

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
Universal Service High-Cost Filing Deadlines	)	WC Docket No. 08-71
	)	
Petition of Virgin Islands Telephone Corp. d/b/a Innovative Telephone for Waiver of Section 54.904(d) of the Commission's Rules	)	
	)	
	)	

**PETITION OF VIRGIN ISLANDS TELEPHONE CORP. D/B/A INNOVATIVE  
TELEPHONE FOR WAIVER OF RULE 54.904(D) OF THE COMMISSION'S RULES**

Pursuant to section 1.3 of the rules of the Federal Communications Commission ("FCC" or "Commission"),<sup>1</sup> the Virgin Islands Telephone Corp. d/b/a Innovative Telephone ("Innovative" or "Company") respectfully requests a waiver of the July 2, 2012 filing deadline to submit the Interstate Common Line Support ("ICLS") annual certification, as set forth in section 54.904(d) of the Commission's rules.<sup>2</sup> In support of its petition, Innovative states as follows:

**I. BACKGROUND**

Innovative is the incumbent local exchange carrier ("ILEC") serving the territory of the United States Virgin Islands ("USVI"). Although formerly a rate-of-return regulated carrier at the interstate level, Innovative has been regulated by the FCC as a price cap ILEC since 2010.<sup>3</sup> In allowing Innovative to convert from rate-of-return regulation to price cap regulation, the

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<sup>1</sup> 47 C.F.R. § 1.3.

<sup>2</sup> 47 C.F.R. § 54.904(d).

<sup>3</sup> See *Virgin Islands Telephone Corporation Petition for Election of Price Cap Regulation and Limited Waiver of Pricing and Universal Service Rules*, Order, 25 FCC Rcd 4824 (2010).

Commission permitted the Company to continue to receive ICLS, calculated at its 2009 per-line disaggregated amounts and frozen at those per-line levels going forward.<sup>4</sup>

Pursuant to section 54.904(d) of the Commission's rules, in order to receive ICLS, an eligible telecommunications carrier ("ETC") was required to file a certification with the Commission and the Universal Service Administrative Company ("USAC") by July 2, 2012.<sup>5</sup> The certification must state that all ICLS will be used only for the provision, maintenance, and upgrading of facilities and services for which the support is intended.<sup>6</sup>

Unfortunately, consistent with information provided by the National Exchange Carrier Association, Inc. ("NECA") regarding the Commission's universal service certification requirements, Innovative understood that the ICLS annual certification under section 54.904(d) was no longer required for price cap carriers but instead had been superseded by the new reporting and certification requirements under section 54.313 of the Commission's rules. Only after the July 2, 2012 deadline had passed, however, did Innovative realize that it had misunderstood the Commission's rules. Innovative promptly remedied the situation by filing its ICLS annual certification on July 13, 2012 – only eight business days after the deadline.

Unless Innovative's waiver request is granted, the Company stands to lose in excess of \$ 6.4 million in universal service support for the period from July 1, 2012 through December 31, 2012.<sup>7</sup> This support is critical to enabling Innovative to meet the communications needs of

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<sup>4</sup> *Id.*, ¶¶ 19-22.

<sup>5</sup> 47 C.F.R. §§ 54.904(a) & 54.904(d). The Commission's rules require that the ETC annual certification be filed by June 30. However, because June 30 fell on a weekend this year, the filing was due on July 2, 2012, which was the next business day.

<sup>6</sup> 47 C.F.R. § 54.904(d); *see* 47 U.S.C. § 254(e).

<sup>7</sup> *See ICLS Certifications – High Cost Program*, Universal Service Administrative Company, <http://www.usac.org/hc/legacy/incumbent-carriers/step06/icls.aspx> (last visited July 23, 2012).

residents of the USVI and to satisfying the universal service requirements of section 254 of the Act.

## II. DISCUSSION

The Commission may waive its rules for good cause shown.<sup>8</sup> The Commission may exercise its discretion to waive a rule when “the particular facts make strict compliance inconsistent with the public interest.”<sup>9</sup> In deciding whether to grant a waiver, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.<sup>10</sup>

The Wireline Competition Bureau (“Bureau”) routinely has found good cause to waive the Commission’s universal service filing deadlines.<sup>11</sup> For example, earlier this year the Bureau

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<sup>8</sup> 47 C.F.R. § 1.3.

