

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)
Request for Waiver of Section 54.611)
of the Commission's Rules)
Unicom, Inc.)
Anchorage, Alaska)
Rural Health Care Universal Service) WC Docket No. 02-60
Support Mechanism)

ORDER

Adopted: October 2, 2006

Released: October 2, 2006

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order, we grant a request by Unicom, Inc., (Unicom) to waive section 54.611 of our rules concerning reimbursement for services provided under our rural health care mechanism. Because Unicom has shown that this rule, as applied to its special circumstances, threatens to disrupt telehealth services to rural health clinics throughout the state of Alaska, we find that it has demonstrated that good cause warrants this waiver. We thus direct the Universal Service Administrative Company (USAC) to make an initial reimbursement payment to Unicom for the current net payments to which it is entitled under the rural health universal support mechanism no later than 10 calendar days from release of this Order, and any additional subsequent payments on a quarterly basis.

II. BACKGROUND

2. In section 254 of the Telecommunications Act of 1996, Congress sought to provide rural health care providers "an affordable rate for the services necessary for the purposes of telemedicine and instruction relating to such services." Specifically, Congress directed telecommunications carriers "[to] provide telecommunications services which are necessary for

1 Unicom, Inc. Request for Waiver, WC Docket No. 02-60, filed June 19, 2006 (Request for Waiver); 47 C.F.R. § 54.611. Section 54.611 provides that any reimbursement made by the Universal Service Administrative Company (USAC) due to a telecommunications carrier providing services eligible for rural health care universal service fund support is offset against its universal service obligation to the Universal Service Fund, calculated on an annual basis. 47 C.F.R. § 54.611(d). In addition, section 54.719(c) of the Commission's rules provides that any person aggrieved by an action taken by a division of USAC may seek review from the Commission. 47 C.F.R. § 54.719(c).

2 Pub. L. No. 104-104, 110 Stat. 56.

3 H.R. Conf. Rep. No. 458, 104th Cong. 2nd Sess. 133 (1996).

the provision of health care services in a State, including instruction relating to such services, to any public or nonprofit health care provider that serves persons who reside in rural areas in that State at rates that are reasonably comparable to rates charged for similar services in urban areas in that State.”⁴ Congress also directed the Commission to enhance access to advanced telecommunications and information services for health care providers.⁵

3. The Commission implemented this statutory directive by adopting the rural health care support mechanism in the *1997 Universal Service Order*.⁶ The mechanism provides discounts to rural health care providers to access modern telecommunications for medical and health maintenance purposes. Section 54.611 of our rules sets forth the circumstances under which a telecommunications service provider may receive universal service support for providing service to an eligible health care provider under the rural health care support mechanism.⁷ Under section 54.611, a telecommunications carrier providing services eligible for rural health care universal service support shall offset the amount eligible for support against its universal service obligation.⁸ If the total amount of support owed to the carrier exceeds its universal service payment obligation, calculated on an annual basis, the carrier is entitled to receive the differential as a direct reimbursement.⁹ Any reimbursement due a carrier, however, shall be made after the offset is credited against the carrier’s universal service obligation.¹⁰ Any reimbursement shall be submitted to a carrier no later than the first quarter of the calendar year following the year in which the costs for the services were incurred.¹¹ USAC explained that these refunds typically occur in November of each year, which is the earliest time USAC knows the annual contribution amount for that carrier with reasonable certainty.¹²

4. *Unicom’s Request for Waiver*. Unicom is a native Alaska-owned telecommunications provider serving a large region of the southwest and central Alaska.¹³ The Yukon-Kuskokwim Health Corporation (YKHC), a native Alaska-owned, non-profit organization, owns and operates health clinics in a large number of small, widely dispersed villages in Alaska.¹⁴ In 2004, YKHC signed a multi-year contract with Unicom for delivery of

⁴ See 47 U.S.C. §§ 151 *et seq.* (adding 47 U.S.C. § 254(h)(1)(A) to the Act). The term “State” includes the District of Columbia and the territories and possessions. 47 U.S.C. § 153(40).

⁵ 47 U.S.C. § 254(h)(2)(A).

⁶ See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776 (1997) (*1997 Universal Service Order*) (*subsequent history omitted*).

⁷ See 47 C.F.R. § 54.611.

⁸ *Id.*

⁹ 47 C.F.R. § 54.611(b).

