

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

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

**ORDER**

Adopted: April 16, 2003

Released: April 18, 2003

By the Commission:

**I. Introduction**

1. On October 23, 2002, the Commission released the *Fifth Reconsideration Order* in this proceeding.<sup>1</sup> A summary of that order was published in the Federal Register on December 3, 2002.<sup>2</sup> On December 19, 2002, WorldCom, Inc. filed a Motion for Extension of Time to file a petition for reconsideration of the *Fifth Reconsideration Order*. On January 16, 2003, WorldCom, Inc. filed its Petition for Reconsideration or in the Alternative, for Rescission. In this order, the Commission denies WorldCom's motion and dismisses WorldCom's reconsideration petition.

**II. Discussion**

2. By statute, Congress has limited the Commission's power to consider petitions for reconsideration to those filed within a specific time period.<sup>3</sup> Petitions for reconsideration of a rulemaking order must be filed within thirty days of its publication in the Federal Register.<sup>4</sup>

<sup>1</sup> *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, *Fifth Order on Reconsideration and Order on Remand*, 17 FCC Rcd 21274 (2002) (hereinafter *Fifth Reconsideration Order*).

<sup>2</sup> 67 Fed. Reg. 71861 (Dec. 3, 2002).

<sup>3</sup> Petitions for reconsideration in a rulemaking proceeding are governed by 47 U.S.C. § 405 and 47 C.F.R. § 1.429. Section 405 specifies in part that any "petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order . . . complained of." Section 1.429(d) specifies in part that a "petition for reconsideration and any supplement thereto shall be filed within 30 days from the date of public notice of such action, as that date is defined in § 1.4(b)." *Licenses of 21<sup>st</sup> Century Telesis Joint Venture and 21<sup>st</sup> Century Bidding Corp.*, 16 FCC Rcd 17257, 17263 (2001), *appeal dismissed in part and denied in part sub nom. 21<sup>st</sup> Century Telesis Joint Venture v. FCC*, 2003 WL 203126 (D.C. Cir. Jan. 31, 2003) (No. 01-1435).

<sup>4</sup> 47 C.F.R. § 1.4(b). Pursuant to 47 C.F.R. § 1.4(b), the relevant "date of public notice" in this notice and comment rulemaking proceeding was December 3, 2002, the date of publication in the Federal Register. Accordingly, the deadline for filing a reconsideration petition for the *Fifth Reconsideration Order* was January 2, 2003, the thirtieth day after Federal Register publication. See also *Amendment of the Commission's Rules Concerning Maritime Communications*, PR Docket No. 92-257, *Second Memorandum Opinion and Order and Fifth Report and Order*, 17 FCC Rcd 6685, 6690 (2002).

In this particular case, WorldCom was required to file its reconsideration petition no later than January 2, 2003.

3. The Commission has consistently held that it lacks authority to waive or extend, even by as little as one day, the statutory thirty-day filing period for petitions for reconsideration in rulemaking proceedings,<sup>5</sup> absent extraordinary circumstances.<sup>6</sup> When the Commission has extended the period absent such circumstances, the U.S. Court of Appeals for the District of Columbia Circuit has "conclude[d] that the Commission acted beyond its lawful authority when it entertained [a] belated petition for reconsideration."<sup>7</sup>

4. According to WorldCom's extension request, it needed additional time because "nearly half of the thirty days allowed" for filing a reconsideration petition "falls during the Winter holiday season, when many of the persons needed to evaluate the business impact and review and craft a possible response will be on vacation."<sup>8</sup> In 1990, however, the Commission specifically rejected counsel workload, coupled with activities associated with the Christmas and New Year holidays, as justification for acceptance of a late-filed reconsideration petition.<sup>9</sup> WorldCom presents no evidence of extraordinary circumstances surrounding this particular filing. We do not view the annual holiday season each December as rising to the level of "extraordinary circumstances," particularly when WorldCom was on notice of the substance of the *Fifth Reconsideration Order* as early as October 23, 2002.

5. WorldCom cites to two cases in support of its assertion that the Commission is obligated to grant its extension motion and accept its untimely reconsideration petition.<sup>10</sup> WorldCom's reliance on the *Meredith* case is misplaced because "Meredith filed a timely petition for reconsideration,"<sup>11</sup> which is not the situation here. The relevant controversy in *Meredith* concerned a supplement filed after the statutory deadline. While the court ruled that the Commission had discretion to grant Meredith permission to present its supplemental constitutional argument, the court also ruled "that the Commission within its discretion could have denied Meredith leave to file because of procedural defects."<sup>12</sup> Significantly, the Commission, in another case, rejected an untimely reconsideration petition despite a petitioner's citation of the *Meredith* decision to support its argument that section 405 is not an absolute bar to considering untimely reconsideration petitions, just as WorldCom argued here.<sup>13</sup>

<sup>5</sup> *Ole Brook Broadcasting, Inc.*, 15 FCC Rcd 20644 (2000); *Sunjet Car Service, Inc.*, 15 FCC Rcd 25451 (Enf. Bur. 2000).