<sup>9</sup> *Verizon Communications Inc., Petition for Waiver of Section 54.802(a) of the Commission’s Rules*, Order, 21 FCC Rcd 10155, ¶ 6 (WCB 2006) (“*Verizon Order*”). The Commission has considerable discretion as to whether to waive its rules. See *Office of Communication of United Church of Christ v. FCC*, 911 F.2d 803, 812 (D.C. Cir. 1990) (upholding the Commission’s grant of a waiver “[g]iven the deference due the agency in matters of this sort”); *City of Angels Broadcasting, Inc. v. FCC*, 745 F.2d 656, 663 (D.C. Cir. 1984) (noting that the scope of review of a waiver determination by the Commission “is narrow and constrained”). As the D.C. Circuit has observed, the Commission’s waiver determinations are entitled to heightened deference because “the agency’s discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety-value procedure for consideration of an application for exemption based on special circumstances.” *AT&T Wireless Services, Inc. v. AT&T*, 270 F.3d 959, 965 (D.C. Cir. 2001) (internal quotation marks omitted).

<sup>10</sup> *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972); *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

<sup>11</sup> See, e.g., *Verizon Order*, ¶ 8 (granting waiver of section 54.802(a) when Verizon submitted data two business days late); *Petitions for Waiver of Universal Service High-Cost Filing Deadlines*, Order, 25 FCC Rcd 843, ¶ 22 (WCB 2010) (granting requests for waiver of various high-cost universal service support filing deadlines); *NPCR, Inc. Petition for Waiver of Section 54.802(a) of the Commission’s Rules*, Order, 22 FCC Rcd 560 (2007) (same); *Dixie Net Communications, Inc. Petition for Waiver of Section 54.307(c) of the FCC’s Rules*, Order, 26 FCC Rcd 184 (WCB 2011) (granting a request for waiver of section 54.307(c) when carrier filed required data one-day late); *Ringsted Communications Company Petition for Waiver of Section*

granted six petitions for waiver of the Commission's rules setting forth deadlines that ETCs must meet to be eligible to receive certain forms of high-cost universal service support.<sup>12</sup> In each case, the Bureau found good cause to grant the requested waivers "because the missed deadlines were the result of minor ministerial, clerical, or procedural errors."<sup>13</sup>

Similarly, in 2011 the Bureau granted four separate requests for waivers of various high-cost universal service support filing deadlines, including section 54.904(d) of the Commission's rules.<sup>14</sup> The Bureau found good cause because: (i) the carrier promptly filed the required data or certification shortly after the filing deadline; and (2) the carrier took corrective measures to ensure compliance with Commission's rules and future universal service filing requirements.<sup>15</sup> The carriers made the required filings between one and seven business days after the deadlines, and Bureau found that the carriers "promptly remedied their errors."<sup>16</sup>

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*54.307(c) of the FCC's Rules*, 26 FCC Rcd 4912 (WCB 2011) (granting a request for waiver of section 54.307(c) when carrier filed required data one-day late).

<sup>12</sup> Public Notice, The Telecommunications Access Policy Division of the Wireline Competition Bureau Grants Petitions Requesting Waiver of Various High-Cost Universal Service Filing Deadlines, WC Docket No. 08-71, DA 12-39 (rel. Jan. 11, 2012); Public Notice, The Telecommunications Access Policy Division of the Wireline Competition Bureau Grants Petitions Requesting Waiver of Various High-Cost Universal Service Filing Deadlines, WC Docket No. 08-71, DA 12-315 (rel. Feb. 29, 2012).

<sup>13</sup> *Id.*

<sup>14</sup> *Petitions for Waiver of Universal Service High-Cost Filing Deadlines et al.*, Order, 26 FCC 11069 (WCB 2011).

<sup>15</sup> *Id.* at 11069, ¶ 1.

<sup>16</sup> *Id.* at 11074, ¶ 12; *see also Petitions for Waiver, F&B Communications Inc.*, Order, DA 11-560 (rel. Mar. 29, 2011) (finding good cause to waive section 54.802(a) when: (i) the carrier's office manager, who was the sole employee responsible for such filings, and its general manager were out of town just before the filing deadline; (ii) the line count data was filed eight business days late; and (iii) the carrier revised its internal procedures to ensure compliance with future filing deadlines).

