CC Docket No. 96-45, 16 FCC Rcd 15275, 15277, para. 6 (Wireline Comp. Bur. 2001).

Commission in March 2001 but did not submit an annual certification by the June deadline. The Commission found that special circumstances justified granting a limited wavier because the newly eligible company had submitted a certification just three months before the June deadline, continued to comply with the commitments, and remedied its omission.[17] It also found that a waiver would be consistent with the public interest and the Commission's mandate to ensure consumers in all regions of the nation have access to telecommunications services.[18]

Finally, the Bureau states that SureWest is eligible to receive high-cost support in the third and fourth quarters of 2013 because the CPUC filed a certification with respect to the SureWest before April 1, 2013, in accordance with Section 54.314(d)(3).[19]

C. The Commission's Authority to Address This Application for Review

The Commission has authority to review orders issued pursuant to delegated authority for conflict with federal statutes, Commission rules and regulations or Commission precedent; to address a question of policy not previously resolved by the Commission; to reverse application of a precedent or policy to a specific carrier; to correct an erroneous finding as to an important fact; and to provide redress for prejudicial procedural error.[20] The *Bureau Order* was issued pursuant to delegated authority. As shown herein, the *Bureau Order* does not address material facts that distinguish SureWest's case and is in conflict with Commission precedent and policy. SureWest has been adversely impacted by the decision and has timely filed this appeal within 30 days of the public notice of the *Bureau Order*. As such, the Commission has authority to address SureWest's request for review and reverse the Bureau Order to correct the errors of fact and law.

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17 *Id.* at para. 6.

18 *Id.* at para. 7.

19 *Bureau Order* at para. 6.

20 47 C.F.R. § 1.115(b)(2)(iii).

II. GOOD CAUSE EXISTS TO WAIVE THE COMMISSION'S RULES

The Commission may grant waiver of a rule for good cause.[21] Waiver is appropriate if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest.[22] The Commission has found good cause "where the particular facts make strict compliance inconsistent with the public interest if applied to the petitioner and when the relief requested would not undermine the policy objective of the rule in question."[23] When reviewing a request for waiver, the Commission will consider hardship, equity and effective implementation of its policy.[24]

As demonstrated below, the *Bureau Order* does not consider the particular facts of SureWest's situation, the lack of harm to the Fund, and public interest considerations including a negative impact to customers, and applies a disproportionate penalty for the inadvertent error that is inconsistent with Commission policy. The Commission should evaluate the facts, apply the correct standards, and grant SureWest's request for waiver.

A. The Bureau Order Did Not Consider Material Facts that Distinguish this Case from Others

The *Bureau Order* did not address the fact that SureWest filed with the Commission and USAC -- just three months before the State certification was due -- a certification that ICLS support will be used for its intended purposes during the 2012-2013 program year, which included the first and second quarters of 2013. This material fact distinguishes SureWest's

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21 47 C.F.R. § 1.3.

22 *Northeast Cellular Telephone Co. v. FCC*, 897 F2d 1164, 1166 (D.C. Cir. 1990).

23 *See Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones*, Order on Reconsideration and Further Notice of Proposed Rulemaking, 20 FCC Rcd 11221, n. 158 (2005) (*citing Northeast Cellular Telephone Co. v. FCC*, 897 F2d 1164 (D.C. Cir. 1990)).

24 *See WAIT Radio v. FCC*, 418 F2d 1153, 1157 (D.C. Cir 1969).

situation from the precedents that the Bureau cited. USAC was not waiting for data to be provided with the annual certification to calculate SureWest's funding amounts. Also, the integrity of the Fund was never in doubt, because during the two calendar quarters at issue in this case, SureWest was still operating under its final ICLS certification pursuant to former rule 54.904.[25] Simply put, the precedent cited by the Bureau did not address these unique circumstances. Instead, SureWest's situation is analogous to another case where an annual certification deadline waiver was granted because the petitioner had provided a certification just three months before the missed deadline and continued to comply with the commitments made in the prior certification until the omission was remedied.[26]

On review, the Commission should evaluate SureWest's appeal and request for waiver based on these facts and find that the particular facts of SureWest's case satisfy the test for waiver.

