

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

<b>In the Matter of</b>	)	
	)	
<b>Implementation of the</b>	)	
<b>Pay Telephone Reclassification</b>	)	<b>CC Docket No. 96-128</b>
<b>and Compensation Provisions of</b>	)	
<b>The Telecommunications Act of 1996</b>	)	

**WORLD.COM, INC.  
REPLY TO APCC'S MOTION TO DISMISS**

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Pursuant to Section 1.429 of the Commission's rules, WorldCom, Inc. respectfully submits the following reply comments.

**I. WorldCom's Motion for Reconsideration Was Timely Filed**

WorldCom's motion was timely filed under the Commission's rule §1.46, which holds that "[m]otions for extension of time in which to file . . . filings in rulemaking proceedings . . . shall be filed at least seven days before the filing date. If a timely motion is denied, the responses and comments, replies thereto, or other filings need not be filed until two business days after the Commission acts on the motion." 47 C.F.R. § 1.46. Although APCC suggests that this rule is somehow inapplicable, that assertion is plainly wrong.

First, there is no dispute that WorldCom complied with rule 1.46. WorldCom filed a motion for extension of time to file its reconsideration petition with the Commission on December 19, 2002, well over seven days in advance of the expiration of the thirty-day limit. Nor is there any dispute that WorldCom filed the petition itself well within the time period made applicable by that rule. The timely filing of a motion for extension tolls the thirty-day limit for filing a reconsideration petition until two days after the Commission denies the motion. Because the Commission has yet to act on the motion for extension, § 1.46's two-day grace period— and the time within which WorldCom may timely file its motion— has not expired.

APCC does not quibble with these facts, but asserts only — with no support whatsoever — that " the Section 405(a)

reconsideration filing deadline is statutory. Accordingly, the Commission has no power to waive or extend that deadline. . . .” APCC Mot. to Dismiss at 5. This assertion is wrong. Although Section 405 is statutory, the D.C. Circuit has made perfectly clear that it does not establish an absolute jurisdictional bar to Commission reconsideration after the 30-day limit has expired. See *infra* at 2-3. Instead, the Commission retains discretion to reconsider issues, either *sua sponte* or as raised by a party, after the 30-day deadline. *Id.* Because the Commission possesses discretion to extend the deadline, a motion for an extension falls squarely within § 1.46. WorldCom’s Petition for Reconsideration was thus timely filed.

## **II. Section 405 of the Communications Act Does Not Bar Consideration of WorldCom’s Petition**

Even if WorldCom had not timely sought an extension of time within which to file its Petition for Reconsideration, but had instead simply missed the otherwise applicable 30-day deadline, the Commission could consider its Petition. As set out below, the D.C. Circuit has made clear that the Commission has ample authority to consider late-filed petitions, and the posture of this case would militate strongly in favor of the Commission’s doing so.

As WorldCom explained in the *ex parte* letter filed January 17, 2003, Section 405 does not preclude the Commission from reconsidering an issue after the 30-day deadline has passed. Section 405’s deadline for filing reconsideration petitions means only that during the first thirty days of this period, “ a reconsideration petition is filed as a matter of right, without

need for leave, and it serves to reopen the case and to require FCC consideration." *Id.* (citing *Southland Indus. v. FCC*, 99 F.2d 117, 121 (D.C. Cir. 1938)). Even when the 30-day limit has expired, however, "so long as the time for appeal has not expired the FCC has jurisdiction to provide reconsideration in its sound discretion." *Id.* at 283; see also *Greater Boston Television Corp. v. FCC*, 463 F.2d 268, 282 (D.C. Cir. 1971); *Albertson v. FCC*, 182 F.2d 397, 399-401 (D.C. Cir. 1950). APCC's argument that "the Commission has no power to waive or extend" the reconsideration filing deadline in Section 405 of the Communications Act, see 47 U.S.C. § 405(a), is thus demonstrably wrong.