**A. Innovative Missed The Filing Deadline Due To A Procedural Error.**

Innovative is a small company with relatively few in-house regulatory personnel.<sup>17</sup> With the Commission's comprehensive reforms to the high-cost universal service program, intercarrier compensation system, and federal Lifeline program, Innovative's limited resources have been strained as the Company has struggled to analyze how this multitude of changes affects the Company's business and understanding what new compliance obligations these changes require.<sup>18</sup> This effort has been made even more challenging by virtue of the several clarification and reconsideration decisions issued by the Commission and the staggered implementation deadlines associated with the Commission's reforms.<sup>19</sup>

It was Innovative's understanding (albeit erroneous) that the Commission's new reporting requirements in section 54.313 adopted in the *USF/ICC Transformation Order* constituted the entirety of the certifications required by price cap carriers receiving high-cost universal service support.<sup>20</sup> Innovative filed the information and certifications required by section 54.313 on June

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<sup>17</sup> Declaration of Tisha Lake ¶ 4 ("Lake Declaration").

<sup>18</sup> Lake Declaration ¶ 4. See *Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011) ("*USF/ICC Transformation Order*"); *pets. for review pending sub nom. In re: FCC 11-161*, No. 11-9900 (10th Cir. filed Dec. 8, 2011); *Lifeline and Link Up Reform and Modernization*, Report and Order and Further Notice of Proposed Rulemaking, FCC 12-11 (rel. Feb. 6, 2012).

<sup>19</sup> *Connect America Fund*, Order on Reconsideration, 26 FCC Rcd 17633 (2011); *Connect America Fund*, Second Order on Reconsideration, FCC 12-47 (rel. April 25, 2012); *Connect America Fund*, Third Order on Reconsideration, FCC 12-52 (rel. May 14, 2012); *Connect America Fund*, Order, DA 12-147 (rel. Feb. 3, 2012); *Connect America Fund*, Order, DA 12-298 (rel. Feb. 27, 2012).

<sup>20</sup> Lake Declaration ¶ 5.

29, 2012, which Innovative understood (again erroneously) satisfied its reporting obligations as a recipient of ICLS.<sup>21</sup>

Innovative based its understanding, at least in part, upon notices from NECA – upon which Innovative relies to ensure compliance with its regulatory obligations – which identified the information price cap carriers were required to file with the FCC by July 2, 2012. The first notice was dated June 8, 2012 entitled “For Your Action - FCC Reporting Requirements for 2012,” and the second notice was dated June 14, 2012 entitled “For Your Action – Clarification on FCC Reporting Requirements for 2012.”<sup>22</sup> Both the June 8, 2012 and June 14, 2012 notices identified the information that NECA understood ETCs were required to file with the FCC by July 2, 2012; both notices identified the certifications required by section 54.313 of the Commission’s rules, but neither mentioned the ICLS annual certification under section 54.904(a).<sup>23</sup> Innovative also contacted expert third-party sources that did not identify an ICLS annual certification being due on July 2, 2012.<sup>24</sup>

In retrospect, Innovative should have contacted USAC directly or requested assistance from outside counsel or a consultant to clarify its specific ICLS reporting obligations.<sup>25</sup> It was a

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<sup>21</sup> Letter to Marlene H. Dortch from Seth R. Davis, WC Docket No. 10-90 (filed June 29, 2012). In fact, the Commission eliminated section 54.904 effective July 2013, at which time ETCs will certify compliance with section 254(e) of the Act through the reporting and certification requirements in section 54.314 of the Commission’s rules. *USF/ICC Transformation Order*, 26 FCC Rcd at 17862.

<sup>22</sup> Lake Declaration ¶ 6, Appendix 1.

<sup>23</sup> *Id.* The calendar that accompanied NECA’s June 8, 2012 notice reflected a deadline of June 29, 2012 for Common Line Pool members to provide NECA with ICLS “Use Certification.” However, Innovative overlooked this reference because it is not a Common Line Pool member. Instead, the Company was focused on the July 2, 2012 deadline, which, according to NECA’s calendar, did not apply to the filing of the ICLS annual certification. Lake Declaration ¶ 6.