¹⁰ 47 C.F.R. § 54.611(c).

¹¹ 47 C.F.R. § 54.611(d).

¹² See Request for Waiver, Exh. A at 2 (USAC Letter). There may also be an additional refund in February for services not taken into account in the November refund. *Id.*

¹³ Request for Waiver at 2.

¹⁴ *Id.*

broadband telecommunications services supporting 47 of YKHC's rural clinics.¹⁵ Subsequently, the funding request was approved by USAC.¹⁶ In December 2004, service was initiated under the agreement and, in June 2005, Unicom commenced deployment of its microwave system called "DeltaNet."¹⁷

5. In February 2006, USAC issued a credit balance refund to Unicom for services rendered in 2005.¹⁸ Subsequently, Unicom learned that USAC would not immediately issue any additional refunds to Unicom for services rendered in 2006 because it is USAC's practice, pursuant to section 54.611 of our rules, to refund any credit balances due a service provider after calculating their universal service obligation "on an annual basis."¹⁹ Subsequently, on May 4, 2006, Unicom sent a letter to USAC requesting immediate payment of costs incurred.²⁰ On June 19, 2006, USAC responded to Unicom explaining that the Commission's rules require that any reimbursement due a carrier shall be made after any offset is credited against the carrier's universal service obligation.²¹ USAC agreed with Unicom that, as of May 15, 2006, Unicom had a substantial credit on its contribution account as a result of netted rural health care program disbursements as well as Unicom's continual payment of its monthly contribution charges to the universal service fund (USF).²² USAC explained, however, that it could not ascertain a contributor's USF contribution obligation, calculated on an annual basis, until the contributor reports its projected revenue on its FCC Form 499-Q²³ in August for each year and the Commission sets the fourth quarter USF contribution factor in mid-September of each year.²⁴ Thus, USAC asserted, once a carrier's contribution obligation for the year is determined, USAC can then issue any refund due a carrier participating in the rural health care program.²⁵ This

¹⁵ *Id.* The contract was originally awarded by YKHC to United Utilities, Inc. (UUI), a corporation under common ownership and control with Unicom that provides local exchange services to the communities served by YKHC. *Id.* at 2, n.3. In 2005, YKHC's contract was assigned by UUI to Unicom. *Id.* For purposes of this Order, we refer to YKHC's vendor as Unicom, the present contracting party.

¹⁶ Request for Waiver at 2.

¹⁷ *Id.*

¹⁸ *See* USAC Letter at 2, 4.

¹⁹ Request for Waiver at 3.

²⁰ *See* USAC Letter at 1.

²¹ *Id.*

²² *Id.*

²³ The FCC Form 499-Q sets forth information that the contributor must submit, so that USAC may calculate and assess contributions. *See* USAC website, USAC Forms, Form 499-Q, <http://www.usac.org/fund-administration/forms/> (retrieved Aug. 22, 2006).

²⁴ USAC Letter at 2; 47 C.F.R. § 54.711(b); *see* 47 C.F.R. § 54.709 (setting dates for contributor filings and determining the contribution factor).

²⁵ USAC Letter at 2.

typically occurs in November of each year.²⁶ Subsequently, on July 7, 2006, Unicom filed the Request for Waiver.²⁷

6. In its Request for Waiver, Unicom seeks a waiver of section 54.611 of our rules to allow USAC to begin making reimbursement payments immediately to Unicom on a monthly basis for the net payments to which it is entitled under the rural health universal support mechanism.²⁸ Unicom argues that USAC's implementation of section 54.611 of our rules, as applied to Unicom, is unnecessarily rigid and harmful and creates a financial burden for Unicom, particularly, in this instance, where there is a great disparity between Unicom's contribution obligations to USF and the refund amount due Unicom.²⁹

7. *Waiver Standard.* The Commission may waive any provision of its rules on its own motion and for good cause shown.³⁰ A rule may be waived where the particular facts make rigid compliance inconsistent with the public interest.³¹ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.³² In sum, waiver is appropriate if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule.³³

III. DISCUSSION

8. We grant Unicom's Request for Waiver. Upon review of the record, we find that good cause exists to waive section 54.611 of our rules.³⁴ Thus, we direct USAC to make an initial reimbursement payment to Unicom for the current net payments to which it is entitled under the rural health universal support mechanism, no later than 10 calendar days from release of this Order, and any additional subsequent payments on a quarterly basis.³⁵

9. As noted above, section 54.611 sets forth the schedule by which USAC must reimburse service providers when the funding they are owed for providing service in the rural health care program is greater than their contributions to the USF.³⁶ Specifically, the

²⁶ *Id.*

²⁷ See Request for Waiver.

