

Before the
Federal Communications Commission
Washington, D.C.

In the Matter of
ATEAC, Inc.
Alaska Telephone Company
Arctic Slope Telephone Association
Cooperative, Inc.
Interior Telephone Company, Inc.
Mukluk Telephone Company, Inc.
United-KUC, Inc.
Petition for Waiver of
Sections 61.41(c) and (d)
of the Commission's Rules
CCB/CPD No. 00-03

MEMORANDUM OPINION AND ORDER

Adopted: August 16, 2000

Released: August 18, 2000

By the Deputy Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On February 8, 2000, ATEAC, Inc. (ATEAC),¹ Alaska Telephone Company (ATC), Arctic Slope Telephone Association Cooperative Inc. (ASTAC), Interior Telephone

1 ATEAC is an Alaska corporation which is owned by four Alaska Corporations: (1) Alaska Power & Telephone Company ("AP&T"), the parent company of ATC which serves fourteen Alaska exchanges (approximately 4,523 access lines); (2) ASTAC, a local exchange carrier (LEC) which serves eight Alaska exchanges (approximately 2,367 access lines); (3) TelAlaska, Inc. ("TelAlaska"), the parent company of ITC, a local exchange company which serves nine Alaska exchanges (approximately 4,777 access lines) and of MTC, local exchange carriers which serves twelve Alaska exchanges (approximately 1,295 access lines) and (4) United Companies, Inc. ("United"), the parent company of United-KUC, a new Alaska local exchange carrier, and of United Utilities, Inc. ("UUI"), a local exchange carrier which serves fifty-seven Alaska exchanges (approximately 5,911 access lines). AP&T, ASTAC, TelAlaska and United each own 25 percent of ATEAC's issued and outstanding stock.

Company, Inc. (ITC), Mukluk Telephone, Inc. (MTC), and United KUC, Inc. (Petitioners, collectively), filed a petition requesting a waiver of sections 61.41 (c) and (d) of the Commission's rules. 47 C.F.R. §§ 61.41(c), 61.41(d). Petitioners² request that we waive the Commission's rules in order to allow them to operate thirteen Alaska telephone exchanges as cost carriers under rate of return regulation following ATEAC's acquisition of these exchanges from GTE Alaska, Incorporated (GTEAC), a price cap carrier.³ On March 1, 2000, the Common Carrier Bureau (Bureau) released a Public Notice requesting comment on the Petition.⁴ No comments or reply comments opposing the Petition were filed in response to the Public Notice. The Commission received two comments in support of the Petition.⁵ In this Memorandum Opinion and Order, we grant Petitioners' waiver request.

II. BACKGROUND

2. Section 61.41(c)(1) of the Commission's rules provides that any price cap telephone company subject to a merger, acquisition, or similar transaction shall continue to be subject to price cap regulation notwithstanding such transaction.⁶ In addition, the Commission's rules provide that when a non-price cap company acquires, merges with, or otherwise becomes affiliated with a price cap company or any part thereof, the acquiring company becomes subject to price cap regulation and must file price cap tariffs within a year.⁷ Section 61.41(d) of the Commission's rules further

² Petitioners note that ATC, ASTAC, ITC, MTC, and UUI qualify as "rural telephone companies" under Section 3 (37) of the Communications Act of 1934, as amended, 47 U.S.C. §3 (37), and section 51.5 of the Commission's rules, 47 C.F.R. § 51.5, and further note that United-KUC, a new Alaska local exchange carrier, will also qualify as a "rural telephone company" under these two provisions. Petition at 2.

³ Petition at 1.

⁴ ATEAC, Inc. et. al. Petitions for Waiver of Sections 61.41(c) and (d) of the Commission's Rules, Public Notice, DA 00-441 (rel. March 1, 2000).

⁵ Comments of Alaska Communications Systems, Inc., (filed March 24, 2000) (*Alaska Comments*) and The National Telephone Cooperative Association (filed March 24, 2000) (*NTCA Comments*).

