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

JAN 29 2003

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of the Pay Telephone) Docket No. 96-128
Reclassification and Compensation Provisions of)
the Telecommunications Act 1996)

ERRATUM

On January 28, 2003, the American Public Communications Council ("APCC"), by its attorneys, filed a Motion to Dismiss the January 16, 2003 Petition for Reconsideration or in the Alternative, Rescission filed by WorldCom, Inc.

The incorrect date of "August 29, 2002" was inadvertent set forth on the signature page of APCC's Motion, in place of the correct date of "January 28, 2003." By this erratum, APCC hereby amends its Motion to indicate that the correct filing date of the Motion is January 28, 2003

Corrected copies of the complete filing are attached.

January 29, 2003

Respectfully submitted,

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Certificate of Service

I hereby certify that on January 29, 2003, copies of the foregoing Erratum to the Motion Of The American Public Communications Council, Inc. To Dismiss Worldcom, Inc.'s Petition For Reconsideration Or In The Alternative, For Rescission was sent by first-class mail, postage prepaid to the following:

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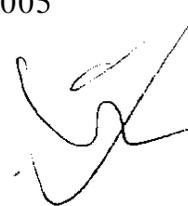
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CORRECTED COPY

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MOTION OF THE AMERICAN PUBLIC COMMUNICATIONS COUNCIL,
INC. TO DISMISS WORLDCOM, INC.'S PETITION FOR
RECONSIDERATION OR IN THE ALTERNATIVE, **FOR RESCISSION**

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MOTION OF THE AMERICAN PUBLIC COMMUNICATIONS
COUNCIL, INC. TO DISMISS WORLDCOM, INC.'S PETITION FOR
RECONSIDERATION OR IN THE ALTERNATIVE, FOR RESCISSION

The American Public Communications Council, Inc. (“APCC”) hereby moves the Federal Communications (“Commission”) to dismiss the late-filed Petition for Reconsideration or in the Alternative, Rescission filed by WorldCom, Inc. (“WorldCom”) on January 16, 2002 (“Petition”). WorldCom seeks reconsideration of the Fifth Order on Reconsideration and Order on Remand (“*Fifth Order*”) in this proceeding.¹ As notice of the *Fifth Order* was published the *Federal Register* on December 3, 2002, see 67 Fed. Reg. 71861, petitions for reconsideration were due on or before January 2, 2003. See 47 U.S.C. § 405(a). Because WorldCom’s petition was filed fourteen days after the statutory thirty-day filing period had expired, the petition must be dismissed. In support of its motion, APCC shows the following.

I. WOEUDCOM’S PETITION FOR RECONSIDERATION IS PROCEDURALLY DEFECTIVE

A. The Statutory Filing Period for Petitions for Reconsideration May Not Be Waived

Section 405(a) of the Communications Act of 1934, as amended (“the Act”), provides in relevant part that “. . . [a] petition for reconsideration must be filed within

¹ *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Fifth Order on Reconsideration and Order on Remand, CC Docket No. 96-128, FCC 02-292 (rel. October 23, 2002) (“*Fifth Order*”).

thirty days from the date upon which public notice is given of the order, decision, report, or action complained of.” 47 U.S.C. § 405(a). Section 405(a) does not provide for any extension or waiver of this thirty-day filing deadline. Therefore, WorldCom’s premise that the filing deadline can be waived or extended is incorrect. Although the Commission has discretion to waive its own rules, the commission has repeatedly ruled that it cannot waive statutory requirements, including the statutory deadline for filing petitions for reconsideration. *See, e.g., Request by Horace P. Rowley, III, New York, N.Y. to Reverse Staff Action Dismissing a Petition for Rehearing*, 42 FCC 2d 481 (1973); *Sidney Gelb, Glen Echo, MD v. Chesapeake & Potomac Telephone Company of the District of Columbia et al.*, 34 FCC 2d 869 (1972); *Complaint by Sidney Willens and Russell Millin Concerning Fairness Doctrine and Personal Attack Rule re Metromedia, Inc.*, 38 FCC 2d 443 (1972); *Amendment of Section 73.202(b), Table of Assignments, FM Broadcast Stations*, 78 FCC 2d 1208, 1210 (1980); *Application of Richardson Independent School District*, 5 FCC Rcd 3135, 3136 (1990).

B. Untimely Petitions for Reconsideration May Not Be Entertained Absent Highly Unusual Circumstances

Cases decided by the U.S. Court of Appeals for the D.C. Circuit confirm that Section 405(a) of the Act bars the filing of petitions for reconsideration after the thirty-day filing period has expired. Although the court has recognized a very limited exception to the bar on acceptance of untimely filed petitions in a case involving “highly unusual circumstances,” *Gardner v. FCC*, 530 F.2d 1086 (D.C. Cir. 1976) (“*Gardner*”), the court has construed that exception very narrowly. In *Gardner*, the court held that Gardner’s petition for reconsideration should have been accepted because of the highly unusual circumstances presented — namely, that the affected party resided out of state and was unrepresented by counsel, that the Commission failed to provide notice of its decision to

Gardner, as required by the Commission's Rules, and that Gardner, upon learning of the Commission's action on his own, immediately filed the requisite petition. *Id.* at 1090-1092.