²⁸ Request for Waiver at 1.

²⁹ *Id.* at 1, 5-7.

³⁰ 47 C.F.R. § 1.3.

³¹ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

³² *WAIT Radio v. FCC*, 418 F.2d 1153, 1157, (D.C. Cir. 1969), *aff'd*, 459 F.2d 1203 (D.C. Cir. 1972).

³³ *Northeast Cellular*, 897 F.2d at 1166.

³⁴ 47 C.F.R. § 54.611.

³⁵ We note that Unicom's account balance will be adjusted continuously as USAC receives information about Unicom's universal service obligation through its FCC Form 499-Q and FCC Form 499-A filings, and invoices for Unicom's rural health care services.

³⁶ *Id.*; *supra* para. 3.

Commission established the first quarter of the calendar year following the year in which the costs were incurred as the deadline for USAC to make any reimbursement payments, and instructed USAC to calculate the reimbursement as the difference between the support owed and the universal service obligation “calculated on an annual basis.”³⁷ In this instance, rigid adherence to this rule, as interpreted by USAC, would mean that Unicom would be owed millions of dollars by the time it would be reimbursed in full. Additionally, because Unicom is a small carrier but an active participant in the rural health care program, and thus has one of the largest differentials between what it pays into and receives from the USF, this rule causes a particular hardship for Unicom. We find that such an outcome is not the intended result of this rule. USAC’s implementation of section 54.611, in this instance, places Unicom in a unique financial position in which it cannot meet its current payment obligations to vendors without finding other means of financial support.³⁸ This puts continued performance of the rural health program in underserved regions of Alaska at risk by jeopardizing the continued deployment of Unicom’s terrestrial broadband system and also subjects Unicom to a possible contract breach with both YKHC and various subcontractors.³⁹ In this instance, the requested waiver would enable Unicom and YKHC to continue their efforts to maintain and promote access to advanced telecommunications services in underserved areas in Alaska.

10. Moreover, the Wireline Competition Bureau has waived our true-up procedures for USF contributions where it found that the application of the governing rule would be inequitable because it would have resulted in the petitioning carriers being required to pay more than their annual universal service obligation.⁴⁰ Similarly, in this instance, the application of section 54.611, as interpreted by USAC, would produce an inequitable result by depriving Unicom of the funding flow needed to continue to perform its services contract. Finally, we note that the result here is consistent with the goals of section 254 of the Act – enhancing access to advanced telecommunications and information services for health care providers – and therefore serves the public interest.⁴¹

IV. ORDERING CLAUSES

11. ACCORDINGLY, IT IS ORDERED that, pursuant to the authority contained in sections 1-4 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154 and 254, and pursuant to authority delegated in sections 0.91 and 0.291, of the Commission’s rules, 47 C.F.R. §§ 0.91, and 0.291, that the Request for Waiver of 47 C.F.R. § 54.611 of the Commission’s rules filed by Unicom, Inc., Anchorage, Alaska, IS GRANTED.

³⁷ 47 C.F.R. § 54.611; *supra* para. 3.

³⁸ Request for Waiver at 4-5.

³⁹ *Id.* at 5, 8-9.

⁴⁰ See *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order, 20 FCC Rcd 14699, 14701, para. 4 (Wireline Comp. Bur. 2005) (granting petitions for waiver filed by BellSouth Long Distance and Southern Communications Services, Inc. d/b/a SouthernLINC Wireless of the Commission’s universal service true-up procedures for 2003 finding that they would have contributed more through the annual true-up process for 2003 than their equitable share).

⁴¹ 47 U.S.C. § 254(h)(2)(A).

12. IT IS FURTHER ORDERED that, pursuant to the authority contained in sections 1-4 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154 and 254, and pursuant to authority delegated in sections 0.91, and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91 and 0.291, USAC SHALL MAKE an initial reimbursement payment to Unicom for the current net payments to which it is entitled under the rural health universal support mechanism, no later than 10 calendar days from release of this Order, and any additional subsequent payments on a quarterly basis.

FEDERAL COMMUNICATIONS COMMISSION

Thomas J. Navin
Chief
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