Indeed, every time the D.C. Circuit has addressed the issue, it has squarely held that Section 405 does not deprive the FCC of discretion to entertain reconsideration petitions filed after the 30-day limit. *Graceba Total Communications, Inc. v. FCC*, 115 F.3d 1038, 1041 (D.C. Cir. 1997) (holding that the FCC has discretion to consider a reconsideration petition filed outside the 30-day limit); *Virgin Islands Tel. Corp. v. FCC*, 989 F.2d 1231, 1237 (D.C. Cir. 1993) ("[S]ection 405 does not absolutely prohibit untimely petitions for reconsideration. . . ."); *Meredith Corp. v. FCC*, 809 F.2d 863, 869 (D.C. Cir. 1987) (holding that the FCC "[c]learly" had discretion to grant petitioner leave to make new arguments on reconsideration after 30-day deadline had passed); *Gardner v. FCC*, 530 F.2d 1086, 1091 (D.C. Cir. 1976) ("[S]ection 405 does not prevent the entertainment of rehearing petitions beyond the statutory period where

extraordinary circumstances indicate that justice would be served." ); see also *Greater Boston*, 463 F.2d at 283 (same); *In the Matter of Filing and Review of Open Network Area Plans*, 5 F.C.C. Rcd. 3084, 13 n.16 (granting motion to accept reconsideration petition filed after 30-day limit and citing *Meredith Corp.*).<sup>1</sup> In fact, " section 405 has never been construed to be an absolute bar on [agency] reconsideration of issues raised after thirty days." *Meredith Corp.*, 809 F.2d at 869; accord *Graceba Total Communications*, 115 F.3d at 1041.

APCC's attempts to distinguish this unanimous authority fail. Although the petitioner in *Meredith Corp.* filed an untimely supplemental pleading rather than an untimely reconsideration petition, for example, that issue was not crucial to the court's holding. Instead, the Court pointed to the FCC rule explicitly permitting late filing of supplemental pleadings as an example of the agency's general discretion to waive Section 405's filing deadline. See *Meredith Corp.*, 809 F.2d at 869 (noting the FCC rule permitting late filing of supplemental pleadings to illustrate that " the Commission had discretion to grant Meredith leave to present its constitutional argument" ). In *Greater Boston*, the Court expressly recognized that the 30-day deadline was not an absolute bar to reconsideration, and did not purport to limit the FCC's discretion to waive Section 405's 30-

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<sup>1</sup> The Commission Orders cited by APCC, see *APCC Mot. to Dismiss* at 2, are not to the contrary. Three of these cases are from 1972 or 1973—well before the D.C. Circuit established judicially recognized exceptions to section 405 in *Gardner* and *Meredith Corp.* And in the other two orders cited by APCC, which the Commission issued after *Gardner* and *Meredith Corp.*, the Commission readily acknowledged that the thirty-day limit is not absolute and can be waived. See *Application of Richardson Indep. Sch. Dist.*, 5 F.C.C. Rcd. 3135, ¶ 7 (1990) (citing *Gardner*); *Amendment of Section 73.202(b), Table of Assignments, FM Broad. Stations*, 78 F.C.C. 2d 1208, ¶ 6 (1980) (citing *Gardner*).

day limit to particular circumstances, but held broadly that so long as the FCC retains jurisdiction it generally retains the prerogative to entertain reconsideration petitions. See *Greater Boston*, 463 F.2d at 282. And APCC makes no effort whatsoever to grapple with *Graceba Communications*, in which the D.C. Circuit rejected the FCC's argument that it could deny a reconsideration petition solely on the grounds that the petition was not filed within the 30-day limitation period. See *Graceba Communications*, 115 F.3d at 1041.

