Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
Universal Service Contribution Methodology Requests for Waiver of Decisions of the Universal Service Administrator by Achieve Telecom Network of Massachusetts, LLC, *et al.*	)	WC Docket No. 06-122

ASCENT MEDIA GROUP PETITION FOR RECONSIDERATION

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SUMMARY

Ascent Media Group, Inc. ("Ascent") seeks reconsideration of the Wireline Competition Bureau's ("Bureau") decision denying Ascent's request for waiver of the Form 499Q revision filing deadline and for refund of late payment charges associated with Universal Service Fund ("USF") contribution assessments based on that Form 499Q filing. Ascent made a minor error – its first in five years of filing the Form 499Qs and From 499As – which resulted in Ascent being assessed a quarterly USF contribution of $2.1M, an amount in excess of Ascent's telecommunications revenues. The Universal Service Administrative Company ("USAC") invoices were $717,000 per month - over 10 times Ascent's usual monthly USF assessment amount.

As a result of the waiver denial, Ascent was required either (1) to pay erroneous USF invoices that exceeded its total telecommunications revenues for the period or (2) to suffer a "true-up" that deducted $150,000 in penalties from the refund of an overpayment of $500,000.

Ascent asserts that the Bureau's failure to grant Ascent's waiver request is both unlawful and inequitable in violation of Commission and court precedent. The Commission has granted similar waiver requests in the past and the circumstances underlying Ascent's waiver request are sufficiently similar that grant of its waiver request is warranted here. Further, a decision of the United States Court of Appeals for the Fifth Circuit has definitively ruled that a USF assessment which exceeds a filer's interstate telecommunications revenues "*violates the requirement in section 254(d) of the Act that universal service contributions be equitable and nondiscriminatory.*"

Granting Ascent's waiver request would alleviate the unduly harsh and disproportionate penalty imposed on Ascent, would be consistent with Commission and Court precedent and would not undermine the goals of the USF.

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In the name of promoting "predictability," the Bureau unlawfully requires Ascent Media Group, Inc. ("Ascent") – who heretofore contributed to the Universal Service Fund ("USF") without fail for five years – either (1) to pay erroneous USF invoices that exceed its total telecommunications revenues for the period or (2) to suffer a "true-up" that deducts $150,000 in penalties from the refund of an overpayment of $500,000. Such an outcome neither is necessary for the protection of the $7 billion Universal Service Fund nor does it satisfy the statutory requirements of Section 254 and applicable Commission precedent. Therefore, Ascent through its undersigned counsel and pursuant to sections 1.3 and 1.106 of the Federal Communications Commission's ("Commission") rules, 47 C.F.R. §§1.3 and 1.106, respectfully seeks reconsideration of the Order of the Wireline Competition Bureau ("Bureau") denying

Ascent's request for waiver of a FCC Form 499Q filing deadline and request for refund of late fees, penalties and interest charges.[1]

I. BACKGROUND

Ascent is a media content provider based in Burbank, California. Ascent provides systems integration, consulting, network origination, and content distribution services for the film, TV, and media industries. Its clients include CBS, Disney, MTV Networks, Sony Pictures Television International, and the Yankees Entertainment & Sport Network ("YES Network"). Although Ascent arranges for transmission of content between designated points, content creation and management, not telecommunications, is its primary business.

For the past five years, the Company has timely-filed its quarterly FCC Form 499Qs and annual FCC Form 499As without incident.[2] On August 1, 2007, Ascent timely-filed its FCC Form 499Q reporting projected revenues for the fourth quarter of 2007 ("August 2007 Form 499Q") and did not notice an administrative error – its first ever error - which resulted in a significant overstatement of its projected revenues subject to the USF contribution assessment.

In late October 2007, Ascent received a Universal Service Administrative Company ("USAC") invoice for $717,000 for a single month – an amount over ten times Ascent's customary USF invoice. In fact, in accordance with USAC procedures, the invoice was the first of three identical invoices Ascent would receive for the quarter. The total amount Ascent would be invoiced was over $2.1 million, more than Ascent's projected gross telecommunications revenues for the quarter.

