

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Cascade Utilities, Inc. (SAC 532371))	WC Docket No. 10-90
Trans-Cascades Telephone Company (SAC 532378))	
Rio Virgin Telephone Company (SAC 552356))	
)	
Petition for Waiver and Rescission of High-Cost Support)	
Reduction Penalties Imposed by the Universal Service)	
Administrative Company pursuant to Section 54.316(c)(1))	
of the Commission's Rules)	

PETITION FOR WAIVER AND RESCISSION OF PENALTIES

**CASCADE UTILITIES, INC.
TRANS-CASCADES TELEPHONE COMPANY
RIO VIRGIN TELEPHONE COMPANY**

Gerard J. Duffy
Blooston, Mordkofsky, Dickens, Duffy & Prendergast, LLP
2120 L Street NW (Suite 300)
Washington, DC 20037
Phone: (202) 659-0830
Facsimile: (202) 828-5568
Email: gid@bloostonlaw.com

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Summary

Cascade Utilities, Inc.; Trans-Cascades Telephone Company; and Rio Virgin Telephone Company (“the Cascade companies”) respectfully request that the Commission waive Section 54.316(c)(1) or any other applicable section of the Rules, and order the Universal Service Administrative Company (“USAC”) to rescind the \$88,460.36 in support reduction penalties that it has imposed upon them for their alleged “failure” to submit an annual Section 54.316(a) certification by March 1, 2018. First, Section 54.316(a) of the Rules makes no mention of any certification requirement with respect to HUBB filings, and does not clearly or expressly require that the recurring HUBB filings made during the course of each year be accompanied by an annual certification submitted on or before March 1 of the following year. Moreover, even if an annual certification were, for any reason, deemed to be required for recurring HUBB filings, the subject \$88,460.36 support reduction penalty should be waived and rescinded with respect to the March 1, 2018 deadline because: (1) this was the very first time that the Cascade companies and other Alternative Connect America Cost Model (“ACAM”) recipients were required to make the complicated and difficult HUBB filings; (2) the Cascade companies had filed all of their 2017 location data in the HUBB prior to March 1, 2018, and hence were in at least material and substantial compliance; (3) the Cascade companies submitted the HUBB certifications at issue within five working days and hence did not delay or impair USAC’s administration of the HUBB data; (4) the loss of \$88,460.36 in ACAM support deprives the Cascade companies of financial resources that they urgently need for broadband deployment and upgrades; and (5) \$88,460.36 is an onerous and excessive penalty for a minor oversight that was essentially a clerical error

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PETITION FOR WAIVER AND RESCISSION OF PENALTIES

Cascade Utilities, Inc. ("Cascade"), Trans-Cascades Telephone Company ("Trans-Cascades") and Rio Virgin Telephone Company ("Rio Virgin") (hereinafter, collectively referred to as "the Cascade companies"), by their attorney and pursuant to Section 1.3 of the Commission's Rules ("the Rules"), hereby request waiver and rescission of the total \$88,460.36 in support reduction penalties calculated pursuant to Section 54.316(c)(1) of the Rules that were imposed upon them by the Universal Service Administrative Company ("USAC") for an alleged rule violation relating to their asserted "failure" to submit a certification by March 1, 2018, of the locations that they timely reported to the High Cost Universal Broadband ("HUBB") portal for calendar year 2017 pursuant to Sections 54.316(a)(1) and (2) of the Rules.

The subject late certification penalties calculated pursuant to Section 54.316(c)(1) of the Rules should be waived and rescinded because Section 54.316(a) of the Rules makes no mention whatsoever of any certification requirement with respect to HUBB filings, and does not clearly or explicitly require that the recurring HUBB filings made during the course of each year be accompanied by a certification submitted on or before March 1 of the following year. Section