⁶ 47 C.F.R. § 61.41(c)(1).

⁷ 47 C.F.R. § 61.41(c)(2). *See also Policy and Rules Concerning Rates for Dominant Carriers*, Second Report and Order, 5 FCC Rcd 6786, 6821 (1990) (*LEC Price Cap Order*), *Erratum*, 5 FCC Rcd 7664 (Com. Car. Bur. 1990), *modified on recon.*, *Order on Reconsideration*, 6 FCC Rcd 2637 (1991) (*LEC Price Cap Reconsideration Order*), *aff'd sub nom. National Rural Telecom Ass'n v. FCC*, 988 F.2d 174 (D.C. Cir. 1993); *Petitions for Further Recon. dismissed*, 6 FCC Rcd 7482 (1991), *further modification on recon.*, *Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, Policy and Rules Concerning Rates for Dominant Carriers, Report and Order and*

provides that local exchange carriers (LECs) that become subject to price cap regulation are not permitted to withdraw from such regulation.⁸

3. On May 20, 1999, GTEA, GTE, and ATEAC entered an asset purchase agreement for the sale of all thirteen of GTEA's⁹ Alaska exchanges (approximately 23,796 access lines) to ATEAC. GTEA and GTE are both price cap carriers. On September 3, 1999, GTEA and ATEAC jointly applied to the Regulatory Commission of Alaska ("Alaska Commission") for authorization to transfer GTEA's Certificate of Public Convenience and Necessity No. 3 for the thirteen exchanges to ATEAC. On December 28, 1999, GTEA filed an application under Section 214(a) of the Communications Act and section 63.71 of the Commission's rules¹⁰, requesting authority to discontinue providing interstate services in Alaska, effective with the sale of its thirteen Alaska local exchanges to ATEAC.¹¹ The Petitioners filed applications with the Alaska Commission for authorization to transfer operating assets and state certificates for the thirteen exchanges from ATEAC to the other petitioners.¹² These applications were granted by the Alaska Commission on July 11, 2000.

4. The Petitioners state that, with the Alaska Commission's authorization to transfer the thirteen exchanges from GTEA to ATEAC, GTEA, GTE, and ATEAC can now close the asset

Order on Further Reconsideration and Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 4524 (1991) (*ONA Part 69 Order*), *further recon.*, *Memorandum Opinion and Order on Second Further Reconsideration*, 7 FCC Rcd 5235 (1992).

⁸ 47 C.F.R. § 61.41(d).

⁹ GTEA, an Alaska corporation, is a wholly owned subsidiary of GTE Corporation ("GTE"), a New York corporation.

¹⁰ 47 U.S.C. §214(a); 47 C.F.R §63.71.

¹¹ On January 7, 2000, the Commission released a Public Notice requesting comments and objections by interested parties.

¹² These "drop down" transactions are as follows: (a) six of the exchanges, (Haines, Hyder, Klukwan, Metlakatla, Petersburg and Wrangell, comprising approximately 7,593 aggregate access lines) are to be transferred from ATEAC to ATC (Alaska Commission Docket No. U-99-119); (b) one of the exchanges (Barrow, comprising approximately 3,693 access lines) is to be transferred from ATEAC to ASTAC (Docket No. U-99-120); (c) two of the exchanges (Moose Pass and Seward, comprising approximately 4,096 aggregate access lines) are to be transferred from ATEAC to ITC (Docket No. U-99-121); (d) one of the exchanges (Nome, comprising approximately 3,398 access lines) is to be transferred from ATEAC to MTC (Docket No. U-99-122); and (e) three of the exchanges (Bethel, McGrath and Unalakleet, comprising approximately 5,016 aggregate access lines) are to be transferred from ATEAC to United-KUC (Docket No. U-99-123). *See* Petition, pp. 3-4.

