

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

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|---|---|----------------------|
| 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 Inter-carrier 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 |

COMMENTS OF NTCA–THE RURAL BROADBAND ASSOCIATION

PETITION FOR LIMITED WAIVER OF 47 C.F.R. § 51.917(c)

**ALENCO COMMUNICATIONS, INC.
FIVE AREA TELEPHONE COOPERATIVE, INC.
NORTEX COMMUNICATIONS
NORTH TEXAS TELEPHONE COMPANY
PEOPLES TELEPHONE COOPERATIVE, INC.
TOTELCOM COMMUNICATIONS, LLC
WEST PLAINS TELECOMMUNICATIONS, INC.
XIT RURAL TELEPHONE COOPERATIVE, INC.**

I. INTRODUCTION AND BACKGROUND

NTCA–The Rural Broadband Association (“NTCA”)¹ hereby submits these comments in support of Alenco Communications, Inc.’s, Five Area Telephone Cooperative, Inc.’s, Nortex Communications, North Texas Telephone Company’s, Peoples Telephone Cooperative, Inc.’s, Totelcom Communications, LLC’s, West Plains Telecommunications, Inc.’s, and XIT Rural Telephone Cooperative, Inc.’s (collectively, “the Texas RLECs” or “the Companies”) petition² for limited waiver of Section 51.917(c)³ of the rules of the Federal Communications Commission (“Commission” or “FCC”). All of the Companies are NTCA members except for North Texas Telephone Company.

For the reasons discussed below, NTCA requests that the Commission grant the Texas RLECs’ request for a limited waiver of 47 C.F.R. Section 51.917(c). The Companies have shown good cause exists for granting the waiver, and that granting the waiver would be in the public interest. Further, the FCC has granted waivers submitted by other carriers in similar situations. NTCA therefore joins with the Texas RLECs in requesting that the Commission grant the Companies’ requested waiver as expeditiously as possible.

II. SPECIAL CIRCUMSTANCES AND THE PUBLIC INTEREST SUPPORT IMMEDIATE GRANT OF THE REQUESTED LIMITED WAIVER

All of the Companies are rural incumbent local exchange carriers (“RLECs”) operating in the state of Texas. The Texas RLECs have a long history of providing high-quality service to

¹ NTCA represents nearly 900 rural rate-of-return regulated telecommunications providers. All of NTCA’s members are full service local exchange carriers and broadband providers, and many provide wireless, video, satellite, and/or long distance services, as well.

² *Connect America Fund et. al.*, WC Docket No. 10-90 *et al.*, “Petition for Limited Waiver of 47 C.F.R. § 51.917(c),” filed April 25, 2014 (“*Texas RLECs Petition.*”)

³ 47 C.F.R. § 51.917(c).

their customers. The Companies have relied upon predictable and sufficient Universal Service Fund (“USF”) support and intercarrier compensation (“ICC”) revenues to provide reasonably priced service throughout their rural service areas. Any threat to the sufficiency of the Companies’ USF and ICC funding will in turn endanger their ability to continue to provide uninterrupted, high-quality service to their customers.

As detailed in their petition, the Companies began terminating traffic from Halo Wireless, Inc. (“Halo”) in 2010, and billed Halo for the traffic it sent. The total amount ultimately billed by the Texas RLECs to Halo but uncollected was \$243,176.33, broken down as follows: ⁴

| <u>Petitioner</u> | <u>2011 Base Period Revenue Adjustment</u> |
|---------------------------------------|--|
| Alenco Communications, Inc. | \$9,279.86 |
| Five Area Telephone Cooperative, Inc. | \$11,552.40 |
| Nortex Communications | \$23,958.93 |
| North Texas Telephone Company | \$8,341.36 |
| Peoples Telephone Cooperative, Inc. | \$84,312.08 |
| Totalcom Communications, LLC | \$37,965.46 |
| West Plains Telecommunications, Inc. | \$49,099.82 |
| XIT Rural Telephone Cooperative, Inc. | \$18,666.42 |

Halo refused to pay all intercarrier compensation charges to the Companies, claiming “that all of its traffic was CMRS-originated and intraMTA, when in fact it was not.”⁵

⁴ *Texas RLECs Petition*, p. 3.

⁵ *Ibid.*

The Companies, together with a number of other Texas RLECs, filed complaint and arbitration cases against Halo with the Texas Public Utility Commission (PUC.) However, Halo filed for bankruptcy on August 8, 2011, temporarily staying all regulatory proceedings. In July 2012, Halo was forced from Chapter 11 (reorganization) to Chapter 7 (liquidation) bankruptcy. The Texas PUC released a final arbitration award in September 2012. However, since Halo had already converted to Chapter 7 bankruptcy, the Texas PUC dismissed the case and thus removed any possibility that Halo will ever make the payments it owes to the Texas RLECs. The Companies' sole recourse is to seek waiver from the Commission.