In subsequent cases, the exception **has** been limited to situations involving "extremely unusual circumstances" such as those present in *Gardner*. See, e.g., *Virgin Islands Telephone Company v. FCC*, 989 F.2d 1231 (D.C. Cir. 1993); *Reuters Limited v. FCC*, 781 F.2d 946 (D.C. Cir. 1986).

WorldCom offers no explanation of why it needed an extension of time to file its petition. Moreover, WorldCom admits that it "could have otherwise filed [its] petition[for reconsideration] within the otherwise applicable 30 day period." *January 17 Ex Parte Letter*, ¶ 1. Given that WorldCom, by its own admission, could have timely filed its petition for reconsideration absent an extension of time, there are clearly no "highly unusual circumstances" that prevented a timely filing. Because WorldCom satisfies neither the *Gardner* test nor any interpretation thereof, late acceptance of its Petition in the face of an explicit, non-waivable statutory deadline is clearly not warranted

C. The Cases WorldCom Cites Do Not Support Acceptance of Its Petition

To support its claim that Section 405(a) does not bar the Commission from considering its late-filed Petition,² WorldCom relies on the holdings in *Meredith Corp. v. FCC*, 809 F.2d 863 (D.C. Cir. 1987) ("*Meredith*") and *Greater Boston Television Corp. v. FCC*, 463 F.2d 268 (D.C. Cir. 1972) ("*Greater Boston*"). WorldCom's reliance on these cases is entirely misplaced

In *Meredith*, the petitioner had timely filed a petition for reconsideration prior to the expiration of the thirty-day filing period, but sought to file a *supplemental pleading* two

² Letter from Larry Fenster, Senior Economist, WorldCom, Inc. to Jeffrey Carlisle, Federal Communications Commission (January 17, 2002) ("*January 17 Ex Parte Letter*")

months after the petition for reconsideration deadline had passed. *Meredith*, 809 F.2d at 869. Section 405(a) of the Act expressly states that a petition for reconsideration must be filed within the thirty-day filing window, but is silent as to the filing of supplements to timely-filed petitions for reconsideration. Therefore, unlike the situation here, there was no statutory impediment to acceptance of *Meredith*'s supplemental pleading. Accordingly, the court's holding in *Meredith* **does** not support Commission acceptance of WorldCom's late-filed petition for reconsideration.

The situation in *Greater Boston* also differs from WorldCom's situation. In *Greater Boston*, the issue before the court was not whether a petition for reconsideration was timely filed, but rather whether the Commission could alter its disposition of a petition for reconsideration in light **of** new evidence or material changes that, if known at the time the petition for reconsideration was being considered, would have affected the Commission's disposition of the petition. *Greater Boston*, 463 F.2d at 282-83. The court held that that the Commission could modify its disposition of the petition for reconsideration based on new evidence **or** material changes. *Greater Boston*, 463 F.2d at 283 (citing *Enterprise Company v. FCC*, 231 F.2d 708, 712 (D.C. Cir. 1955) and *Albertson v. FCC*, 182 F.2d 397, 399-401 (D.C. Cir. 1950)). WorldCom not **only** failed to timely file its petition for reconsideration, but also has offered nothing in its late-filed petition that constitutes new evidence. Accordingly, *Greater Boston* offers no support for the acceptance of WorldCom's late-filed Petition.

II. THE GRACE PERIOD PROVIDED BY SECTION 1.46(B) CANNOT EXTEND THE STATUTORY DEADLINE

WorldCom claims that in any event, its petition for reconsideration was timely filed, because Section 1.46(b) of the Commission's Rules provides that if a timely filed motion under Section 1.46(b) of the Commission's Rules is denied, the filing that was the

subject of the motion need not be filed until two business days after Commission action on the motion. 47 C.F.R. § 1.46(b).

As discussed above, the Section 405(a) reconsideration filing deadline is statutory. Accordingly, the Commission has no power to waive or extend that deadline under Section 1.46(b). Therefore, the two-business-day grace period provided under Section 1.46(b) cannot extend the statutory deadline either.