B. Waiver of the Deadline in this Instance Would Not Harm the Fund

The waiver requested by SureWest would not harm the Fund. The *Bureau Order* emphasizes that the state certification rule is "a critical part of the Commission's new national framework for accountability[,]"[27] which aims "to ensure appropriate use of high-cost support and to allow the Commission to determine whether it is achieving its goals efficiently and effectively."[28] The *Bureau Order* does not allege any actual impact on the Fund as a result of the state certification being late-filed, and the facts demonstrate that SureWest's unintentional error does not pose any risk of "[in]appropriate use of high-cost support" in this particular

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25 *USF/ICC Transformation Order* at para. 614.

26 *Smith Bagley, Inc.*, 16 FCC Rcd at 15277, para. 6.

27 *Bureau Order*, para. 6.

28 *Id.*, para. 3, quoting *USF/ICC Transformation Order*, para. 573.

instance. Unique circumstances arising from the transition to new certification rules and a new high-cost support status produced this situation, and the probability of such a situation occurring again is infinitesimal. Moreover, the transitional Section 54.904 certification was a one-time event, and cannot give rise to any future requests for waivers absent another rule change. The Commission should not therefore have any concern that a grant of SureWest's waiver will lead to additional waiver requests. As a precaution, the waiver could be limited to the following distinguishing facts where: (1) a state certification deadline is missed, (2) a carrier has submitted a certification to the Commission and USAC for quarters that would be covered by the state certification, and (3) the missed deadline has no impact on funding calculations.

C. Waiver of the Deadline Would be Consistent With the Public Interest

Granting a waiver of the deadline would be consistent with the public interest. The Commission concluded in the *USF/ICC Transformation Order* that fixed and mobile broadband are "crucial to our nation's economic growth, global competitiveness, and civic life" and that a key goal for universal service is to ensure "all Americans are served by networks that support high-speed Internet access—in addition to basic voice service—where they live, work, and travel.[29] To that end, the Commission took multiple steps to accelerate broadband deployment to "all Americans in all parts of the nation, including those in rural, insular and high-cost areas" and to ensure robust, scalable broadband that is "capable of enabling the kinds of key applications that drive our efforts to achieve universal broadband" such as distance learning, health care monitoring, and person-to-person communications.[30] One of those steps was to provide frozen high-cost support for price cap carriers and their rate-of-return affiliates.[31]

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29 *USF/ICC Transformation Order* at paras. 3, 5.

30 *Id.* at paras. 51, 87.

31 *Id.* at para. 128.

SureWest planned to use frozen high-cost support to update its network and improve services for its customers. As noted above, several broadband expansion projects impacting over 6,000 customers have been cancelled. Without the funding, SureWest's ability to update its network and achieve the Commission's goals to accelerate broadband deployment may not be possible, or at a minimum, might be significantly delayed. Such an outcome would be inconsistent with the Commission's goals and would specifically be a detriment to SureWest's customers.

The *Bureau Order* did not consider the impact that a denial of the waiver will have on the public interest. On review, the Commission should evaluate public interest considerations including the impact a denial of the wavier will have on SureWest's customers as well as the Commission's broadband goals.

D. The Loss of All Funding for an Untimely Filed Certification is a Disproportionate Penalty and Inconsistent with the Commission's Forfeiture Policy Statement

The loss of approximately $2.5 million in high-cost support is a disproportionate penalty to assess against SureWest for the state certification being filed after the deadline. As described above, the late submission was unintentional, harmless, and had no impact on funding calculations. SureWest's longstanding history of timely submitting ICLS certifications as well as considerations of hardship and equity from the loss of $2.5 million should also weigh in favor of granting the waiver.

The Commission should consider that similar omissions under other rules would result in highly dissimilar consequences. In most cases, an untimely submission of a required filing to the Commission would render the filer liable for a potential forfeiture. A $2.5 million penalty in these circumstances, however, would be more than 400 times a typical forfeiture for similar omissions under other rules and inconsistent with the Commission's *Forfeiture Policy Statement*

and Section 1.80(b) of its Rules. These set a base forfeiture amount of $3,000 for failure to timely file required forms or information and a maximum forfeiture for any violation by a common carrier of $150,000 for each violation or each day of a continuing violation, except that a forfeiture for a continuing violation cannot exceed $1.5 million for any single act or failure to act.[32] The Commission generally relies on its *Forfeiture Policy Statement* and Section 1.80(b) to assess forfeiture penalties against carriers that fail to timely file forms or information as required by the Commission rules.[33] It has considerable discretion to impose, reduce or even rescind a forfeiture penalty for a violation of its rules pursuant to 47 U.S.C. §503 and may take into account the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require to determine the amount of a penalty.[34]