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1 *In re Universal Service Contribution Methodology Requests for Waiver of Decisions of the Universal Service Administrator by Achieve Telecom Network of Massachusetts, LLC, et al.*, Order, DA 08-2695 (Dec. 15, 2008) (the "Order").

2 Ascent's Form 499 filer ID is 823142.

The receipt of such a large and unexpected invoice placed Ascent in an extremely difficult situation. Whereas Ascent typically received invoices in the $60,000 range, this invoice was for $717,000 — nearly one year's worth of its USF liability. Payment of the $717,000 invoice clearly would result in Ascent knowingly overpaying its USF obligation for years to come. In fact, a single payment of the $717,000 invoice would exceed its quarterly USF obligation by over a half million dollars; three payments would have exceeded the amount Ascent had been billed for nearly the past three years.[3]

Naturally, the cash flow consequences to Ascent of paying invoices that exceeded its total telecommunications revenues would impose a severe financial hardship on the Company. Further, the invoices clearly were excessive. Therefore, Ascent opted to both pay and dispute the erroneous USAC invoice. Ascent paid the October invoice and immediately sought to correct its future invoices. Ascent filed its appeal with USAC on November 14, 1007, the due date of the initial USF invoice and well in advance of the next two installments.[4] Concurrent with the appeal, Ascent submitted a corrected 499-Q, properly reporting its telecommunications revenues for the quarter (rather than the non-telecommunications revenues which previously were reported). The Company reasonably postponed its decision whether to pay the subsequent November and December USF invoices in the expectation that USAC would rule promptly on Ascent's waiver request.

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3 $2.1 million represents approximately 35 months' worth of USF at $60,000 per month.

4 *See* Letter from Donna Cote, Ascent Media Group to USAC (Nov. 14, 2007) ("Ascent Revised Filing").

Unfortunately, USAC did not issue its *Administrator's Decision* on Ascent's request until January 11, 2008,[5] almost two months after Ascent submitted the request and after the payment due dates had passed for USAC invoices issued after the appeal was filed.

After receiving the USAC *Administrator's Decision*, Ascent promptly appealed the decision to the Federal Communications Commission ("Commission").[6] By *Order* dated December 15, 2008, the Bureau denied Ascent's request for waiver of the revision filing deadline and cancellation of related late fees and penalties. The Bureau concluded that Ascent's actions contradicted the Commission's "pay and dispute" policy. Further, the Order asserts that Ascent's failure to pay each invoice could have harmed the "predictability" of the USF.[7]

Ascent requested waiver of a filing deadline to enable it to correct a single, minor typographical error which resulted in the Company being assessed a USF contribution of over $2.1 million for a single quarter, in excess of *10 times* the amount of its correct USF contribution for the quarter. The denial of that waiver request has resulted in Ascent incurring costs of over $150,000 in penalties and late fees and, therefore, Ascent was not made whole by the annual FCC Form 499A true-up process. The *Order* is inconsistent with other similar requests for waiver and is unjust and inequitable because the invoices are contrary to Section 254(d) as interpreted by the Fifth Circuit in *Texas Office of Public Utilities Counsel*, and in light of the facts, the resulting penalty and costs to Ascent are unduly harsh.

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5 *See* Letter from USAC to Donna Cote, Ascent titled *Administrator's Decision on Contributor Appeal* (Jan. 11, 2008) ("Administrator's Decision").

6 *See* Letter from Donna Cote, Ascent to Office of the Secretary, FCC (Feb. 6, 2008) ("Ascent Appeal").

7 *Order*, ¶9.