54.316(c)(1) of the Rules does not authorize USAC to reduce support for an act or omission that does not violate the clear and specific provisions of Section 54.316(a). Moreover, even if an annual certification were, for any reason, deemed to be required for recurring HUBB filings during a year, the subject support reduction penalty should be waived and rescinded with respect to the March 1, 2018 deadline because: (1) 2017 was the first year that the Cascade companies and other Alternative Connect America Cost Model (“ACAM”) recipients were required to make the complicated and difficult HUBB filings so that minor first-time mistakes and oversights should be allowed to be corrected without penalty; (2) the Cascade companies had filed all of their 2017 location data in the HUBB prior to March 1, 2018, and hence were in at least material and substantial compliance with the Section 54.316(a) HUBB filing requirements; (3) the Cascade companies did not delay or impair USAC’s administration of the 2017 HUBB data because they submitted their subject certifications on March 8, 2018, immediately after they were told to do so and mere days after the end of a weekend-shortened “grace period; (4) the loss of \$88,460.36 in ACAM support will deprive the Cascade companies of financial resources that they urgently need for broadband deployment and upgrades, and consequently will penalize their rural customers more than anyone else; and (5) \$88,460.36 is an onerous and excessive penalty for a minor oversight that was essentially a clerical error.

I

Relevant Factual Background

Cascade is an Oregon incumbent local exchange carrier that serves the communities of Ash Valley, Corbett, Elkton, Estacada, Haines, Medical Springs and Scottsburg in rural Oregon (approximately 5,980 access lines). Trans-Cascades, an affiliate of Cascade having substantial common ownership, is also an Oregon incumbent local exchange carrier that serves the community

of Antelope in rural Oregon (approximately 170 access lines). As of January 24, 2017, Cascade and Trans-Cascades d/b/a Reliance Connects (under the name of holding company Day Management Corporation) were authorized to receive ACAM support beginning in 2017.

Rio Virgin, also a wholly-owned subsidiary of Cascade, is a Nevada incumbent local exchange carrier that is headquartered in Mesquite, Nevada (approximately 5,740 access lines). As of December 20, 2016, Rio Virgin was deemed to have accepted “glide path” ACAM support beginning in 2017.

On or before Wednesday, February 28, 2018, the Cascade companies uploaded and submitted the 2017 HUBB data for the Oregon study areas of Cascade and Trans-Cascades, and for the Nevada study area of Rio Virgin. On Thursday, March 8, 2018, the Cascade companies received a phone call from the National Exchange Carrier Association (“NECA”), their settlement administrator, indicating that their HUBB data had not been certified. Without checking any relevant Commission regulations or public notices or any USAC announcements, authorized personnel of the Cascade companies immediately went into the HUBB and submitted the certifications on the same March 8, 2018 date.

On March 1, 2019, the Cascade companies received a call from NECA indicating that their Oregon and Nevada companies were being penalized for having certified their 2017 HUBB data late on March 8, 2018. The amounts of reduced support appear to be \$73,103.77 for Cascade and Trans-Cascades in Oregon, and \$15,356.59 for Rio Virgin in Nevada.

On May 9, 2019, the Cascade companies sent a letter to USAC requesting substantial reductions of the assessed penalties. On or about May 31, 2019, USAC personnel notified the Cascade companies that an FCC waiver is required for any adjustments to penalties.

II

The Commission's Section 54.316(a) HUBB Filing Regulation Does Not Require Certification

It is a long and well-established principle of administrative law that an agency is bound by its own rules and must follow them. See, for example, *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954); *Service v. Dulles*, 354 U.S. 363 (1957); and *Vitarelli v. Seaton*, 359 U.S. 535 (1959).

Section 54.316(c) of the Commission's Rules, entitled "*Filing deadlines*," states:

In order for a recipient of high-cost support to continue to receive support for the following calendar year, or retain its eligible telecommunications carrier designations, it must submit the annual reporting information as set forth below.

- (1) Price cap carriers that accepted Phase II model support and rate-of-return carriers *must submit the annual reporting information required by March 1 as described in paragraphs (a) and (b) of this section* [emphasis added]. Eligible telecommunications carriers that file their reports after the March 1 deadline shall receive a reduction in support pursuant to the following schedule: [which includes support reduction penalties for filing: (i) after March 1 but by March 8; (ii) on or after March 9; and (iii) a one-time grace period for filing after March 1 but before March 5].