purchase agreement transaction if the Commission grants GTEA's Section 214(a) application¹³. The Petitioners further state that, with the Alaska Commission's approval of the "drop down" transactions, ownership of the thirteen exchanges will pass to ATC, ASTAC, ITC, MTC and United-KUC.¹⁴ The thirteen exchanges will continue to be included within the ATEAC study area until Petitioners request and receive a study area waiver from the Commission to divide the ATEAC Alaska study area and distribute the exchanges among existing study areas of ATC, ASTAC, ITC, and MTC and the new study area of United-KUC.¹⁵

5. Petitioners ATC, ASTAC, ITC and MTC are rate of return carriers (cost carriers). They are Issuing Carriers in the interstate access tariffs of the National Exchange Carriers Association (NECA) and participants in NECA's Common Line and Traffic Sensitive pools. United-KUC is not yet a cost carrier, but wishes to become a cost carrier, an Issuing Carrier in NECA tariffs, and would participate in NECA's Common Line and Traffic Sensitive pools. ATEAC states that, if necessary, it would become a cost carrier, an Issuing Carrier in the NECA tariffs, and a participant in NECA's Common Line and Traffic Sensitive pools. Both ATEAC and United-KUC will be eligible to participate in the NECA tariffs and pools under section 69.601 of the Commission's rules.¹⁶

6. Petitioners state that ATEAC, its stockholders and their subsidiaries and affiliates have no common stock ownership or other corporate affiliations with GTE, GTEA and other GTE subsidiaries and affiliates¹⁷. They also state that there is no overlap in the respective boards of directors or officers of ATEAC, its stockholders and their subsidiaries and affiliates, on the one hand, and GTE, GTEA and other GTE subsidiaries and affiliates, on the other.¹⁸

¹³ Petition at 4.

¹⁴ *Id.*

¹⁵ Petition at 4-5.

¹⁶ As assignees of GTEA, a pre-February 8, 1996 incumbent local exchange carrier, ATEAC and United-KUC each will qualify as a "telephone company" under section 69.2 (hh) of the Commission's rules, 47 C.F.R. § 69.2 (hh), and Section 251(h)(1)(B)(ii) of the Communications Act, 47 USC § 251(h)(1)(B)(ii). They would, therefore, be eligible to participate in the NECA tariffs and pools under section 69.601 of the Commission's rules. 47 C.F.R. § 69.601.

¹⁷ Petition at 6.

¹⁸ Petition at 6.

7. To support its request for a waiver, ATEAC argues that the transaction involved in this request is essentially identical to the one involved in a prior decision involving the Maine Telecommunications Group, in which the Commission granted a price cap waiver.¹⁹ The *Maine Waiver* transaction also involved the sale of several exchanges within a state to an acquisition company comprised of multiple local exchange carriers operating within the state. The Petitioners state that, consistent with the circumstances involved in the *Maine Waiver*, the subject exchanges also will be operated initially by the LECs within the study area of the acquisition company; pending a grant of the study area waiver, the acquired exchanges will be distributed among the study areas of the individual LECs.²⁰ In addition, ATEAC argues, in evaluating requests for waivers of the “all or nothing” rule, the Commission has generally taken into account the preference of small carriers for rate of return regulation over price cap regulation.²¹

8. Alaska Communications System, Inc. (“Alaska”) and the National Telephone Cooperative Association (“NTCA”) filed comments supporting a grant of the waiver. As argued by ATEAC, both commentors state that the policy justifications behind the section 61.41(c) “all or nothing rule” and the section 61.41(d) “permanent choice” rule are inapplicable under the circumstances surrounding the GTE/GTEA and ATEAC transaction. These commentors assert that improper cost-shifting between rate of return and price cap regulated affiliates is not likely to occur because Petitioners’ entire operation will be subject to rate of return regulation.²² Commentors also assert that the arms-length transfer between GTEA and the Petitioners, two non-affiliated companies, removes any opportunity for “gaming” the system because GTEA will retain no ability to bring the exchanges sold to Petitioners back under price caps.²³

9. In addition, the commentors agree with Petitioners that the proposed transaction is in the public interest.²⁴ Alaska also agrees with Petitioners that price cap regulation may have an

¹⁹ See *Maine Telecommunications Group, Inc.*, 9 FCC Rcd 3082 (1994) (*Maine Waiver*).