Implicitly recognizing that the Commission has jurisdiction to reconsider issues raised after the 30-day deadline expires, APCC is forced to argue that the Commission may do so only in "highly unusual circumstances." *APCC Mot. to Dismiss* at 2-3. That, too, is wrong. Although courts have certainly approved the FCC's reconsideration of issues in such circumstances, that is plainly not the only exception recognized to the 30-day deadline. Thus, for example, in *Greater Boston* the Court held that the FCC must exercise jurisdiction over an untimely reconsideration petition because of material changes occurring after the deadline's expiration. See 463 F.2d at 282-83; see also *Id.* at 282 (" [The Commission] may of course consider petitions for reconsideration in order to 'correct errors or to hear newly discovered evidence before an appeal.'" ) (quoting *Saginaw Broad. Co. v. FCC*, 96 F.2d 554, 558 (D.C. Cir. 1938)). In *Meredith Corp.*, the court ruled that the Commission properly entertained arguments made after the statutory limit in the absence of an extraordinary showing, merely because the filing fell within the

FCC rule permitting consideration of untimely supplemental pleadings. See 115 F.3d at 1040-41. And in *Graceba Total Communications*, the court held that the FCC erred by refusing to hear a late-filed reconsideration petition, even though the petitioner asserted no circumstances excusing its tardiness. See 809 F.2d at 869.

In any event, the holding of *Gardner* applies with full force to this case. The touchstone of the exception articulated in *Gardner* is whether "extraordinary circumstances indicate that justice would be served" by waiver of the thirty-day limit. 530 F.2d at 1091. The D.C. Circuit concluded that such circumstances were present there because the petitioner's untimely filing was "due, in substantial measure, to the FCC's omission." *Id.* Just as in *Gardner*, Commission action contributed directly to the timing of the filing in this case. On December 27, 2002, FCC attorney Jon Stover gave WorldCom's counsel oral approval of its request to extend the deadline for filing reconsideration petitions. And on January 7, 2003— five days after the thirty-day limit expired— Stover again gave WorldCom's counsel verbal assurances that the Commission would consider WorldCom's motion for reconsideration regardless of Section 405's thirty-day limit. Just as the Commission's failure to notify the petitioner in *Gardner* warranted waiver of the thirty-day reconsideration deadline in the interests of justice, so should WorldCom's reasonable reliance on the Commission's repeated assurances that it would extend the time in which to file for reconsideration justify the deadline's waiver.

**III. The Fourth Reconsideration Order Did Not Clearly Establish That A New Per-Phone Methodology Applied To All Non-Flex ANI Payphones After The Interim Period**

APCC next argues that the Commission should dismiss WorldCom's petition for reconsideration because, in APCC's view, WorldCom's petition arises more from the Fourth rather than the Fifth Order. This argument goes to the merits, and thus does not provide a basis to dismiss. Equally important, this assertion is wrong.

As WorldCom explained in its Petition, the Commission had not clearly established a new per-phone compensation methodology in its Fourth Reconsideration Order for periods of time after the Interim Period. The Fourth Reconsideration Order specifically noted the existence of the Per-Call Waiver Order, and indicated that per-phone compensation is due according to the methodology established in that Order. *Implementation of the Pay Telephone and Compensation Provisions of the Telecommunications Act of 1996*, Fourth Order On Reconsideration And Order On Remand, CC Docket No. 96-168, 17 FCC Rcd 2020 (2002) (*Fourth Order on Reconsideration*), ¶ 35 and footnote 98. In the next paragraph, however, the Commission also purported to prescribe another methodology for determining per-phone compensation, *Id.*, ¶36, although the Order appears to indicate that it applies only to those calls not already covered by the Per-Call Waiver Order.

APCC asserts that because the Commission set a per-phone "rate" that might be applied to non-Flex ANI payphones after the Interim Period, it was clear that this rate applied to calls already covered by the Per-Call Waiver Order. *APCC Mot. To Dismiss* at 6. The fact that the Commission solicited information to permit it to allocate responsibility for this per-phone rate among carriers ; does not settle the issue of the phones to which this rate and allocator would be applied. *Fourth Reconsideration Order* at ¶ 39, and *December 20, 2001 letters from Jeffrey*

*Carlisle to Kathleen Levitz, Marie Breslin, Michelle Thomas, and R. Hance Haney.*<sup>2</sup> Similarly, APCC's argument that WorldCom's challenge of the per-phone rate for periods after the Interim Period shows it understood the Commission had upended the Per-Call Waiver Order, confuses the issue of rate level with the issue of which subset of phones is required to use that rate. *APCC Mot. To Dismiss*, at 6, footnote 8.