The Section 54.316(a) paragraph explicitly referenced in Section 54.316(c)(1) is entitled "*Broadband deployment reporting*," and contains the Commission's regulations governing the reporting of broadband location information in USAC's HUBB portal. It states, in relevant part:

Broadband deployment reporting. Rate of Return ETCs, ETCs that elect to receive Connect America Phase II model-based support, and ETCs awarded support to serve fixed locations through a competitive bidding process shall have the following broadband reporting obligations:

- (1) Recipients of high-cost support with defined broadband deployment obligations pursuant to §54.308(a), 54.308(c), or §54.310(c) shall provide to the Administrator on a recurring basis information regarding the locations to which the eligible telecommunications carrier is offering broadband service in satisfaction of its public interest obligations, as defined in either §54.308 or §54.309.

- (2) Recipients subject to the requirements of §54.308(a)(1) shall report the number of locations for each state and locational information, including geocodes, separately indicating whether they are offering service providing speeds of at least 4 Mbps downstream/1 Mbps upstream, 10 Mbps downstream/1 Mbps upstream, and 25 Mbps downstream/3 Mbps upstream.

Section 54.308(a), and specifically Section 54.308(a)(1), are the applicable Commission regulations that set forth the defined broadband public interest obligations of ACAM support recipients such as the Cascade companies.

The relevant point here is that Sections 316(a)(1) and 316(a)(2), which specify the HUBB reporting obligations of the Cascade companies and other recipients of ACAM support pursuant to §54.308(a)(1), make no reference whatsoever to any certification requirement. In fact, nowhere in the Section 54.316(a) HUBB reporting requirements is there any reference to any annual or other certification requirement.

In stark contrast, Section 54.316(b), which is entitled “*Broadband deployment certifications*,” specifically and repeatedly requires ACAM and other high-cost support recipients to certify their compliance with applicable broadband deployment milestones as of various applicable March 1 annual deadlines.^{*} Under the legal principle of *expressio unius est exclusio alterius*, a reasonable argument can be made that the absence of any mention of certification requirements in Section 54.316(a), together with the repeated and explicit requirements for certifications in Section 54.316(b), means that there are no clear and explicit Commission requirements in Section 54.316(a) for certification of HUBB submissions and that the Commission would have included express requirements for annual or other certifications in Section 54.316(a) if it had intended to require such certifications.

The Wireline Competition Bureau’s initial HUBB reporting Public Notice (*Wireline Competition Bureau Provides Guidance to Carriers Receiving Connect America Fund Support*

Regarding Their Broadband Location Reporting Obligations), WC Docket No. 10-90, DA 16-1363, released December 8, 2016, appears to be consistent with this interpretation. For example, it states on its second page that “Rate-of-return carriers, recipients of Phase II model-based support and ACS must file broadband location information in the HUBB by March 1, 2017, [footnote omitted] and deployment milestone certifications in later years [footnote omitted].”

A later Wireline Competition Bureau Public Notice (*Wireline Competition Bureau Provides Further Guidance to Recipients of Connect America Fund Broadband Loop Support on Reporting and Deployment Obligations*), WC Docket No. 10-90, DA 18-207, released March 1, 2018, is somewhat more ambiguous. It states on its second page:

Ongoing HUBB Reporting Obligations. Carriers’ annual reporting and deployment obligations are separate and independent obligations [footnote omitted]. We clarify that our rules require carriers with HUBB filing obligations to submit locations and make related certifications on an annual basis until the end of their support term, regardless of whether they have already met their final deployment obligation [footnote omitted]. We note that a carrier can certify in the HUBB that it did not deploy any locations in the prior reporting year.

Even here, it is not clear whether the “related certifications” refer to the HUBB location data or to the carrier’s broadband build-out obligations and milestones. In any event, the Public Notice was not released until the very day of the subject March 1, 2018 deadline, and was directed specifically to Connect America Fund – Broadband Loop Support (“CAF-BLS”) recipients. There is no reason that the Cascade companies or any other ACAM recipients that had completed their 2017 location filings in the HUBB on or before March 1, 2018 would have looked at the CAF-BLS public notice, or noted or questioned its “related certifications” language.