II. THE USF CONTRIBUTIONS ASSESSED AGAINST ASCENT EXCEEDED ASCENT'S RELEVANT TELECOMMUNICATIONS REVENUES AND THUS VIOLATED SECTION 254

A USF contribution amount which exceeds a contributor's interstate revenues is inequitable and violates Section 254's requirement that carriers contribute to the USF "on an equitable and non-discriminatory basis."[8] As discussed in greater detail below, the USF contribution assessed to Ascent for the fourth quarter of 2007 exceeded Ascent's *total* telecommunications revenues and thus is *per se* inequitable in violation of Section 254.

In a 1999 decision by the U.S. Court of Appeals for the Fifth Circuit, the court addressed numerous issues related to implementation of the Telecommunications Act of 1996 (the "Act"), including a challenge to the USF contribution assessed against COMSAT, at that time, a small interstate service provider that specialized in providing international services.[9] COMSAT argued that requiring it to contribute $5 million to the USF when its interstate revenues totaled only $3.8 million constituted unfair treatment.[10] The Court noted:

> COMSAT'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 makes a compelling argument that this result alone violates the equitable language of [Section 254.][11]

The Court then ruled that "the agency's interpretation of 'equitable and nondiscriminatory,' allowing it to impose prohibitive costs on carriers such as COMSAT, is 'arbitrary and capricious and manifestly contrary to the statute.'"[12]

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8 47 U.S.C. §254(d).

9 *See Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (1999) (*"TOPUC"*).

10 *Id.*, at 434.

11 *Id.* (emphasis added)

12 *Id.* at 434-35.

In the Commission's own words, the Court's holding is clear cut: "*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.*"[13]

The Bureau's *Order* violates this principle, as applied to Ascent. The USF contribution erroneously assessed to Ascent exceeded $2.1 million[14] while its *total* telecommunications revenues for the quarter were only $2.0 million.[15] Such a result alone violates Section 254, as *TOPUC* holds.[16] The Bureau erred by interpreting the pay and dispute policy to require payments that impose such "prohibitive costs" on Ascent.[17] In this instance, *TOPUC* requires that the Bureau refrain from requiring payments — even "refundable" payments[18] — that exceed a contributor's total gross telecommunications revenues. It is inequitable and a *per se* violation of Section 254 to require Ascent to pay the invoices in this instance. The Bureau's denial of Ascent's appeal on the ground that it did not pay the erroneous invoices, therefore, is unlawful.

The inequity of requiring Ascent to make the full $2.1 million payment is even more egregious in light of the fact that the FCC Form 499Q error which resulted in the erroneous assessment was Ascent's first error in its five year history of filing the FCC form 499s. Unlike

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

14 *See* USAC Invoice No. UBDI0000274108 attached to Ascent Revision filing.

15 *See* Ascent Revised Form 499Q (filed Nov. 14, 2007).

16 *TOPUC*, 183 F.3d at 435.

17 *Id.* at 434-35.

18 Because USAC deducted $150,000 in interest and penalties, it did not in fact refund all of the erroneous invoices here.

other petitioners, such as Achieve[19] and New Edge,[20] Ascent did in fact, make a contribution to the USF during this time period. That contribution exceeded its actual, correct USF assessment by over $500,000 and was more than sufficient to pay its USF obligations for the period.

Further magnifying the inequity of the Bureau's denial of Ascent's waiver request is that Ascent was charged over $150,000 in late fees associated with the unpaid USF contribution obligation that ultimately, it would not owe to the fund. Although Ascent received a credit during the true-up process after restating its actual revenues without the erroneous projections,[21] Ascent did not receive any credit for the late fees imposed upon it. As a result, Ascent suffered a significant drain on its financial resources when it made the first USF contribution payment and was not made whole by the true-up process as the Company now still must contend with late payment penalties exceeding $150,000. Based on these facts and the reasons addressed below, the Commission should reconsider the Bureau's *Order* and grant Ascent a waiver of the 45-day revision filing deadline.

III. COMMISSION PRECEDENT JUSTIFIES GRANT OF ASCENT'S WAIVER REQUEST

There is Commission precedent granting requests for waivers of filing deadlines – for both USF contributors and USF support recipients – and the denial of Ascent's waiver request is inconsistent with those prior Commission decisions. Granting Ascent's waiver request

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19 *Order*, ¶9 (noting that Achieve did not pay any of its USF contribution invoices).

