

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

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| In the Matter of |) | |
| |) | |
| Request for Waiver and Review of Decisions of the |) | CC Docket No. 02-6 |
| Universal Service Administrator by |) | |
| |) | |
| San Antonio Positive Solutions, Inc. |) | File No. SLD Form 471 No. 367995 |
| DBA Positive Solutions Charter School |) | FRN 1002895 |
| |) | |
| Schools and Libraries Universal Service |) | |
| Support Mechanism |) | |

Second Petition for Reconsideration

San Antonio Positive Solutions, Inc., doing business as Positive Solutions Charter School (“Positive Solutions” or “School”), through its undersigned counsel hereby files this Second Petition for Reconsideration (“Second Petition”) requesting that the Wireline Competition Bureau (“Bureau”) reconsider its denial, as set forth in the Bureau’s Public Notice, DA 19-942 (released September 30, 2019) (“September Notice”), of the School’s Petition for Reconsideration filed on August 23, 2019 (“First Petition”). This Second Petition is filed pursuant to Section 1.106 of Title 47 of the Code of Federal Regulations (“47 CFR”).

I. Introduction.

In this Second Petition, the School contends that its First Petition was timely filed in accordance with the Bureau’s written instruction, as set forth in the Bureau’s transmittal Memo dated April 30, 2019 (“April Memo”). In this regard, the School argues that any untimely filing of its First Petition was attributable to the specific written instruction provided by the Bureau in its April Memo, upon which the School actually and reasonably relied and acted upon in preparing and filing its First Petition.

II. Background.

A. Notice of Denial of Request for Waiver and Review.

In response to the School's Request for Waiver and Review filed on March 20, 2019, the Bureau issued its April Memo transmitting to the School the Public Notice, DA 19-326 (released April 30, 2019) ("April Notice"), wherein the Bureau informed the School of the Bureau's decision to deny its Request for Waiver and Review. Importantly, in the April Memo, the Bureau instructed:

If the Bureau has dismissed or denied your appeal and you would like to seek reconsideration of that decision, the deadline to file a petition for reconsideration or application for review by the full Commission is 116 days from the release date.

B. Reliance on Instruction.

As has been the School's experience with other regulatory agencies, the School has received similar written instructions from local, state and federal regulatory authorities relating to various ordinary and extraordinary filings. In each of these instances, the School was not provided an instruction that did not conform to applicable legal requirements. As the Bureau routinely addresses matters pertaining to the appeal of decisions by the Universal Service Administrative Company, the School presumed, erroneously, that its written instruction had the full force and effect of law. Otherwise, why provide a seemingly conflicting directive?¹ Consequently, the School did not have reason to doubt or take issue with the Bureau's instruction to file a petition for reconsideration within 116 days from the release date of the April Notice. As it has been

¹ We observe here that the Bureau provided, again, a similar instruction as before in its transmittal Memo dated September 30, 2019: "If the Bureau has dismissed or denied your appeal and you would like to seek reconsideration of that decision, the deadline to file a petition for reconsideration or application for review by the full Commission is 830 days from the release date." If this written instruction does not conform to applicable Commission rule and does not convey any meaningful information to the School upon which it may rely and act, why is it provided?

customary practice with and legally required by other oversight bodies, the School acted upon the Bureau's written instruction and filed its First Petition on August 23, 2019.²

C. Basis for Denying First Petition.

In arriving at its decision relating to the First Petition, the Bureau relied upon the precedent established in *Petitions for Reconsideration by Rockwood School District and Yakutat School District; Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, 26 FCC Red 13004, 13004, and other similar cases whereby the Federal Communications Commission has enforced its rules relating to the date by when a petition for reconsideration must be filed. *See* 47 CFR §§ 1.106(f), 1.115(d). Thus, in accordance with its established practice, the Bureau dismissed as untimely the School's First Petition.

III. Denial of First Petition Erroneous.

In arriving at its decision relating to the First Petition, the Bureau did not consider its written instruction to the School. Importantly, in its April Memo, the Bureau provided the School a written instruction notifying it of an incorrect timeline by when a petition for reconsideration must be filed. Consistent with its prior experience dealing with regulatory agencies, the School relied and acted reasonably upon the plain language of the Bureau's written instruction to file its First Petition within 116 days of the release date of the April Notice. Because the Bureau provided incorrect formal notice to the School of its appeal rights, the School has good cause for its untimely First Petition. It has been found that relief is appropriate where a delay was "caused by erroneous instructions from the administrative agency charged with enforcement of the relevant statute." *Huss v. City of Huntington Beach*, 317 F.Supp.2d 1151, 1162 (C.D.Cal. 2000); *Bowden v.*

² Given the April Notice was dated April 30, 2019, the 116th day by when the School was instructed to file its First Petition was August 24, 2019.

United States, 106 F.3d 433, 438 (D.C. Cir. 1997)(“Like other courts, we have excused parties who were misled about the running of a limitations period...by a government official’s advice upon which they reasonably relied[.]”); *see also Lawrence v. Cooper Communities, Inc.*, 132 F.3d 447, 451–52 (8th Cir. 1998) (finding excusable the operation under improper agency instructions and interpretations of filing procedures). Moreover, the failure to provide correct notice of appeal rights has been found to constitute good cause for a late filing. *Toyama v. Merit Systems Protection Board*, 481 F.3d 1361, 1366-67 (Fed. Cir. 2007) (finding good cause for late filing as the agency notified the petitioner of incorrect appeal rights and that petitioner acted reasonably upon the plain language of the agency’s notice); *Shiflett v. U.S. Postal Serv.*, 839 F.2d 669, 674 (Fed. Cir. 1988). Had the Bureau provided a written instruction that conformed to the pertinent rule, 47 CFR § 1.106(f), the School would have filed its First Petition timely. *Shiflett*, 839 F.2d at 673 (“[I]f the respondent had furnished petitioner with this information and these instructions and materials, the petitioner would have, in all likelihood, filed a timely appeal with the Board.). Instead, the Bureau facilitated the School’s failure to timely file its First Petition. *Id.* (“By wrongfully failing to give petitioner a notice of her appeal rights, the respondent effectively contributed to petitioner’s failure to file a timely appeal, or, perhaps, even caused such untimely filing altogether.”). Thus, the School asserts that the Bureau erred in rendering its decision to deny the First Petition.

IV. Request for Relief.

Positive Solutions respectfully requests that, for the above reasons, the Bureau reconsider its denial of the School’s First Petition relating to its Request for Waiver and Review and that it afford the School the due process to which it is entitled and grant it a fair hearing of the facts and law applicable at the time that the funding commitment at issue was utilized.

Respectfully Submitted,

Schulman, Lopez, Hoffer & Adelstein, LLP

A handwritten signature in black ink, appearing to read 'Robert A. Schulman', is written over a horizontal line.

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