<sup>6</sup> The narrow exception to the statutory filing period applies to extraordinary circumstances, such as when the Commission fails to provide timely notice of the action for which reconsideration is sought. *Virgin Islands Telephone Corp.*, 7 FCC Rcd 4238 (1992), *rev'd on other grounds*, 989 F.2d 1231, 1237 (D.C. Cir. 1993) ("In this case, extenuating circumstances did not prohibit Vitelco from filing within the prescribed time limits. . . . Therefore, the Commission's refusal to entertain Vitelco's petition for reconsideration was justified."); see *Gardner v. FCC*, 530 F.2d 1086 (D.C. Cir. 1976).

<sup>7</sup> *Reuters Limited v. FCC*, 781 F.2d 946, 951-952 (D.C. Cir. 1986).

<sup>8</sup> WorldCom Extension Motion at 1.

<sup>9</sup> *Richardson Independent School District*, 5 FCC Rcd 3135 (1990), *vacated and remanded on other grounds sub nom. WLOS TV, Inc. v. FCC*, 932 F.2d 993 (D.C. Cir. 1991).

<sup>10</sup> Letter from Larry Fenster, WorldCom, to Jeffrey Carlisle, FCC, at 1 (Jan. 17, 2003).

<sup>11</sup> *Meredith Corp. v. FCC*, 809 F.2d 863, 866 (D.C. Cir. 1987).

<sup>12</sup> *Id.*, 809 F.2d at 869 n. 6.

<sup>13</sup> *Portland Cellular Partnership*, 9 FCC Rcd 3291 (1994).

6. The second decision cited by WorldCom, *Greater Boston*, also is distinguishable from the present situation. The court in *Greater Boston* specifically discussed reconsideration petitions filed "[w]ithin the period provided therefor by the statute," while the court was silent as to reconsideration petitions filed after the statutory deadline.<sup>14</sup> Because the decision did not consider late-filed reconsideration petitions, WorldCom's reliance on *Greater Boston* is not persuasive here. Neither *Meredith* nor *Greater Boston* requires that the Commission consider late-filed reconsideration petitions.<sup>15</sup>

7. WorldCom also argues that the filing of an extension request pursuant to 47 C.F.R. § 1.46(b)<sup>16</sup> tolls the thirty-day statutory deadline for the filing of reconsideration petitions.<sup>17</sup> Section 1.46(b) tolls the filing deadlines for "responses and comments, replies thereto" and "other filings in rulemaking proceedings" where an extension is sought more than seven days before the deadline. The list of pleadings covered by the regulation does not include petitions for reconsideration, which are filed *after* the completion of the rulemaking. Indeed, the specified pleadings are those that typically are filed in the course of a rulemaking; the catch-all category of "other filings" is intended to include filings due in the course of the rulemaking that do not fit into the standard categories. The "other filings" category cannot include petitions for reconsideration because if it did any participant could effectively grant itself an extension, and our regulation would overrule the statutory deadline on reconsideration petitions. As we discussed above, the statute permits no extension of the 30-day deadline except in extraordinary circumstances; section 1.46(b) thus cannot be read to provide for an automatic extension.<sup>18</sup> Not surprisingly, although there have been instances in which deadlines to file comments or reply comments in rulemaking proceedings were tolled briefly pursuant to section 1.46(b), WorldCom fails to cite a single instance in which the deadline for filing a reconsideration petition was tolled pursuant to section 1.46(b). We likewise found no such instance in our own review.

8. Finally, WorldCom argues that it was promised by Commission staff that its extension motion would be granted.<sup>19</sup> Even assuming *arguendo* that a staff member had made such a promise to WorldCom, the Commission is not bound by any promises or advice given by subordinate staff.<sup>20</sup> That is particularly the case for a company like WorldCom, which has a sophisticated and frequent FCC practice coupled with the advice of the most highly skilled counsel, and should have known that the deadline for reconsideration petitions would not be so easily waived. This case calls for application of the Commission's general rule that parties who

<sup>14</sup> *Greater Boston Television Corp. v. FCC*, 463 F.2d 268, 282-83 (D.C. Cir. 1971).

<sup>15</sup> *Portland Cellular Partnership*, 9 FCC Rcd 3291 (1994).

<sup>16</sup> 47 C.F.R. § 1.46(b) provides in part: "If a timely [extension] motion is denied, the responses and comments, replies thereto, or other filings need not be filed until 2 business days after the Commission acts on the motion."

<sup>17</sup> Letter from Larry Fenster, WorldCom, to Jeffrey Carlisle, FCC, at 1-2 (Jan. 17, 2003).

<sup>18</sup> *Applications for Renewal of License of Certain Louisiana and Mississippi Broadcast Stations*, 50 FCC 2d 1020 (1975) (Commission specifically rejected section 1.46 as a basis for granting an extension of time to file a reconsideration petition because "the Commission has no authority under the Act or its rules, to extend that time" to file reconsideration petitions.); *Amendment of Part 73 (formerly Part 3) of the Commission's Rules and Regulations to Raise the Nighttime Power Limitation of Class IV Standard Broadcast Stations*, 2 Rad. Reg. 2d 1561 (1964) (Commission rejected section 1.46 as basis for extending time to file reconsideration petition because 30-day period in which to file petitions for reconsideration is "limited by Section 405. . .").