The Commission typically assesses a $3,000 base forfeiture for an untimely submission of a required filing even when the submission is filed multiple months or years later. It seldom adjusts the base forfeiture amount upward by thousands of dollars for such a violation or imposes the maximum penalty for a continuing violation. For example:

- When a television broadcaster failed to timely file children's television programming reports for **three quarters** and omitted information about such violations from its renewal application, the Commission found apparent liability for a total forfeiture of $3,000.[35]

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32 *See The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087 (1997), *recons. denied*, Memorandum Opinion and Order, 15 FCC Rcd 303 (1999) ("*Forfeiture Policy Statement*"); 47 C.F.R. §1.80(b).

33 *Id.*

34 *See* 47 U.S.C. §503(b)(2)(D); 47 C.F.R. §1.80(b).

35 *See Central Ohio Association of Christian Broadcasters Licensee of Station WGCT-CD Columbus, Ohio*, Notice of Apparent Liability for Forfeiture, DA 13-073 (rel. Oct. 28, 2013).

- When a company failed to submit a form to update the antenna structure registration database about dismantling a registered tower for over **six years**, the Commission found apparent liability for a forfeiture of $9,000 for that violation.[36]

- When a telephone company failed to file annual international telecommunications traffic reports for **three years**, the Commission found apparent liability for a forfeiture of $9,000 for that violation.[37]

- When a company failed to file a renewal application for a private land mobile radio service station for more than **nine years**, the Commission found apparent liability for a forfeiture of $3,000 for that violation.[38]

- When a company failed to file a renewal application for a satellite earth station for approximately **nine months**, the Commission found apparent liability for a forfeiture of $1,500 for that violation.[39]

- When a telephone company failed to file two application forms following an auction until **14 days** after the deadline, the Commission found apparent liability for a forfeiture of $3,000.[40]

The Commission may also exercise its discretion to propose a different base forfeiture amount to address a specific rule violation.[41] In those instances, the Commission sometimes sets

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36 *See Johnson Towers Corporation Owners of Antenna Structure Nos.: 160088, 1060089, and 1060090 Pinellas Park, Florida*, Notice of Apparent Liability for Forfeiture and Order, FCC 13-142 (rel. Nov. 1, 2013) (finding a total forfeiture of $234,000 for multiple violations that also included failing to install required lighting systems on two antenna structures for more than two years).

37 *See Unipoint Technologies, Inc.*, Notice of Apparent Liability for Forfeiture, 27 FCC Rcd 12751 (2012) (finding a total forfeiture of $179,000 for multiple violations that also included failing to apply for and obtain authorization to provide international telecommunications service, failing to file its Form 499-A, and failing to contribute to the Telecommunications Relay Service Fund).

38 *See Emigrant Storage LLC*, Notice of Apparent Liability for Forfeiture, 27 FCC Rcd 8917 (2012) (finding a total forfeiture with an upward adjustment of $20,000 for multiple violations that also included operating a station without Commission authority).

39 *See Saga Radio, LLC, Satellite Earth Station, Call Sign E872070, Grosse Pointe Farms, MI*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 11273 (2008) (finding a total forfeiture with a downward adjustment of $5,400 for multiple violations that also included operating a station without Commission authority).

40 *See Telephone & Two-Way, Inc.*, Notice of Apparent Liability for Forfeiture, 17 FCC Rcd 26247 (2002).

a higher base forfeiture amount than $3,000 but does not increase the amount exponentially. For example, forfeiture amounts of $20,000 were proposed against carriers for failing to file an annual certification for customer proprietary network information ("CPNI") and $25,000 for a repeat violation.[42] The Commission also set a $6,000 base forfeiture amount for violations of the wireless hearing aid compatibility reporting requirements.[43]

The Commission rarely assesses forfeiture penalties for hundreds of thousands or millions of dollars, and then only where the violations are "egregious." Egregious violations may include those that create a public safety hazard,[44] endanger important public interest considerations involving national security, law enforcement, foreign policy and trade policy,[45] create an unfair competitive advantage,[46] or involve fraud or abuse.[47] None of those situations occurred from the state certification for SureWest being late-filed.

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41 *See Forfeiture Policy Statement* at paras. 22, 29; 47 C.F.R. §1.80(b).