APCC also maintains that WorldCom was on notice that the Commission might modify the per-phone rate prior to the adoption of the Fourth Reconsideration Order because WorldCom "commented on a petition for reconsideration of that aspect of the 1998 Waiver Order, filed by APCC. . . ." APCC's fails to identify the aspect of the Per-Call Waiver Order WorldCom addressed. Examination of WorldCom's comments, and the record since those comments, shows that no party could have expected the wholesale modification of per-phone compensation established in the Fifth Reconsideration Order.

In its 1998 Per-Call Waiver Order, the Commission established two per-phone methodologies. For payphones transmitting calls from non-equal access switches and payphones transmitting calls made from certain small and mid-sized LECs, the Commission set a default number of calls per-phone equal to 16. *Implementation of the Pay Telephone and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-168, 13 FCC Rcd 10893 (1998) (*Per-Call Waiver Order*), at && 30, 32. The Commission expected parties to provide additional data on the number of calls being transmitted from payphones served by non-equal access switches and payphones served by certain small and medium mid-sized LECs. *Id.*, at & 31.

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<sup>2</sup> Moreover, both the data request letters, and the reference to them in the Fourth Reconsideration Order, refer solely to the need to allocate per-phone payment responsibility for Interim Period compensation.

For all other payphones that did not transmit payphone-specific coding digits, carriers could use the average number of calls per-phone from certain LEC phones that did transmit payphone-specific coding digits as a proxy for compensating calls completed from these phones. *Id.*, at && 26, 28. The Commission applied this same per-phone methodology to LEC and non-LEC PSPs alike, finding that “data on the record still indicates that call volumes from independent PSPs and BOC payphones are similar.” *Id.*, at & 29. The Commission determined that its per-phone methodology provides “fair compensation for payphones that are unable to provide payphone-specific coding digits,” *Id.*, at & 35, and declined to consider retroactive adjustments based on call volume data drawn from the Interim Period, because this data was not drawn from the relevant time periods.

APCC subsequently petitioned the Commission to reconsider each of these per-phone methodologies. It petitioned the Commission to increase the default call volume for payphones served by equal access switches and payphones served by certain small and mid-sized LECs from 16 calls per month to 171 calls per month. *Petition for Partial Reconsideration of the American Public Communications Council*, CC Docket 96-128, (*APCC Per-Phone Petition*) May 4, 1998 at 12. MCI did oppose APCC’s request to modify the default call count for these payphones. *Comments of MCI*, CC Docket No. 96-128, May 18, 1998. *See also, Reply of MCI Telecommunications Corporation In Support Of Its Petition For Reconsideration*, CC Docket No. 96-128, June 5, 1998. Because the Commission expected parties to submit data on payphones served by non-equal access switches and payphones served by small and mid-sized LECs who received permanent waivers from the requirement to implement Flex ANI, WorldCom concedes that it was placed on notice that compensation obligations might increase for these sorts of payphones.

However, the opposite is the case for all other phones that had been compensated on a per-phone basis, viz. those payphones that were compensated according to an average of call volumes obtained from RBOC payphones. Such phones account for over 98 percent of all phones that do not transmit payphone-specific coding digits. For payphones being compensated according to this per-phone methodology, APCC petitioned the Commission to true-up per-phone payments as these payphones began to transmit payphone-specific coding digits. *APCC Per-Phone Petition* at 8. APCC's Per-Phone Petition could not possibly serve to notify carriers of the possibility that additional per-phone payments would be established in the Fifth Reconsideration Order, or even the Fourth Reconsideration Order.