Regardless of how the Wireline Competition Bureau’s 2016 and 2018 public notices can be interpreted, the Commission’s published regulations control. The Cascade companies do not challenge the Commission’s right or authority to require annual or other periodic certifications of

HUBB location data or submissions. They merely point out that there was no such certification requirement in Section 54.316(a) of the Commission's Rules as of the relevant March 1, 2018 deadline, and there remains none as of the present date. Because an administrative agency must follow its own rules, it is neither lawful nor equitable for the Commission's USAC agent to penalize the Cascade companies by reducing their ACAM support for failure to make a "timely certification" that was not required by the applicable Section 54.316(a) of the Rules. Because the Cascade companies did in fact comply fully with the explicit requirements of Section 54.316(a) by reporting their deployed 2017 broadband location information to the HUBB on or before March 1, 2018, they have violated no Commission regulation. Consequently, USAC's reduction of their ACAM support by \$88,460.36 should be waived or rescinded and the withheld support distributed to the Cascade companies.

The Cascade companies further note that they fully understand the differences which the Commission has emphasized between its Section 54.316(a) HUBB filing requirements and its Section 54.316(b) build-out milestone certifications. Because high-cost support recipients have accepted specific build-out obligations as a condition of receiving such support, it makes perfect sense to require ETC management to conduct an annual review of the ETC's progress in offering new or upgraded broadband service to locations within its service area, and to certify whether such broadband deployment has met the ETC's applicable milestone. Such annual Section 54.316(b) certifications on specified dates not only measure progress and problems with respect to ultimate full compliance with the ETC's build-out obligations, but also help to ensure that "locations" are properly defined and accurately counted. In contrast, it is not clear what purpose an annual Section 54.316(a) certification would serve or what value it would have. For example, if geocoded location data is provided by various contractors or outside plant personnel at the differing times that

construction is completed at or near specific locations during the year, and if service level classifications and HUBB submissions are made by office staff or consultants at later dates, what aspects of HUBB data would be required to be certified annually and who would be qualified to make such annual certifications? The numerous errors and inaccuracies that apparently have been found in early HUBB filings would seem to indicate that there is a problem obtaining precise location data, and that many people are going to be unable or unwilling to certify to the complete accuracy of certain location data compiled by others. The Cascade companies suggest that one alternative for addressing this problem without needing to amend Section 54.316(a) of the Rules would be to program the HUBB portal to require each and every HUBB filing session to be “certified” by the person entering the data before it can be submitted and accepted. A number of online Commission filing systems require the individual making a submission to push a button indicating his or her recognition that he or she is making an official filing with the Commission, that the submission is believed to be accurate and is made in good faith, and that any deliberate false statements are subject to criminal penalties. The Cascade companies submit that a per-filing certification of similar nature would not require amendment of Section 54.316(a), would help to ensure that recurring Section 54.316(a) HUBB filings were prepared as carefully and accurately as possible, and would avoid the weaknesses and pitfalls of an annual Section 54.316(a) certification.

In sum, the Cascade companies have merely offered suggestions as to how the Commission could improve the accuracy of recurring Section 54.316(a) HUBB filings without amending its Rules to require specific annual certifications. However, their predominant point remains that there is no clear and explicit certification requirement in Section 54.316(a) at the present time, much less as of March 1, 2018, and that USAC has no authority or reason to impose a Section

54.316(c)(1) support reduction penalty of \$88,460.36 (or any other amount) upon the Cascade companies in the absence of such a Section 54.316(a) certification requirement.

III

If An Annual Section 54.316(a) Certification Is Deemed to Have Been Required, A Waiver of the Initial March 1, 2018 Certification Is Warranted

Section 1.3 of the Commission's Rules permits it waive its rules for good cause shown. 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). In addition, the Commission may take into account considerations of hardship, equity, and the effective implementation of public policy on an individual basis. *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

Assuming, *arguendo*, that the Cascade companies had been subject to a requirement to certify the 2017 location data that they had submitted in the HUBB by March 1, 2018, that requirement should be waived with respect to the initial March 1, 2018 filing for any or all of several reasons.

