

Before the
Federal Communications Commission
Washington, DC 20554

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

ORDER

Adopted: June 23, 2010

Released: June 23, 2010

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this order, we grant a request by Action Communications, Inc., (Action) for waiver of section 54.611 of the Commission's rules concerning reimbursement for services provided under the universal service rural health care support mechanism. As a result, we conclude that Action has demonstrated that good cause exists to waive this rule because, absent waiver. Action has provided evidence that it will be unable to sustain its operations and will be unable to provide discounted telecommunications services to the rural health care providers it serves. We thus direct the Universal Service Administrative Company (USAC) to make an initial reimbursement payment no later than 10 calendar days from release of this order to Action for the current rural health care support payments to which it is entitled without deducting any universal service contributions that Action may owe consistent with the terms of this order. USAC shall remit to Action any additional subsequent rural health care payments on a monthly basis.

II. BACKGROUND

2. In section 254 of the Communications Act of 1934, as amended, Congress directed telecommunications carriers to "provide telecommunications services which are necessary for 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."

1 See Action Communications, Inc., Petition for Waiver and Emergency Request for Expedited Stay and/or Special Relief, WC Docket No. 02-60 (filed Oct. 13, 2009) (Request for Waiver); 47 C.F.R. § 54.611. Action requested that the Commission immediately stay enforcement of section 54.611 with respect to disbursements of rural health care support to Action. Request for Waiver at 1. Given the relief granted to Action in this order we dismiss the request for stay as moot.

2 See Request for Waiver at 2.

3 Action requested to receive rural health care support payments on a monthly basis. See Request for Waiver at 6.

4 47 U.S.C. § 254.

5 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

3. The Commission implemented this statutory directive by adopting the rural health care support mechanism.⁶ The mechanism provides discounts to rural health care providers to access modern telecommunications for medical and health maintenance purposes.⁷ The Commission's 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.⁸ Under section 54.611, in particular, a *non-de minimis* telecommunications carrier providing services eligible for universal service rural health care support shall offset the amount eligible for support against its universal service contribution obligation.⁹ Under the Commission's rules, a telecommunications carrier's contribution obligation is *de minimis* if its universal service contribution in any given year is less than \$10,000, in which case it is not required to contribute directly to the universal service fund.¹⁰ During the annual true-up, if the total amount of support owed to the carrier exceeds its universal service contribution obligation, calculated on an annual basis, the carrier is entitled to receive the differential as a direct reimbursement.¹¹ Any reimbursement due to a carrier, however, must be made after the offset is credited against the carrier's universal service contribution obligation for the applicable year.¹² The Commission sets the fourth quarter universal service contribution factor in mid-September of each year.¹³ Therefore, once a carrier's contribution obligation for the year is determined, USAC can issue any refund due to a carrier participating in the rural health care program.¹⁴ Finally, 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.¹⁵

4. *Action's Request for Waiver.* Action is a competitive local exchange carrier that provides telecommunications services in Nebraska, Colorado, Wyoming, and South Dakota.¹⁶ Action receives universal service support for many of its customers through the rural health care support mechanism.¹⁷

of Columbia and the territories and possessions. 47 U.S.C. § 153(40).

⁶ See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776 (1997) (*Universal Service First Report and Order*) (subsequent history omitted); 47 C.F.R. §§ 54.601-54.625.

⁷ *Universal Service First Report and Order*, 12 FCC Rcd at 9093-9094, para. 610.

⁸ See 47 C.F.R. § 54.611.

⁹ *Id.*

¹⁰ 47 C.F.R. § 54.708.

¹¹ 47 C.F.R. § 54.611(b).

¹² 47 C.F.R. § 54.611(c).

¹³ See 47 C.F.R. § 54.611(b); see also 47 C.F.R. § 54.709 (setting dates for contributor filings and determining the contribution factor).

¹⁴ See 47 C.F.R. § 54.611(d). See E-mail from Michele Garber, USAC, to Erica Myers, FCC (dated Jun. 7, 2010). USAC explains that it reviews invoices of companies that have a credit on their invoices in November and February of each year and then makes payments shortly thereafter.

¹⁵ *Id.*

¹⁶ See Request for Waiver at 2; Letter from Shana Knutson, on behalf of Nebraska Public Service Commission, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-60 (dated Nov. 23, 2009) (Nebraska PSC Comments).

¹⁷ See Request for Waiver at 2.

Prior to July 2009, pursuant to the Commission's universal service contribution rules, Action was considered to be a *de minimis* carrier and therefore was not required to contribute directly to the universal service fund.¹⁸ While it was a *de minimis* carrier, Action received monthly payments from the rural health care program.¹⁹

5. After filing its revised 2008 Telecommunications Reporting Worksheet, FCC Form 499-A, Action's revenues surpassed the \$10,000 revenue threshold, and Action was no longer considered a *de minimis* carrier.²⁰ Consequently, Action became subject to the Commission's rule that requires USAC to offset the amount of rural health care support against the company's universal service contribution obligation on an annual basis.²¹ Accordingly, Action's required contributions to the universal service fund have increased from zero to approximately \$2,800 per year and under our rules Action is no longer eligible to receive monthly rural health care support payments.²² In addition, Action states that it may not receive reimbursement for as long as 18 months after filing its revised 2008 FCC Form 499-A.²³