20 *Id.*, The Bureau noted that New Edge made only a partial payment amounting to what it believed was its correct USF contribution.

21 The Commission refunds overpayments to the USF "based on an average of the two lowest contribution factors for the year." *See, e.g., In re Federal-State Joint Board on universal Service; Universal Service Contribution Methodology; Aventure Communications Technology, LLC, Form 499 Filer ID: 825749 Request for Waiver of USAC Rejection Letter and Request for Waiver of USAC 45 Day Revision Deadline*, 23 FCC Rcd 10096, n.15 (June 26, 2008) ("Aventure Waiver Order"). Thus it is highly likely that Ascent received a credit based on a contribution factor lower than the contribution factor used in calculating the payments Ascent was required to make.

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 Commission's rules permit companies to seek waiver of Commission rules for "good cause shown."[22] The Commission has stated that it "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."[23] The Bureau has further noted that "the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis."[24]

Failure to grant Ascent's request would be inconsistent with the Commission's prior precedent. In October 2008, the Bureau granted requests for waivers of a USF filing deadline for six companies that were seeking support from the USF.[25] The petitioners offered

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22 47 C.F.R. §1.3.

23 *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).

24 *See In re Federal-State Joint Board on Universal Service; Universal Service Contribution Methodology; Aventure 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).

25 *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; Aventure 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").

reasons for the filing delays ranging from problems with e-mailed filings,[26] a change in personnel,[27] to simply forgetting the deadline.[28] 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.[29]

The factual circumstances underlying Ascent's waiver request are very similar to those of the waiver case described above and similarly justify a result consistent with those waiver requests. As in that waiver proceeding, Ascent's mistake – its first in five years of filing and just like the error of the six waiver petitioners,[30] was one of timing – it missed the deadline to file a revised Form 499Q but did actually file the form. Ascent's failure to notice or realize the significance of a notice e-mail sent by USAC regarding an increase in Ascent's USF contribution assessment was an administrative oversight. Like those petitioners, Ascent has revised its internal policies to ensure that all future deadlines are met.[31] 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 repeated[32] and grant Ascent's waiver request.

Similarly, in June 2008 the Bureau granted a request for waiver of the same 45-day revision filing rule at issue in Ascent's waiver request.[33] In that proceeding, Aventure Communications Technology, LLC ("Aventure") asserted it mistakenly included its total

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26 *6-Waiver Grant Order*, ¶5.

27 *Id.*, ¶10.

28 *Id.*, ¶7.

29 *Id.*, ¶11.

30 *Id.*, ¶¶ 5-10.

31 *Id.*, ¶ 11.

32 *Id.*, 12.

33 *Aventure Waiver Order.*

company revenues on a Form 499 filing – resulting in a substantial increase in its USF contribution assessment - and did not realize its mistake until after the revision filing deadline.[34] Aventure paid the USF assessments, sought waiver of the deadline then appealed USAC's denial of the waiver request.[35] The Bureau found the waiver was warranted to "avoid requiring Aventure to make excessive, incorrect payments to the USF with no reimbursement for more than a year."[36] The Bureau also stated that Aventure demonstrated that "strict enforcement of the filing deadline would disproportionately penalize [the carrier] when considered in light of its actions to remedy the error."[37]

Again, the circumstances surrounding Ascent's waiver request are similar to those of Aventure and justify the same result as in the Aventure proceeding. Waiver is warranted here based on the facts of Ascent's situation and because granting the waiver would not undermine the goals of the USF program. As in the Aventure case, Ascent made a single mistake of reporting total revenues instead of projected telecommunications revenues.[38] Like Aventure, Ascent complied with the Commission's pay-then-dispute procedures when Ascent paid the first invoiced amount – more than three times its correct USF contribution amount of the entire quarter – then disputed that invoice. Ascent complied with the spirit and process for appealing a USF contribution assessment and made the reasonable decision to wait for USAC's response to that appeal before deciding how to proceed. Unfortunately, USAC did not respond to Ascent until January, nearly two months after Ascent filed its appeal. Just as the Bureau found in the Aventure proceeding, requiring Ascent to pay an "excessive and incorrect payment[] into the

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34 *Id.*, ¶2.