APCC's 1998 Per-Phone Petition proposed truing up compensation for phones that did not transmit coding digits on the basis of call volumes once FLEX ANI became available for each of these phones. Since APCC filed this petition and the release of the Fourth, and then the Fifth, Reconsideration Order, the number of payphones served by switches that transmit coding digits has increased from approximately 60% to 84%. Yet during this time, the Commission never acted on APCC's true-up proposal. Neither did the Commission or any party propose alternate per-phone methodologies that might apply retroactively to the post-Interim period. Carriers could therefore presume that once phones began to transmit coding digits, no further true-up possibility existed, since the Commission had not even called for public comment on, let alone approved, APCC's proposal, and no other per-phone methodologies that might apply to the post-Interim Period had been proposed. It would be unreasonable to expect carriers to predict that another retroactive true-up methodology, one that had never been proposed, would not only be adopted on a going-forward basis, but would retroactively supplant the one they had been operating under since 1998. The new true-up methodology the Commission adopted therefore

violated the settled expectations of carriers not to be subject to any further true-up for those payphones that, although they once were compensated on a per-phone basis, had since begun to be compensated on a per call basis.

**IV. The Commission Must Either Open A Rulemaking To Consider WorldCom's Petition For Rescission Or Issue An Order Amending Its Rules**

WorldCom's petition establishes three reasons the Commission should rescind its new per-phone compensation methodology. As discussed in Section III above, no proposal by the Commission, or any party, put carriers on notice that a phone that once had been compensated on a per-phone basis, but later began to be compensated on a per-call basis, might be entitled to additional per-phone compensation. *See also WorldCom Petition for Rescission* at 8-9. Having failed to put carriers on notice that the per-phone methodology that would apply to calls made after the Interim Period might be altered, the Commission's decision to then apply its new methodology retroactively, also constitutes retroactive rulemaking. *WorldCom Petition for Rescission* at 6. Finally, the Commission failed to offer any reason for modifying the methodology it had already determined to provide "fair compensation for payphones that are unable to provide payphone-specific coding digits," *Per-Call Waiver Order*, at ? 35.

APCC's argument that the rescission portion of WorldCom's petition should be dismissed as repetitive fails because each of the three foregoing bases for rescission are novel and have not yet been addressed by the Commission. Their novelty (and substantive merit) deprives the Commission of the ability to treat this petition in a summary manner. *See* 47 C.F.R. § 1.401(e) (limiting Commission discretion to summarily dismiss rulemaking petitions to circumstances where the petitions are "moot, premature, repetitive, frivolous"); *see also* Geller v.

FCC, 610 F.2d 973, 979 (D.C. Cir. 1979) (reversing Commission for summarily dismissing rulemaking petition that had stated facts meriting substantive reconsideration of rule).<sup>3</sup>

In short, WorldCom's petition raises grounds for rescission that are new, substantial, and unchallenged. The Commission must accordingly either open a rulemaking to consider the relative merits of WorldCom's petition, or rescind its newly-adopted per-phone methodology. *See Consumer Energy Council of Am. v. FERC*, 673 F.2d 425, 446 (D.C. Cir. 1982).

## **Conclusion**

WorldCom urges the Commission to adopt the positions advocated herein.

Sincerely,

**Larry Fenster**

Larry Fenster

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<sup>3</sup> Indeed, even if these issues had been addressed in some fashion in prior orders – and they were not – to ensure that all relevant issues have been considered, the Commission frequently evaluates the merits of rulemaking petitions even if their content is “essentially repetitive.” *See Office of Communication of the United Church of Christ v. FCC*, 911 F.2d 813, 818 (D.C. Cir. 1990). Here, where the arguments are both weighty and new, there is plainly no basis to decline even to consider WorldCom's petition on the merits.

## Statement of Verification

I have read the foregoing and, to the best of my knowledge, information and belief, there is good ground to support it, and it is not interposed for delay. I verify under penalty of perjury that the foregoing is true and correct.

Executed on February 11, 2003

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## Certificate of Service

I, L. Elizabeth Bryant, do hereby certify that copies of the foregoing Petition for Reconsideration of WorldCom Inc. were sent on this 11<sup>th</sup> day of February, 2003, via first-class mail, postage pre-paid, to the following:

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