42 *See Annual CPNI Certification,* Omnibus Notice of Apparent Liability for Forfeiture and Order, 26 FCC Rcd 2160 at para. 8 (2011).

43 *See Northeast Telephone Services, Inc.*, Notice of Apparent Liability for Forfeiture, DA 13-1936 (rel. Sept. 24, 2013) (finding apparent liability for failing to timely file a hearing aid compatibility status report and adjusting the forfeiture downward to $5,400 for prompt voluntary disclosure and remedial efforts).

44 *See Johnson Towers Corporation Owners of Antenna Structure Nos.: 160088, 1060089, and 1060090 Pinellas Park, Florida* at para. 14 (finding a public safety hazard from failing to install required lighting systems on two antenna structures for more than two years).

45 *See RB Communications, Inc. d/b/a Starfone*, Notice of Apparent Liability for Forfeiture, 27 FCC Rcd 4393, para. 22 (2012) (assessing a forfeiture of $408,668 for failing to obtain Section 214 authority, register with the Commission, contribute to telecommunications relay service and pay regulatory fees).

46 *See, e.g., Telrite Corp.*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 7231 (2008) (finding an unfair competitive advantage as a result of shifting universal service costs and burdens to compliant carriers and assessing a forfeiture of $924,212 for failing to file and contribute to universal service for approximately four years); *Compass Global, Inc.*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 6125 (2008) (assessing a forfeiture of $828,613 forfeiture for failing to file worksheets and contribute to universal service, telecommunications relay service, North American numbering plan administration, and local number portability).

Since the assessment of a $2.5 million penalty would be disproportionate to the error and inconsistent with the Commission's forfeiture policies, the Commission should grant the waiver request and allow SureWest to receive all of its frozen high-cost support for the first and second quarters of 2013. As an alternative, SureWest is willing to accept a reasonable reduction in funding because the state certification was filed late. Any such reduction should be proportionate to the inadvertent, one-time error by SureWest and consider that the mistake did not harm the Fund and was ultimately rectified. SureWest suggests that a reduction of $3,000 per quarter, or a total of $6,000, would be appropriate and proportionate in comparison to the severity of the omission and the consequences imposed by the Commission for similar errors in other circumstances. It is also important to consider the detrimental impact that the loss of high-cost support will have on SureWest's customers.

E. A $2.5 Million Penalty for an Untimely Filed Certification Violates the Eighth Amendment's Excessive Fines Clause

The Eighth Amendment to the U.S. Constitution provides that "[e]xcessive bail shall not be required, nor *excessive fines* imposed, nor cruel and unusual punishments inflicted."[48] It "limits the government's power to extract payments, whether in cash or in kind 'as punishment for some offense.'"[49] Forfeitures of money are fines when they constitute punishment for an

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47 *See, e.g., Easy Telephone Services d/b/a Easy Wireless*, Notice of Apparent Liability for Forfeiture, FCC 13-129 (rel. Sept. 30, 2013) (assessing a forfeiture of $1,586,545 for requesting and receiving duplicate Lifeline support); *United Telecom, Inc.*, Notice of Apparent Liability for Forfeiture, 27 FCC Rcd 16499 (2012) (assessing a forfeiture of $1,040,000 for slamming violations including misrepresentations and fabrications); *VCI Co.*, Notice of Apparent Liability for Forfeiture, 22 FCC Rcd 15933 (2007) (assessing a forfeiture of $1,047,500 for failing to provide records to USAC in connection with Lifeline and Link Up service and receiving duplicative reimbursements).

48 U.S. Cont., Amdt. 8 (*emphasis* added).

49 *Austin v. United States*, 509 U.S. 602, 609-610 (1993).

offense.[50] To determine whether a fine is "excessive" (*e.g.*, "surpassing the usual, the proper, or a normal measure of proportion"), courts "must compare the amount of the forfeiture to the gravity of the defendant's offense."[51] For example, the U.S. Supreme Court determined that a forfeiture of more than $350,000 for not reporting to a customs inspector the amount in excess of $10,000 being transported, as required under federal law, violated the Excessive Fines Clause of the Eighth Amendment.[52] The wrong-doing was "merely a reporting offense" and the harm caused was minimal, and therefore, the fine was grossly disproportionate and had no "articulable correlation to any injury suffered by the Government."[53]

Depriving SureWest of approximately $2.5 million in high-cost support is a punishment for failing to file the state certification before the deadline set forth in the Commission's rules. However, the amount of such a penalty bears no relationship to the harm from a late submission of the state certification. SureWest's error was as unintentional and had no impact on funding calculations. In other words, the gravity of SureWest's offense is minimal in comparison to a $2.5 million penalty. The Commission should therefore reverse this grossly disproportionate penalty that violates the Excessive Fines Clause of the Eighth Amendment.

