

confirmed by the Fifth Circuit's decision in *TOPUC v. FCC*. The policy thus is unlawful as applied.

Ascent submits that now is an appropriate time for the Commission to reconsider its approach. The Bureau has authority to remedy the inequity by adopting a limited and reasonable waiver policy. Indeed, the Bureau need not create a new policy – it simply may apply the flexible and reasonable waiver policy it uses with respect to *recipients* of universal service funds. Following this reasonable waiver policy, the Bureau may waive the revision deadline in this instance and instruct USAC to re-compute Ascent's USF contributions using its revised form 499-Q.

I. A WAIVER POLICY IS THE APPROPRIATE WAY TO COMBAT THE INEQUITY SUFFERED BY ASCENT AND OTHER USF CONTRIBUTORS

As explained in Ascent's appeal and its petition for reconsideration, due to an inadvertent and undiscovered error in a single 499-Q, Ascent was billed a quarterly USF contribution well over 10 times its appropriate contribution. There is no dispute that Ascent's telecommunications revenues were, in fact, incorrectly reported in the erroneous 499-Q. Based on Ascent's subsequent Form 499-A, its USF contributions have been trued up, save one critical difference – Ascent has been invoiced over \$150,000 in late payment fees and interest on amounts that it ultimately did not owe.

Granting Ascent's waiver request is justified because, based on the facts of the case, application of the revision filing deadline results in an inequitable and unduly burdensome penalty on Ascent. The only entity to file comments on Ascent's petition agrees. The Competitive Telecommunications Association ("COMPTEL"), the leading industry association representing competitive communications service providers and their supplier partners, filed comments in support of Ascent's petition for reconsideration.

As explained by COMPTTEL, the “pay and dispute” policy which the Bureau relied upon is “patently unreasonable” and contrary to commercial practices.² COMPTTEL explained that in commercial situations, the practice is for the recipient of an invoice to pay the *undisputed* amount of an invoice and dispute the balance. The recipient assumes the risk of liability for late fees, penalties and interest if the dispute is ultimately resolved against it. If, however, the recipient’s dispute is upheld, late fees, penalties or interest also are waived.

It is “unconscionable,” says COMPTTEL, for USAC to assess late fees on unpaid amounts for which it ultimately is not entitled to receive.³ This policy harms USF contributors by denying them the time value of money lost pending a true up and “also forces carriers to make interest free loans to a government administered fund for up to a year.”⁴

The Commission may remedy this inequity through a limited and reasonable use of its waiver authority. The Commission (and by delegation, the Bureau) may waive a rule for “good cause shown.”⁵ The Commission “generally finds good cause to grant a waiver of its rules where the particular facts make strict compliance inconsistent with the public interest if applied to the petitioner and when the relief requested would not undermine the policy objective of the rule in question.”⁶ The Bureau has further noted that “the Commission may take into

² COMPTTEL’S Comments in Support of the Petitions for Reconsideration of the Wireline Competition Bureau’s Order Dismissing Requests for Review of USAC Decision, WC Docket 06-122, at 3-4 (filed April 20, 2009) (“COMPTTEL Comments”).

³ *Id.* at 4.

⁴ *Id.*

⁵ 47 C.F.R. §1.3.

⁶ *In re Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems; E911 Phase II Compliance with Deadlines for Tier III Carriers*, 20 FCC Rcd 7709, ¶9 (2005).

account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.”⁷

In fact, the Bureau need not even create a new waiver policy to correct this inequity. In October 2008, the Bureau granted requests for waivers of a USF filing deadline for six *recipients* of support from the USF.⁸ The petitioners offered reasons for failure to meet the deadline ranging from problems with e-mailed filings,⁹ a change in personnel,¹⁰ to simply forgetting the deadline.¹¹ The Commission found each petitioner’s reasoning to be good cause to grant a waiver request and required each company to comply with its own revised internal procedures to ensure the filing deadline would be met in the future.¹² The Bureau should follow this policy with respect to the Ascent petition. Indeed, reasoned decisionmaking dictates that the Commission treat these waiver requests consistently.

⁷ See *In re Federal-State Joint Board on Universal Service; Universal Service Contribution Methodology; Adventure Communications Technology, LLC, Form 499 Filer ID: 825749 Request for Review of USAC Rejection Letter and Request for Waiver of USAC 45 Day Revision Deadline*, 23 FCC Rcd 10096, n.10 (2008) citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C.Cir. 1969).