III. **WORLDCOM HAS ALREADY REQUESTED AND RECEIVED RECONSIDERATION OF THE ISSUE RAISED IN ITS PETITION**

WorldCom's petition for reconsideration is untimely in any case, because the issue for which WorldCom seeks reconsideration was not decided in the order for which WorldCom seeks reconsideration. WorldCom contends that the Commission decided in the *Fifth Order* to overturn the per-payphone methodology established in the Commission's prior orders for the Intermediate Period (October 7, 1997 to April 20, 1999) and subsequent periods.³ In fact, it was the previous order in which the Commission modified the per-payphone rate methodology

Per-payphone compensation rates for the Intermediate Period were initially established in a 1998 Common Carrier Bureau Order for compensation applicable to payphones that do not transmit payphone-specific coding digits.⁴ In the Fourth Order on Reconsideration and Order on Remand ("*Fourth Order*"),⁵ the Commission modified the

Per-payphone compensation is paid for those payphones that were not paid per-call compensation by a carrier. 47 CFR § 64.130(d),(e). In general, carriers do not pay per-call compensation when they do not receive payphone identifying digits from the originating local exchange carrier ("LEC").

⁴ *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Memorandum Opinion and Order, 13 FCC Rcd 10893 (Com. Car. Bur. 1998) ("*1998 Waiver Order*").

⁵ *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Fourth Order on Reconsideration and Order on Remand, 17 FCC Rcd 2020 (2002).

methodology for the per-payphone rate. The Commission set a new overall per-payphone rate of \$33.89 per payphone per month for the Intermediate Period.⁶ The Commission also announced in the *Fourth Order* that it would determine the allocation of a portion of this “overall” rate to each carrier in a future order. In the *Fifth Order*, the Commission, as promised, allocated the per-payphone rate established in the *Fourth Order*. Thus, the modification of the per-payphone rate methodology which for WorldCom now seeks reconsideration was in fact announced in the *Fourth Order*, not the *Fifth Order*. WorldCom was clearly on notice that the Commission might modify the per-payphone rate in the *Fourth Order* because MCI had commented on a petition for reconsideration of that aspect of the *1998 Waiver Order*, filed by APCC and pending before the Commission prior to the issuance of the *Fourth Order*. Furthermore, as WorldCom is well aware, the Commission was obligated to consider modifying the per-payphone rate pursuant to the D.C. Circuit court’s remand in *MCI Telecommunications Corp. v. FCC*, 143 F.3d 606 (1998).

WorldCom now claims it had no adequate notice of the FCC’s *Fourth Order* ruling, and for that reason had not “sought reconsideration of this portion of the [*Fourth Order*].”⁷ In fact, *WorldCom did seek reconsideration of the FCC’s per-payphone methodology for the Intermediate Period*.⁸ The Commission denied WorldCom’s petition in the *Fifth*

⁶ *Id.*, ¶¶ 35-36.

⁷ Petition at 5.

⁸ *See* WorldCom, Inc. Petition for Clarification and Reconsideration (April 3, 2002) at 1-3 (“*April 3 Petition*”). Specifically, WorldCom contended that “the Commission abandoned [the] correct methodology when it applied the call counts for the Interim Period, to subsequent periods for any payments for payphones for which Flex ANI was unavailable.” *Id.* at 2. WorldCom asked the Commission to “reconsider the default number of compensable calls for periods subsequent to the Interim Period to account for declining call volumes per phone.” *Id.* at 2.

Order. Fifth Order, ¶ 22. WorldCom may not seek reconsideration of the same issue *ad infinitum*.

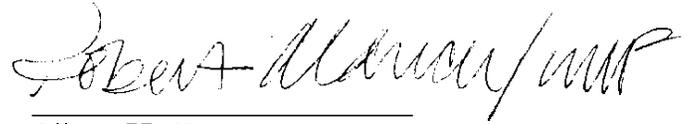
The Commission recently addressed a similar situation in *Sioux Valley Rural Television, Request for Remedial Bidding Credit and Refund*, 17 FCC Rcd 19344 (2002) (“*Sioux Valley*”). Sioux Valley, a winning bidder in the 1994 IVDS auction, timely requested a refund related to a post-auction remedial bidding credit established in a 1999 Commission order. When Sioux Valley’s refund request was denied because it did not qualify, Sioux Valley for the first time sought reconsideration of various aspects of the Commission’s 1999 order. The Commission denied Sioux Valley’s petition as untimely and repetitious. Like Sioux Valley’s petition for reconsideration, WorldCom’s petition should be denied because WorldCom seeks reconsideration of aspects of a Commission order outside the statutory period for reconsideration of that order.

IV. PETITION FOR RESCISSION

Finally, WorldCom argues that, if it is barred from seeking reconsideration of the *Fifth Order*, the Commission should treat its filing as a petition for rescission under Section 1.401 of the Commission’s rules. 47 C.F.R. § 1.401. Action on such petitions is at the Commission’s discretion. In this instance, the Commission should dismiss WorldCom’s petition for rescission pursuant to Section 1.401(c) as repetitive. 47 C.F.R. § 1.401(c). As noted above, the issue that WorldCom raises in its Petition for rescission has already been reconsidered at WorldCom’s request, commented on by parties, and evaluated by the Commission in several decisions.⁹

⁹ See *1998 Waiver Order, Fourth Order, Fifth Order*

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Albert H. Kramer".

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January 28, 2003

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