Initial Filing on New and Unfamiliar Portal. First, the Cascade companies became ACAM recipients in 2017, and hence their broadband location data for 2017 was the first data that they were required to compile and file in the HUBB. The HUBB filing process was relatively new during 2017 and early 2018, and was very complicated and daunting for many high-cost support recipients, particularly small carriers like the Cascade companies that were dealing with it for the first time. The primary focus of the Cascade companies was upon obtaining accurate geocoded and service tier information for their new broadband-capable locations, and upon compiling that information in appropriate files and uploading them successfully into the HUBB. This was a

substantial undertaking, and it is the information and belief of the Cascade companies that there were significant problems and glitches encountered by many carriers while preparing and making these filings, and that USAC personnel and industry consultants spent many hours answering HUBB questions and providing troubleshooting assistance. It is also the information and belief of the Cascade companies that the 2017 broadband location data filed in the HUBB contained a significant number of errors, and that the process of correcting these errors may still not be complete. All in all, the Commission should recognize that the Cascade companies and other small ACAM recipients were using the new and complicated HUBB portal for the first time when filing their 2017 location data, and that mistakes and oversights were certain to occur in that difficult and unfamiliar environment. The Cascade companies should not be penalized by the loss of \$88,460.36 in critically needed ACAM support for any mistake or omission that occurred under such conditions.

Material and Substantial Compliance. Second, the Cascade companies submitted all of their 2017 location data into the HUBB in timely fashion by February 28, 2018. Even if an annual Section 54.316(a) certification had been required, the compilation, organization and uploading of their geocoded 2017 location data would have constituted the major portion of their filing effort. And when the absence of the accompanying certifications was brought to their attention on March 8, 2018, the Cascade companies accessed the HUBB immediately and provided such certifications the very same day. They did not review the Commission's HUBB filing regulations or public notices; rather, they accessed the HUBB, ascertained that the 2017 location data that they had recently submitted was complete, and submitted their certifications.

No Adverse Impact on USAC Administration. The Cascade companies note that the Thursday, March 1, 2018 to Monday, March 5, 2018 "grace period" (pursuant to Section

54.316(c)(1)(iii) of the Rules) that appears to have been applied by USAC was foreshortened to two (2) working days by the intervening weekend. The certification matter was discovered and promptly resolved on March 8, 2018, the fifth working day after the March 1, 2018 deadline.

USAC had all of the 2017 location data for the Cascade companies in the HUBB on or before February 28, 2018. It is not conceivable that USAC's operations were disrupted or delayed at all due to the brief delay in receiving HUBB certifications for the Cascade companies.

Adverse Impact on Broadband Deployment. The \$88,460.36 in ACAM support reductions withheld by USAC constitutes a substantial hardship for small carriers like the Cascade companies that urgently need all of their ACAM support to meet their broadband build-out obligations. The support reduction of \$15,356.59 for Rio Virgin is particularly debilitating because the company elected to take reduced ACAM support under the "glide path" in order to improve the predictability and stability of its high-cost support revenues. Its predictions and calculations did not contemplate the loss of \$15,356.59 that it had counted upon to help it deal with its reduced high-cost support revenue stream. Given that the purpose of HUBB reporting is to provide the Commission, the Congress and the industry with information regarding where broadband is deployed and where it still needs to be deployed, it does not appear reasonable to deprive carriers of substantial amounts of high-cost support that they need to deploy and upgrade broadband facilities and services as punishment for relatively small and harmless delays, mistakes or omissions. Such substantial penalties should be reserved for substantial cases of fraud, abuse and waste. Otherwise, the only entities really penalized are the rural households where broadband deployment is delayed or cancelled due to insufficient funding.

Excessive and Onerous Penalty for a Clerical Error. Penalties and forfeitures are not favored by the law, and should be enforced only when they are within both the spirit and letter of

the law. *United States v. One Ford Coach*, 307 U.S. 219, 226 (1939). In determining whether penalties and fines are excessive, courts have examined whether they are “so disproportionate to the offense as to shock public sentiment” or “contrary to the judgment of reasonable people concerning what is proper under the circumstances.” *Hindt v. State*, 421 A.2d 1325, 1333 (Del. 1980).