²⁰ See Petition at 4-5.

²¹ Petition at 9 (citing *Maine Telecommunications Group et al.*, 9 FCC Rcd 3082 (1994); *Minburn Telecommunications, Inc.*, 14 FCC Rcd 14,184 (1999); *US West Communications, Inc. and South Central Utah Telephone Association, Inc.*, 9 FCC Rcd 198 (Com. Car. Bur. 1993); *US West Communications, Inc. and Triangle Telephone Cooperative Association, Inc. et al.*, 9 FCC Rcd 202 (Com. Car. Bur. 1993); and *US West Communications, Inc. and Nemont Telephone Cooperative Inc.*, 9 FCC Rcd 721 (Com. Car. Bur. 1994)).

²² Alaska Comments at 2; NTCA Comments at 3.

²³ Alaska Comments at 2; NTCA Comments at 3.

²⁴ Alaska Comments at 2; NTCA Comments 3-4.

adverse effect on, and was not intended to be applied to smaller LECs.²⁵ Both Alaska and NTCA favor Petitioners' plan to implement a system that has local management and is designed to bring enhanced and more responsive service to the residential and business customers in the thirteen Alaska exchanges. They also agree with Petitioners that the waiver would further the Commission's interest in relieving some of the administrative burdens faced by small telephone companies.²⁶

III. DISCUSSION

10. For the reasons discussed below, we find that the Petitioners demonstrate good cause for waiver of sections 61.41(c) and (d) of our rules, and that it is in the public interest to grant the Petitioners' waiver request. Under section 1.3 of the Commission's rules, "[a]ny provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown."²⁷ As interpreted by the courts, this requires that a petitioner demonstrate that "special circumstances warrant a deviation from the general rule and such deviation will serve the public interest."²⁸ In this case, we believe that ATEAC has demonstrated that special circumstances warrant a waiver of the Commission's rules and that a waiver will serve the public interest.

11. In the *LEC Price Cap Reconsideration Order*, the Commission addressed two concerns it had regarding mergers and acquisitions involving price cap companies.²⁹ The first concern was that, in the absence of the "all or nothing rule," a LEC might attempt to shift costs from its price cap affiliate to its non-price cap affiliate, allowing the non-price cap affiliate to charge higher rates to recover its increased revenue requirement, while increasing the earnings of the price cap affiliate.³⁰ The second concern was that, absent sections 61.41(c) and (d), a LEC may have an incentive to "game the system" by switching back and forth between rate of return regulation and

²⁵ Alaska Comments at 2-3; Petition at 8.

²⁶ *Id.*

²⁷ 47 C.F.R. § 1.3. Sections 0.91 and 0.291 of the Commission's rules permit the Chief of the Common Carrier Bureau to review such petitions for waiver of the Commission's rules under delegated authority. 47 C.F.R. §§ 0.91 and 0.291.

²⁸ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990) (citing *Wait Radio v. FCC*, 418 F.2d 1153, 1158 (D.C. Cir. 1969), cert. denied, 409 U.S. 1027 (1972)).

²⁹ See *LEC Price Cap Reconsideration Order*, 6 FCC Rcd at 2637, 2706.