⁸ See *In re Universal Service High-Cost Filing Deadlines; Federal-State Joint Board on Universal Service; Advanced Communications technology, Inc. (SAC 519004) – Form 525 Filing Appeal; Allo Communications Petition for Waiver of Filing Deadline; Adventure Communication Technology, LLC Petition for Waiver of Sections 54.307(c) and 54.802 of the Commission’s Rules; CC Cellular Study Area Code 559002 Petition for Waiver of Section 54.307(c)(4) Line Count Certification for CETC Universal Service Funding; PrarieWave Black Hills, LLC Petition for Waiver of Section 54.802(a) of the Commission’s Rules; Texas RSA 1 Limited Partnership dba XIT Wireless Petition for Waiver of the Section 54.307(c)(1) Applicable to the Line Count Submission Applicable to Interstate Common Line Support*, 23 FCC Rcd 15325 (Oct. 22, 2008) (“6-Waiver Grant Order”).

⁹ *6-Waiver Grant Order*, ¶5.

¹⁰ *Id.*, ¶10.

¹¹ *Id.*, ¶7.

¹² *Id.*, ¶11.

As in that waiver proceeding, Ascent's mistake, its first in five years of filing and just like the errors of the six universal service recipients,¹³ was one of timing – it did not realize its mistake until after the deadline to file a revised Form 499Q but did actually file the revision, albeit late. Like the USF recipient-petitioners, Ascent has revised its internal policies to ensure that all future deadlines are met.¹⁴ In accordance with the Bureau's precedent in the *6-Waiver Grant Order*, the Bureau should find that Ascent's failure to meet the revision filing deadline was a unique occurrence that will not be repeated¹⁵ and grant Ascent's waiver request.¹⁶

II. FAILURE TO GRANT A WAIVER TO ASCENT WOULD VIOLATE SECTION 254 AS INTERPRETED BY THE FIFTH CIRCUIT

Further, unique factual circumstances applicable to Ascent compel the Bureau to grant a waiver in this case. As Ascent showed in its petition for reconsideration (at 5-7), strict application of the 45-day revision deadline/"pay and dispute" policy is unlawful. In *TOPUC*, the U.S. Court of Appeals for the Fifth Circuit held that a USF contribution amount which exceeds a contributor's interstate revenues, *on that basis alone*, violates Section 254's requirement that carriers contribute to the USF "on an equitable and non-discriminatory basis."¹⁷ The Court noted:

[Petitioner]'s attack boils down to the argument that it is being unfairly treated because it will be forced to pay more in universal service contributions than it can generate in interstate revenues. It

¹³ *Id.*, ¶¶ 5-10.

¹⁴ *Id.*, ¶ 11.

¹⁵ *Id.*, ¶12.

¹⁶ Alternatively, for the reasons explained in Ascent's petition for reconsideration (at 9-10), the Bureau should grant a waiver in reliance on its *Aventure Waiver Order*.

¹⁷ *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (1999) ("*TOPUC*"); *see* 47 U.S.C. §254(d).

makes a compelling argument that this result alone violates the equitable language of [Section 254.]¹⁸

There is no doubt that the Commission understood the Fifth Circuit's command. In the Commission's own words, the Court held that "*requiring a carrier to pay more universal service contributions than it derives from interstate revenues violates the requirement in section 254(d) of the Act that universal service contributions be equitable and nondiscriminatory.*"¹⁹

As discussed in greater detail in its petition for reconsideration, Ascent, too, "will be forced to pay more in universal service contributions than it can generate in interstate revenues," if it were to follow the pay and dispute policy articulated in the December 15 Order. The USF contribution assessed by USAC for the fourth quarter of 2007 exceeded Ascent's *total* telecommunications revenues for the quarter. Following *TOPUC*, such an outcome is *per se* inequitable in violation of Section 254. The Bureau, therefore, must waive the deadline in this instance.

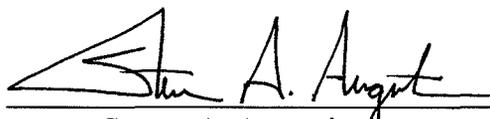
¹⁸ *Id.* (emphasis added)

¹⁹ *In re Federal-State Joint Board on Universal Service*, 23 FCC Rcd 6221, ¶ 11 (2008) (emphasis added).

III. CONCLUSION

For the foregoing reasons, Ascent respectfully requests that the Commission reconsider and reverse the Bureau's *Order* denying Ascent's waiver request and cancel the late payment penalties imposed on Ascent related to the erroneous USF contribution assessments.

Respectfully submitted,



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