The FCC requires that all revenues included in calculating Base Period Revenues (BPRs) for Fiscal Year 2011 had to have been collected by March 31, 2012. In its Petition, the Companies request that the Commission allows them to include in each Company's BPR the amount owed to it by Halo. The Companies maintain that not including these revenues in the Carrier Base Period Revenue would not only create a one-time impact, but would “take the harm already caused...and compound it over time merely because it occurred during the 2011 Base Period, which is the starting point for calculating all future year Baselines and Eligible Recovery amounts.”⁶ As a result, the Companies “will have significantly fewer dollars over the life of the transition with which to make investments in IP networks, and extend and improve affordable voice and broadband services to their customers. Consequently, continued network investment will be undermined, and rural consumers are likely to be harmed.”⁷

⁶ *Id.*, p. 6.

⁷ *Ibid.*

III. THE TEXAS RLECs HAVE SHOWN THAT GOOD CAUSE EXISTS FOR GRANTING THE WAIVER, AND THAT GRANTING THE WAIVER WOULD BE IN THE PUBLIC INTEREST

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 therefore is shown.”⁸ 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. Generally, waiver of the Commission's rules is granted when both (i) special circumstances warrant a deviation from the general rule and (ii) such deviation will serve the public interest. As demonstrated more fully below, both prongs of the Commission’s waiver standard are met in this instance.

As the Commission stated in the USF/ICC Transformation Order, “Carriers may, however, request a waiver of our rules defining the Baseline to account for revenues billed for terminating switched access service or reciprocal compensation provided in FY2011 but recovered after the March 31, 2012 cut-off as the result of the decision of a court or regulatory agency of competent jurisdiction.”⁹

As the Texas RLECs detailed in their petition, the inability to collect more than \$240,000 in revenues owed was through no fault of their own, but rather due to the actions of Halo, with whom the Companies had conducted business in good faith. Compounding this injustice will be the fact that, should the Commission not grant the requested waiver, the Texas RLECs will have been harmed twice—once, when Halo did not pay the money owed; and again, when the lost revenues negatively affect each Company’s Base Period revenue. It is unfortunate that the

⁸ 47 C.F.R. § 1.3.

⁹ *Connect America Fund et. al.*, WC Docket No. 10-90 *et al.*, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161 (rel. November 18, 2011) (“*USF/ICC Transformation Order*”), fn 1745.

Texas RLECs must suffer once for circumstances beyond their control; the Companies should not be made to absorb a second penalty.

The Base Period Revenue is used in the calculation of the Company's Eligible Recovery, and was established by the Commission in order to mitigate the impact of the *USF/ICC Transformation Order* on carrier revenues and investments. The uncollected revenues represent approximately 18% of the Companies' collective existing FY 2011 Transitional Interstate Revenues.¹⁰ As the Companies note, failing to grant the waiver "would unfairly lock in artificial and unrepresentative one-time revenue losses incurred by the Petitioners due to Halo's access arbitrage scheme."¹¹

Granting the Texas RLECs' request is clearly in the public interest. If not granted the waiver, each of the Companies will take a significant financial hit that will adversely affect its ability to continue to invest in its network, which will ultimately negatively affect their customers. The Companies and their customers are innocent victims; they should not be held culpable for the ill-advised actions of a third party that the Commission has explicitly recognized had no justification for its business practices and related policy positions.

Recently, the Commission issued an Order¹² granting similar petitions filed by TDS Telecommunications Corp. and jointly by Cimarron Telephone Company, Cross Telephone Company, and the Pottawatomie Telephone Company. In the Order, the Commission wrote

We believe that incumbent LECs, upon a showing of good cause, should be permitted to include in their recovery calculations revenues associated with traffic eligible for compensation that was terminated during FY 2011 and that otherwise meets the criteria spelled out in our revenue recovery rules. Including such revenue conforms to the

¹⁰ *Texas RLECs Petition*, p.6.

¹¹ *Ibid.*

¹² *In the Matter of Connect America Fund, Developing a Unified Inter-carrier Compensation Regime, Petitions for Waiver of Section 51.917(b)(7) of the Commission's Rules*, WC Docket No. 10-90, CC Docket No. 01-92, "Order" (adopted August 7, 2014) ("Order.")

policies underlying the recovery mechanism, and excluding them would undermine those policies.¹³

As detailed herein, the Texas RLECs have shown good cause for the requested waiver to be granted. The Commission should do so in an expeditious manner.

IV. CONCLUSION

For the foregoing reasons, NTCA urges the Commission to grant this petition for limited waiver without delay, and allow each of the Texas RLECs to include in their Base Period Revenue the amount owed to them by Halo in FY 2011, as follows:

| <u>Petitioner</u> | <u>2011 Base Period Revenue Adjustment</u> |
|---------------------------------------|--|
| Alenco Communications, Inc. | \$9,279.86 |
| Five Area Telephone Cooperative, Inc. | \$11,552.40 |
| Nortex Communications | \$23,958.93 |
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| West Plains Telecommunications, Inc. | \$49,099.82 |
| XIT Rural Telephone Cooperative, Inc. | \$18,666.42 |

¹³ *Id.*, p. 1.

Respectfully Submitted,



By: /s/ Jill Canfield

Jill Canfield

Vice President of Legal and Industry, Asst. General
Counsel

jcanfield@ntca.org

By: /s/ Richard J. Schadelbauer

Richard J. Schadelbauer

Economist

rschadelbauer@ntca.org

4121 Wilson Blvd, Ste. 1000

Arlington, VA 22203

(703) 351-2000