³⁰ *Id.*

price cap regulation.³¹ The Commission noted, as an example, the incentive a price cap company may have to increase earnings by opting out of price cap regulation, building a large rate base under rate of return regulation so as to raise rates and then, after returning to price cap regulation, cutting costs back to an efficient level.³² It would not serve the public interest, the Commission stated, to allow a carrier alternately to "fatten up" under rate of return regulation and "slim down" under price cap regulation, because the rates would not decrease in the manner intended under price cap regulation.³³ The Commission nonetheless recognized that narrow waivers of these rules might be justified if efficiencies created by the purchase and sale of a few exchanges were to outweigh the threat of any gaming.³⁴

12. The Petitioners argue that following completion of the asset purchase, neither ATEAC, the Alaska corporations by which it is owned (AP&T/ATC, ASTAC, TelAlaska/ITC/MTC, and United/UUI/United-KUC,) nor GTE/GTEA will maintain one or more affiliates under price cap regulation, and one or more affiliates under rate of return regulation.³⁵ Neither ATEAC nor any of the Alaska corporations by which it is owned will operate under price cap regulation, whereas GTE and all of its subsidiaries and affiliates will remain under price cap regulation. The Petitioners argue that, therefore, there is no danger of improper cost-shifting between price cap and rate of return affiliates.³⁶ We agree. ATEAC's acquisition of the thirteen Alaska exchanges fails to give rise to the dangers of cost-shifting.

13. ATEAC also contends that "gaming" is not a concern. ATEAC argues that the transfer of the thirteen Alaska exchanges is an "an arms-length sale," by GTEA to the "wholly separate and unrelated ATEAC (and ATC, ASTAC, ITC, MTC and United-KUC).³⁷ ATEAC argues that "there is no possibility that GTE and its subsidiaries and affiliates will be able to 'game' the system" by switching ownership back and forth between rate of return regulation and price cap regulation.³⁸ GTE/GTEA and its subsidiaries will remain under price cap regulation, and the

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ Petition at 7.

³⁶ *Id.*

³⁷ Petition at 8.

³⁸ *Id.*

thirteen Alaska exchanges will be operated by Petitioners, which are unrelated to, and separate and apart from GTE/GTEA and their subsidiaries and affiliates, and totally outside of GTE/GTEA's control.³⁹ We are persuaded that "gaming" is not a concern.

14. We conclude, therefore, that petitioners have established good cause to support a waiver of our rules, and that the waiver will serve the public interest. The Commission's concerns over cost shifting and gaming of the system are not at issue here. The size of ATEAC after acquisition of the Alaska exchanges will be far smaller than the LECs for which price cap regulation is mandatory.⁴⁰ The circumstances of Petitioners' request are substantially similar to those involved in our decision granting the *Maine Waiver*, and to our decisions in other cases involving sales of exchanges by price cap carriers to small rate of return carriers.⁴¹

IV. ORDERING CLAUSES

15. Accordingly, IT IS ORDERED, pursuant to sections 4(i) and 201 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 201, and sections 1.3, 0.91, and 0.291 of the Commission's rules, 47 C.F.R. §§ 1.3, 0.91, and 0.291, that ATEAC, Inc.'s, Alaska Telephone Company's, Arctic Slope Telephone Association Cooperative, Inc.'s, Interior Telephone Company, Inc.'s, Mukluk Telephone Company, Inc.'s, and United-KUC, Inc.'s request for waiver of sections 61.41(c) and (d) of the Commission's rules, 47 C.F.R. §§ 61.41(c) and (d), IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Deputy Chief,
Common Carrier Bureau

³⁹ *Id.*

⁴⁰ In the *LEC Price Cap Order*, the Commission decided that small telephone companies would not be required to operate under a regulatory regime that was designed largely on the basis of the historical performance of the largest LECs. The Commission therefore limited the mandatory application of price cap regulation to the regional Bell Operating Companies and GTE. *LEC Price Cap Order*, 5 FCC Rcd at 6818-19.

⁴¹ See, e.g., *In the Matter of Minburn Communications, Inc.*, 14 FCC Rcd 14,184 (1999) (*Minburn*).