<sup>24</sup> Lake Declaration ¶ 6.

<sup>25</sup> Lake Declaration ¶ 8.

procedural error not to do so, and, as discussed below, Innovative has taken steps to modify its procedures going forward.

**B. Innovative Promptly Cured its Failure To Timely File The Required Certification And Has Taken Corrective Measures to Ensure Compliance Going Forward.**

Consistent with other cases in which the Commission has waived a universal service filing deadline, good cause exists to grant Innovative's request to waive the July 2, 2012 filing deadline for the ICLS annual certification required by section 54.904(d).

First, Innovative promptly filed the certification after the July 2, 2012 deadline. The Company filed its ICLS annual certification on July 13, 2012 – only eight business days after the deadline. This filing was prompted by Innovative's discovery of a reference on USAC's website to an ICLS annual certification being filed by another carrier in 2012, which alerted Innovative to the fact that it may have misinterpreted the Commission's certification requirements. Innovative filed its ICLS annual certification immediately thereafter as a precautionary measure. It then followed up with calls to USAC, which confirmed that Innovative should have filed its ICLS annual certification by July 2, 2012.<sup>26</sup>

Second, Innovative has taken corrective measures to ensure compliance with Commission's rules and future universal service filing requirements going forward. Innovative already has in place a calendar reporting system to track filing deadlines in connection with its participation in the federal universal service program. However, management will now meet with staff on a weekly basis to review all reporting calendars and will follow up with USAC

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<sup>26</sup> Lake Declaration ¶ 7.

directly (or outside attorneys or consultants) to confirm Innovative's understanding regarding applicable filing requirements and the associated deadlines.<sup>27</sup>

The requested waiver will not adversely impact USAC or the USF program. USAC received Innovative's ICLS certification just eight business days after the July 2, 2012 deadline. Innovative understands that it is necessary for carriers to meet filing deadlines, absent special circumstances, due to the large amount of data USAC processes each year. However, this brief delay in USAC's receipt of the Company's ICLS certification would not disrupt or delay USAC's administration of the USF program.

**C. Innovative's Prior Waiver of a Different Rule Does Not Warrant Denial of This Request.**

Good cause exists to grant the requested waiver, notwithstanding that Innovative previously sought and received a waiver of the March 30, 2011 line count filing deadline in section 54.903(a) of the Commission's rules.<sup>28</sup> In connection with that waiver, Innovative committed to put in place procedures to avoid missing future high-cost filing deadlines – a commitment that Innovative has honored. Innovative has since timely filed its line count data as well as its section 54.313 report and certification.<sup>29</sup> Innovative's failure to file its ICLS annual certification by July 2, 2012 was not the result of Innovative overlooking or forgetting about this deadline; rather it was because Innovative mistakenly believed that the deadline did not apply.

Innovative's situation is readily distinguishable from the facts in the *Allo Order* in which the Bureau denied requests for a waiver of high-cost filing deadlines by ETCs that previously

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<sup>27</sup> Lake Declaration ¶ 8.

<sup>28</sup> *Petitions for Waiver of Universal Service High-Cost Filing Deadlines et al.*, Order, 26 FCC Rcd 11069 (2011).

<sup>29</sup> Letter to Marlene H. Dortch from Seth R. Davis, WC Docket No. 10-90 (filed June 29, 2012).

had been granted a waiver.<sup>30</sup> In that case, the ETCs missed the applicable filing deadlines by substantially longer periods of time – in some cases, several months.<sup>31</sup> In contrast, Innovative submitted its ICLS certification just eight business days late.

Furthermore, the ETCs in the *Allo Order* missed deadlines about which they should have been aware had they put in place sufficient procedures to avoid missing high-cost filing deadlines as they had committed previously to do.<sup>32</sup> Here, by contrast, Innovative had sufficient procedures to avoid missing high-cost filing deadlines; it simply mistakenly believed that the July 2 deadline no longer applied – a mistake that was understandable given all of the recent changes to the universal service system.<sup>33</sup>

**D. Granting the Requested Waiver is in the Public Interest.**

A waiver of the July 2, 2012 filing deadline would serve the public interest. Absent a waiver, Innovative stands to lose more than \$6.4 million in ICLS support, which would disproportionately penalize Innovative and create a substantial hardship on its high-cost customers.<sup>34</sup>

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<sup>30</sup> *Federal-State Joint Board on Universal Service; Allo Communications Petition for Waiver of Section 54.307(c) of the Commission's Rules*, Order, 26 FCC Rcd 6178 (WCB 2011) (“*Allo Order*”).