35 *Id.*

36 *Id.*, ¶4.

37 *Id.*, ¶6.

38 *See Order*, n.16.

USF" when USAC had not yet ruled whether it would accept Ascent's revised filing appeal would "disproportionately penalize" Ascent. In fact, USAC did not act on the filing and appeal for almost two months. This delay led to the two unpaid invoices and, ultimately, the large late fees that were assessed on Ascent.[39] Waiver is warranted here based on the facts of Ascent's situation and because granting the waiver would not undermine the goals of the USF program.

IV. ASCENT'S FAILURE TO SUBMIT THE ERRONEOUS USF CONTRIBUTIONS DID NOT NEGATIVELY IMPACT THE UNIVERSAL SERVICE FUND

In addressing waiver requests related to the USF, the Commission has expressed concern over the impact such requests would have on the stability of the USF. The Bureau explained that compliance with the revision filing deadline was "essential in order to eliminate incentives for carriers to revise their revenue projections after the announcement of the contribution factor for the upcoming quarter in order to reduce their contribution obligations and to otherwise reduce the likelihood of a shortfall in universal service funding in a given calendar quarter."[40] Similarly, in the *Aventure Waiver Order*, the Bureau noted that the Form 499 filings were "essential for USAC to determine the projected interstate and international revenues for the industry."[41]

Ascent's reasonable failure to pay the erroneous USF contribution assessments had no negative impact on the USF. The projected budget for the USF for the fourth quarter of

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39 It bears noting that the late fees were assessed for non-payment of amounts that would have been refunded, just as in the Aventure case. Requiring Ascent to pay that amount with no hope of a refund for at least six months would have created an undue hardship.

40 *See In the Matter of Federal-State Joint Board on Universal Service; Request for Review by ABS-CBN Telecom North America, Incorporated of Decision of Universal Service Administrator; Request for Review by Southwest Communications, Inc. of Decision of Universal Service Administrator; Request for Review by Trans National Communications International, Inc. of Decision of Universal Service Administrator*, 22 FCC Rcd 4965, ¶8 (Mar. 14, 2007).

41 *Aventure Waiver Order*, ¶7.

2007 was in excess of $1.85 billion[42] of which the contribution amounts assessed to Ascent amounted to a mere one tenth of one percent (0.1%) "shortfall." Such an amount does not and cannot threaten the "predictability" of USF. To the contrary, the amount is well within the anticipated non-payment or uncollectible amounts that USAC already includes in its calculations of the contribution factor.[43] Ascent did pay over $717,000 of the amount invoiced to it and this payment more than satisfied the approximately $200,000 Ascent correctly should have been invoiced for the *entire* third quarter. Despite having made only a single payment, Ascent still received credits of over $500,000 during the annual true-up process.[44] This is a clear indication that Ascent overpaid into the USF and that the fund was not negatively impacted by Ascent's failure to pay the full invoiced USF contribution assessment. Thus, granting Ascent's waiver request would not "undermine the policy objective" of the 45-day revision rule because Ascent did make a payment; that payment fulfilled the actual USF contribution Ascent was supposed to pay for the quarter; and the USF was not negatively impacted by Ascent's actions.

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42 Proposed Fourth Quarter 2007 Universal Service Contribution Factor, DA 07-3928 (September 13, 2007).

43 See 2007 Letter from D. Scott Barash, USAC, to Marlene H. Dortch, FCC (Mar. 26, 2008) enclosing 2007 USAC Annual Report.

44 Although Ascent received a credit it was still assessed late penalties of $150,000 and thus Ascent was not made whole by the true-up process.

V. 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.

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