F. Refusing to Reverse the Bureau Order Would Be an Abuse of Discretion

It would be an abuse of discretion and an error in judgment to refuse to reverse the *Bureau Order* based on the particular facts in this case, the public interest considerations, and the severity of the omission. When assessing the reasonableness of an agency decision, the Administrative Procedure Act requires that the decision not be arbitrary, capricious, an abuse of

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50 *U.S. v. Bajakajian*, 524 U.S. 321, 328 (1998).

51 *Id.* at 335-337.

52 *Id.*

53 *Id.* at 337-340.

discretion, or otherwise not in accordance with the law.[54] Courts will analyze whether "the agency examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[55]

As noted above, the *Bureau Order* does not allege any actual impact on the Fund as a result of the state certification being late-filed, and the facts demonstrate that SureWest's unintentional error does not pose any risk of "[in]appropriate use of high-cost support" in this particular instance. The *Bureau Order* did not consider the impact that a denial of the waiver will have on the public interest. SureWest's longstanding history of timely submitting ICLS certifications as well as considerations of hardship and equity from the loss of $2.5 million should also weigh in favor of granting the waiver.

Accordingly, upon examination of the relevant factors presented herein, the Commission should reverse the *Bureau Order* and grant the requested waiver, or alternatively, impose an appropriate and proportionate reduction of $3,000 per quarter, or a total of $6,000.

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54 5 U.S.C. §706(2)(A).

55 *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

III. CONCLUSION

For the foregoing reasons, SureWest Telephone respectfully requests that the Commission reverse the *Bureau Order* and grant the requested waiver so that SureWest is able to receive all of its frozen high-cost support for the first and second quarters of 2013. As an alternative, SureWest is willing to accept a reasonable and proportionate reduction in support for the first and second quarters of 2013, and suggests that $6,000 would be an appropriate reduction in the circumstances of this case.

Respectfully submitted,

/s/ Andrew D. Lipman

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Counsel for SureWest Telephone

Dated: November 26, 2013

EXHIBIT A

SureWest Telephone ICLS Certification

Received & Inspected
DEC - 2 2013
FCC Mail Room

SureWest

Interstate Common Line Support (ICLS) 2012-2013

ICLS

Date June 21, 2012

To: Office of Secretary
Federal Communications Commission
445 - 12th Street, SW
Washington, DC 20554

Karen Majcher
Vice President - High Cost and Low Income Division
Universal Service Administrative Company
2000 L Street, NW, Suite 200
Washington, DC 20036
Hccerts@usac.org

Re: CC Docket No. 96-45
Interstate Common Line Support - ICLS
Annual Certification Filing

This is to certify that SureWest Telephone will use its **INTERSTATE COMMON LINE SUPPORT - ICLS** only for the provision, maintenance and upgrading of facilities and services for which the support is intended.

I am authorized to make this certification on behalf of the company named above. This certification is for the study area(s) listed below. **(Please enter your Company Name, State and Study Area Code)**

ICLS

Company Name	State	Study Area Code
SureWest Telephone	CA	542334

(If necessary, attach a separate list of additional study areas and check this box.) ☐

Signed,

Scott B

[Signature of Authorized Representative]

Date: 6/21/12

Scott K. Barber
[Printed Name of Authorized Representative]

Vice President and Chief Operating Officer
[Title of Authorized Representative]

Carrier's Name: SureWest Telephone
Carrier's Address: P.O. Box 969, Roseville, CA 95661-0969
Carrier's Telephone Number: 916-786-1677

Date Received
(For official use only)

USAC

CERTIFICATE OF SERVICE

I, Danielle Burt, hereby certify that on this 26th day of November, 2013, a copy of the foregoing Application for Review of SureWest Telephone in WC Docket No. 08-71, was served via U.S. mail and electronic mail on the following:

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Chief, Wireline Competition Bureau
Federal Communications Commission
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Washington, DC 20554
julie.veach@fcc.gov

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/s/ Danielle Burt

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