6. On October 13, 2009, Action filed the instant request for waiver.²⁴ Specifically, Action seeks a waiver of section 54.611 of the Commission's rules to allow USAC to begin making rural health care support payments immediately to Action on a monthly basis.²⁵ Action argues that it cannot continue operations if it must wait for the annual true-up before receiving its rural health care support reimbursement.²⁶ Specifically, Action alleges that the offset waiting period would create a financial hardship that would require Action to advance hundreds of thousands of dollars before the company would receive its reimbursement.²⁷ Action contends that it has borrowed funds to cover the costs imposed by the offset rule, but that it no longer has assurances from its banks that it can borrow additional monies.²⁸ Absent a waiver, Action states that it will be unable to pay its underlying carriers, causing interruption of Action's service to its rural health care providers and their patients.²⁹ Action also argues that it is in the public interest to resume monthly reimbursement payments, because the discontinuation of Action's services would adversely affect the economy of the rural areas that Action serves and would permanently limit the telecommunications choices available to the communities Action currently serves.³⁰ Furthermore, the Nebraska Public Service Commission states in its comments that absent a waiver, there

¹⁸ *Id.*; *see supra*, para. 3

¹⁹ Request for Waiver at 1-2.

²⁰ *Id.*

²¹ *See supra*, para. 3. 47 C.F.R. § 54.611.

²² *See* Request for Waiver at 2.

²³ *See* Request for Waiver at 3. Action filed its revised FCC Form 499-A on July 23, 2009. *See supra* footnote 13.

²⁴ *See* Request for Waiver.

²⁵ *See* Request for Waiver at 1-2.

²⁶ *See* Request for Waiver at 3.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

may be a disruption in Nebraska's Telehealth Network, due to its dependence on Action for telecommunications services.³¹

III. DISCUSSION

7. We grant Action's request for waiver. Upon review of the record, we find that good cause exists to waive section 54.611 of our rules so that Action may continue to receive monthly rural health care support payments on an ongoing basis.³² The Commission has waived its offset rules in limited, compelling situations.³³ For instance, in the *Unicom Order* and the *TeleQuality Order*, the Bureau found that rigid adherence to the rule would mean that small carriers participating in the rural health care program would be placed in a position where they could not meet payment obligations to vendors.³⁴ Absent waiver, application of the rule could have caused rural health care provider customers to lose health care customers and its subcontractors.³⁵ In Action's case, rigid adherence to the rule would mean that Action would be unable to meet its payment obligations to its underlying carriers without other means of support.³⁶ In turn, Action's rural health care provider customers would be placed at risk due to lost service and with potentially no alternative service providers.³⁷ In addition, without support, the Nebraska Telehealth Network would be in jeopardy of service disruption due to its reliance on Action for telecommunications services.³⁸ Prolonged delay in Action's receipt of rural health care support, therefore, causes a particular hardship for Action because it could go out of business and leave its rural health care provider customers with no comparable provider of discounted services.³⁹ We find that such an outcome is not the intended result of section 54.611 of the Commission's rules and that waiver is appropriate in this instance. Furthermore, grant of a waiver to Action 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.⁴⁰

³¹ Nebraska PSC Comments at 2-3.

³² Generally, the Commission's rules may be waived for good cause shown. 47 C.F.R. § 1.3. The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest. *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*). In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166. Waiver of the Commission's rules is appropriate only if both (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest. *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008); *Northeast Cellular*, 897 F.2d at 1166. See *Request for Waiver by TeleQuality Communications, Inc.*, WC Docket No. 02-6, Order, 24 FCC Rcd 10716 (Wireline Comp. Bur. 2009) (*TeleQuality Order*).

³³ See *Request for Waiver by Unicom, Inc.*, WC Docket No. 02-6, Order, 21 FCC Rcd 11240 (Wireline Comp. Bur. 2006) (*Unicom Order*).

³⁴ See *Unicom Order*, 21 FCC Rcd at 11243-11244, para. 9; *TeleQuality Order*, 24 FCC Rcd at 10718, 10719, paras. 6, 9.

³⁵ See *id.*

³⁶ See Request for Waiver at 3.

³⁷ *Id.* See Nebraska PSC Comments at 2-3.

³⁸ See Request for Waiver at 2.

³⁹ See Nebraska PSC Comments at 2-3.

⁴⁰ 47 U.S.C. § 254(h)(2)(A).

8. Thus, we direct USAC to make an initial reimbursement payment to Action no later than 10 calendar days from release of this order for the rural health care support payments to which Action is entitled without deducting the amount of any universal service contributions that Action may owe. The waiver is effective for Action for funding year 2008 and future funding years. USAC shall remit to Action any subsequent rural health care payments on a monthly basis.

IV. ORDERING CLAUSES

9. 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 Action Communications, Inc., IS GRANTED.

10. 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 Action Communications, Inc. no later than 10 calendar days from release of this order as described above.

11. IT IS FURTHER ORDERED that, pursuant to section 1.102(b)(1) of the Commission's rules, 47 C.F.R. § 1.102(b)(1), this order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Sharon E. Gillett
Chief
Wireline Competition Bureau