<sup>19</sup> *Id.*

<sup>20</sup> *Mulkan FM Associates v. FCC*, 935 F.2d 1313 (D.C. Cir. 1991) (affirming Commission decision to enforce its rules despite earlier staff statements giving erroneous interpretation of the rules at official seminar).

rely on staff advice do so at their own risk.<sup>21</sup> Accordingly, this claim provides no support for WorldCom's assertion that we are obligated to grant its extension motion.<sup>22</sup> The circumstances do not nearly approach the level of extraordinariness required for an extension of the statutory deadline.

9. In its reconsideration petition, WorldCom argues that "if for any reason the Commission declines to reconsider its new rule, it should nonetheless rescind it," based on the same reasons articulated by WorldCom as a basis for reconsideration in its untimely petition.<sup>23</sup> In effect, WorldCom is asking that we deviate from a statutory deadline by treating its reconsideration petition as a rescission request. We conclude that the relief WorldCom seeks is not authorized by the statute. The statutory deadline for filing reconsideration petitions would be rendered meaningless if it could be circumvented by styling the pleading as a petition for rescission. This conclusion is consistent with Commission precedent. In 1993, for example, the Commission dismissed a "petition for clarification," holding that, although "the [p]arties have styled their Petition as a petition for clarification, it is really a petition for reconsideration" of a rulemaking order.<sup>24</sup> The Commission thus dismissed it pursuant to section 405 of the Act and section 1.429(d) of the Commission's rules "as an untimely petition for reconsideration."<sup>25</sup> Again in 1999, the Commission "decline[d] to resolve" an *ex parte* letter seeking clarification, on the grounds that the submission could not "be treated as a petition for reconsideration because it was not filed within the 30-day filing period required by section 405(a) of the Act."<sup>26</sup> We conclude, therefore, that the Commission lacks authority to circumvent the statutory restrictions on its jurisdiction to consider reconsideration petitions by treating WorldCom's late-filed petition for reconsideration as a petition for rescission.<sup>27</sup>

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<sup>21</sup> *Applications of Hinton Telephone Co.*, 10 FCC Rcd 11625, 11637 (1995) ("When the staff advice is contrary to the Commission's rules, the Commission may still enforce its rules, despite any reliance by the public."), *aff'd sub nom. Knollwood, Ltd. v. FCC*, 84 F.3d 1452 (D.C. Cir. 1996); *AAT Electronics Corp.*, 93 FCC 2d 1034, 1047 (1983), *aff'd sub nom. P&R Temmer v. FCC*, 743 F.2d 918, 931 (D.C. Cir. 1984) ("The FCC properly rejected this argument by AAT that a waiver was justified due to reliance on a Commission official. . . . AAT's purported change of its construction election was made at its own risk and created no justification for waiver.").

<sup>22</sup> *Deleted Station WPHR(FM), Ashtabula, Ohio*, 11 FCC Rcd 8513, 8515 (1996).

<sup>23</sup> WorldCom, Inc. Petition for Reconsideration or in the Alternative, for Rescission at 11-12.

<sup>24</sup> *Ass'n of College and Univ. Telecomm. Adm'rs, Am. Council on Educ., and Nat'l Ass'n of College and Univ. Bus. Officers*, 8 FCC Rcd 1781, 1782 (1993).

<sup>25</sup> *Id.*

<sup>26</sup> *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket No. 96-115, *Third Report and Order*, 14 FCC Rcd 15550, 15631-32 (1999); see also *JEM Broadcasting Co., Inc. v. FCC*, 22 F.3d 320, 324 (D.C. Cir. 1994)(petitioner cannot obtain a "back door" to judicial review by filing a petition for amendment or rescission of regulations after the period for direct review has elapsed).

<sup>27</sup> In its dismissal motion, the American Public Communications Council argues that WorldCom's petition, whether for reconsideration or rescission, should be dismissed as repetitious. Motion of The American Public Communications Council, Inc. to Dismiss WorldCom, Inc.'s Petition for Reconsideration or in the Alternative, for Rescission. Because we are dismissing WorldCom's petition on other grounds, we do not reach this argument. On February 11, 2003, WorldCom, Inc. filed a Reply to APCC's Motion to Dismiss.

### III. Conclusion

10. WorldCom had 71 days after the release of the rulemaking order to prepare and submit its reconsideration petition, from October 23 to January 2. WorldCom has failed to present "extraordinary circumstances" to justify granting it an additional 14 days, from January 2 to January 16, to file its reconsideration petition. For the foregoing reasons, we deny WorldCom's extension motion and dismiss its late-filed reconsideration petition.

11. Accordingly, IT IS ORDERED, pursuant to 47 U.S.C. §§ 154(i) and 405, and 47 C.F.R. § 1.429, that the extension motion filed by WorldCom on December 19, 2002 IS DENIED and the reconsideration petition filed by WorldCom on January 16, 2003 IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION



Marlene H. Dortch  
Secretary