The imposition of a penalty of \$88,460.36 upon the Cascade companies for what was, at the very most, an inadvertent clerical oversight or omission is wholly disproportionate to the alleged “offense” and would be deemed “excessive” in the judgment of virtually all reasonable people. In this respect, it should be noted that Section 1.80 of the Commission’s Rules sets far lower base amounts for Section 503 forfeitures in comparable situations. For example, the Section 1.80 base forfeiture for “Failure file required forms or information” is \$3,000; for “Failure to respond to Commission communications” is \$4,000; for “Failure to make required measurements or conduct required monitoring” is \$2,000; and for “Failure to maintain required records” is \$1,000. Reasonable forfeitures such as these are sufficient to encourage timely compliance. In contrast, a forfeiture of \$88,460.36 or so is wholly excessive for a late filing of a few days, and (as noted above) serves primarily to punish innocent rural customers who are likely to have the deployment and quality of their broadband service impaired.

In sum, for any and all of the foregoing reasons and assuming, *arguendo*, that annual Section 54.316(a) certifications of 2017 HUBB location data were actually required under the wording of that rule, the Commission should waive the applicable requirement and order USAC to rescind its reduction of the ACAM support of the Cascade companies.

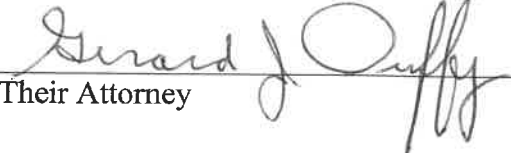
IV

Conclusion

The Commission is respectfully requested to waive Section 54.316(c)(1) or any other applicable section of the Rules, and to order USAC to rescind the \$88,460.36 in support reduction penalties that it has imposed upon the Cascade companies for their alleged “failure” to submit an annual Section 54.316(a) certification by March 1, 2018. First and foremost, Section 54.316(a) of the Rules makes no mention of any certification requirement with respect to HUBB filings, and does not clearly or expressly require that the recurring HUBB filings made during the course of each year be accompanied by an annual certification submitted on or before March 1 of the following year. Moreover, even if an annual certification were, for any reason, deemed to be required for recurring HUBB filings, the subject support reduction penalty should be waived and rescinded with respect to the March 1, 2018 deadline because: (1) this was the very first time that the Cascade companies and other ACAM recipients were required to make the complicated and difficult HUBB filings; (2) the Cascade companies had filed all of their 2017 location data in the HUBB prior to March 1, 2018, and hence were in at least material and substantial compliance; (3) the Cascade companies submitted the HUBB certifications at issue within five working days and hence did not delay or impair USAC’s administration of the HUBB data; (4) the loss of \$88,460.36 in ACAM support deprives the Cascade companies of financial resources that they urgently need

for broadband deployment and upgrades; and (5) \$88,460.36 is an onerous and excessive penalty for a minor oversight that was essentially a clerical error.

Respectfully submitted,
CASCADE UTILITIES, INC.
TRANS-CASCADES TELEPHONE COMPANY
RIO VIRGIN TELEPHONE COMPANY

By 
Their Attorney

Blooston, Mordkofsky, Dickens, Duffy & Prendergast, LLP
2120 L Street NW (Suite 300)
Washington, DC 20037
Phone: (202) 659-0830
Facsimile: (202) 828-5568
Email: gjd@bloostonlaw.com

Dated: June 18, 2019

DECLARATION UNDER PENALTY OF PERJURY

I, Brooke C. Wheeler, hereby declare, under penalty of perjury, that:

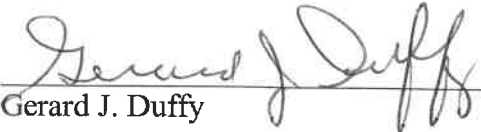
1. I am the Chief Financial Officer of Cascade Utilities, Inc. and its affiliates ("the Cascade companies").
2. I have reviewed and am familiar with the "Petition For Waiver And Rescission Of Penalties," dated June 18, 2019, that the Cascade companies are filing with the Federal Communications Commission. The factual representations made in that "Petition For Waiver And Rescission Of Penalties" are true and correct to the best of my knowledge, information and belief.


Brooke C. Wheeler

6/17/19
Date

CERTIFICATE OF SERVICE

I, Gerard J. Duffy, hereby certify that an exact copy of the foregoing PETITION FOR WAIVER OF RESCISSION AND PENALTIES was sent by electronic mail on Tuesday, June 18, 2019 to the Universal Service Administrative Company at HCAppeals@usac.org (with a duplicate copy to HCFilings@usac.org).


Gerard J. Duffy