<sup>31</sup> See *Allo Order* at ¶¶ 7, 9, 12, 15 (denying waivers where Allo filed 40 days late, Columbus filed several months late, and Pine Belt (seeking a third waiver) filed more than 14 days late).

<sup>32</sup> *Allo Order* at ¶¶ 16-17.

<sup>33</sup> Innovative is not the only ETC to fail to meet a USF filing deadline with the multitude of recent changes to the USF program. See ACS Wireless, Inc. Petition for Waiver of Section 54.313(j) of the Commission's Rules, *Connect America Fund*, WC Docket No. 10-90 (filed July 16, 2012) (requesting a waiver for its failure to file its 54.313 ETC report by the July 2, 2012 deadline, which it overlooked in the “confusion” resulting from the “whirlwind” of public notices and orders associated with the Commission's universal service reforms).

<sup>34</sup> Lake Declaration ¶ 9.

The Bureau repeatedly has granted waivers when, as here, the loss of funding due to strict enforcement of filing deadlines could lead to substantial hardship on carriers' high-cost customers. For example, in addressing a waiver petition from Frontier Communications in 2005, the Bureau recognized that Frontier would lose \$9.6 million in universal service funding due to filing a line count report two business days late, and that such a harsh penalty in light of a small error "constitutes special circumstances warranting a deviation from the current rule."<sup>35</sup> As in prior cases, "strict enforcement of the deadline here would disproportionately penalize [Innovative] when considered in light of its actions to remedy the error."<sup>36</sup>

The hardship on Innovative and its customers would be particularly significant given the unique challenges that the Company faces in serving an insular area – challenges that the Commission recognized in the *USF/ICC Transformation Order*.<sup>37</sup> With the loss of more than \$6.4 million in high-cost support, Innovative would be unable to provide "robust, affordable voice and broadband service" in the USVI – a result that would not be in the public interest and that the Commission cannot and should not tolerate.

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<sup>35</sup> *Citizens Communications and Frontier Communications Petition for Waiver of Section 54.802(a) of the Commission's Rules*, Order, 20 FCC Rcd 16761, ¶ 7 (WCB 2005). See also *AT&T Communications of California, Petition for Waiver of Section 54.802(a) of the Commission's Rules*, Order, 22 FCC Rcd 953, ¶ 7 (2007) (noting that "the loss of funding may undermine AT&T's investments in its network, and thus its ability to ensure that customers have and maintain access to adequate services," and the waiver "would enable AT&T to continue uninterrupted in its efforts to maintain and promote access to advanced services in high-cost areas").

<sup>36</sup> *Verizon Order* at ¶ 7; see also *Aventura Communications Technology, LLC, Request for Review of USAC Rejection Letter and Request for Waiver of USAC 45 Day Revision Deadline*, 23 FCC Rcd 10096, ¶ 6 (WCB 2008) (holding that good cause exists for waiver "given the excessive harm that would occur absent relief"); *NPCR, Inc. Petition for Waiver of Section 54.802(a) of the Commission's Rules*, 22 FCC Rcd 560, ¶¶ 6-7 (WCB 2007) (same).

<sup>37</sup> See *USF/ICC Transformation Order*, 26 FCC Rcd at 17737, ¶ 193.

**III. CONCLUSION**

For the foregoing reasons, Innovative respectfully requests that the Commission grant this petition, waive section 54.904(d) of its rules, and direct USAC to accept the Company's ICLS annual certification.

Respectfully submitted,

By: /s/ Bennett L. Ross

Bennett L. Ross  
Sadie F. Butler  
**WILEY REIN LLP**  
1776 K Street, NW  
Washington, DC 20006  
(202) 719-7000

Counsel for the Virgin Islands Telephone  
Corp. d/b/a Innovative Telephone

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