

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

In the Matter of)
)
Universal Service Contribution Methodology) WC Docket No. 06-122
)
Request for Review of a Decision of the)
Universal Service Administrator and Request for)
Waiver by American Broadband &)
Telecommunications)

ORDER

Adopted: July 22, 2013

Released: July 22, 2013

By the Deputy Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this order, we grant a petition filed by American Broadband & Telecommunications (American Broadband). American Broadband requests that the Commission waive the 45-day deadline for revising the FCC Form 499-Q, and reverse a decision of the Universal Service Administrative Company (USAC) that rejected as untimely American Broadband’s revised May 2010 FCC Form 499-Q. We grant American Broadband’s request for waiver and direct USAC to accept American Broadband’s revised May 2010 FCC Form 499-Q as if timely filed, and to process it accordingly.

II. BACKGROUND

A. The Act and the Commission’s Rules

2. Section 254(d) of the Communications Act of 1934, as amended (the Act), directs that “every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service.” Section 254(d) further provides that “[a]ny other provider of interstate telecommunications may be required to contribute to the preservation and advancement of universal service if the public interest so requires.” To this end, the Commission has determined that common carriers and private carriage providers that provide interstate

1 Emergency Request for Review of a Universal Service Administrator Decision and DCIA Interest and Penalty Assessment and Request for Waiver of 45-Day Revision Deadline by American Broadband & Telecommunications, WC Docket No. 06-122 (filed Dec. 3, 2010) (Petition) (portions confidential). No comments were filed in this proceeding.

2 American Broadband also seeks reversal of interest and penalties stemming from the unpaid third quarter 2010 invoices for universal service fund (USF or Fund) assessments. Because we waive the FCC Form 499-Q revision deadline and direct USAC to process the form as if timely filed, interest and penalties, if any, associated with these months will be assessed based on the revised filing.

3 47 U.S.C. § 254(d).

4 Id.

telecommunications to others for a fee generally must contribute to the USF based on their interstate and international end-user telecommunications revenues.⁵

3. In the *Universal Service Second Order on Reconsideration*, the Commission set forth the specific methodology for contributors to use in computing their universal service contributions.⁶ The Commission also designated USAC as administrator of the Fund, pursuant to which USAC performs billing and collection functions for the Commission as part of its administration of the USF support mechanisms.⁷ Under Commission rules, contributors are required to file FCC Form 499-Q each quarter, projecting their interstate and international revenues for the upcoming quarter and providing their interstate and international revenues from the previous quarter.⁸ USAC computes the entities' quarterly universal service contribution obligation based on the projected revenue information reported on the FCC Form 499-Q, and bills entities each month based on this obligation.⁹ Contributors have the opportunity to correct their quarterly filings up to 45 days after the due date of each FCC Form 499-Q filing.¹⁰ In April of each year, contributors file the FCC Form 499-A to report their actual revenues from the previous year.¹¹ USAC uses the FCC Form 499-A data to conduct a true-up process whereby USAC determines the actual amount owed by each contributor from the previous year and issues either an invoice for underpayment or a credit for the overpayment.¹²

⁵ See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9183-84, para. 795 (1997) (subsequent history omitted). Although the Commission exercised its permissive authority to assess private carriage providers, it exempted certain government entities, broadcasters, schools, libraries, systems integrators, and self-providers from the contribution requirement. 47 C.F.R. § 54.706(d). The Commission also requires certain other providers of interstate telecommunications to contribute to the Fund. See, e.g., *Universal Service Contribution Methodology et al.*, CC Docket No. 96-45 et al., Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518, 7544, para. 52 (2006) (requiring interconnected voice over Internet protocol providers to contribute to the Fund).

⁶ See *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service*, CC Docket Nos. 97-21, 96-45, Report and Order and Second Order on Reconsideration, 12 FCC Rcd 18400 (1997).

⁷ *Id.* at 18423-24, para. 42; 47 C.F.R. § 54.702(b).

⁸ See 47 C.F.R. §§ 54.706 (a)-(b), 54.711; see also 2012 FCC Form 499-Q Telecommunications Reporting Worksheet Instructions at 19.

⁹ 47 C.F.R. §§ 54.709, 54.711(a).

¹⁰ *Federal-State Joint Board on Universal Service et al.*, CC Docket Nos. 96-45 et al., Report and Order and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 24952, 24972, para. 36 (2002) (*2002 Contribution Methodology Order*); 2012 FCC Form 499-Q Telecommunications Reporting Worksheet Instructions at 9.

¹¹ *2002 Contribution Methodology Order*, 17 FCC Rcd at 24973, para. 37.

¹² *Id.* at 24972, para. 36. USAC will refund or collect from contributors any over-payments or under-payments. If the combined quarterly projected revenues reported by a contributor are greater than those reported on its annual FCC Form 499-A, then USAC will provide a refund to the contributor based on an average of the two lowest contribution factors for the year. If the combined quarterly revenues reported by a contributor are less than those reported on its FCC Form 499-A, then USAC will collect the difference from the contributor using an average of the two highest contribution factors from that year. *Id.* In adopting the true-up process, the Commission created incentives for carriers to accurately report their quarterly revenues by instructing USAC to base overpayment refunds on an average of the lowest two contribution factors for the year, and collect underpayments based on an average of the two highest contribution factors from that year. See *Federal-State Joint Board on Universal Service; Petition for Reconsideration Filed by AT&T*, CC Docket No. 96-45, Report and Order and Order on Reconsideration, 16 FCC Rcd 5748, 5752-53, para. 12 (2001).

4. In 2004, the Commission adopted rules implementing the requirements of the Debt Collection Improvement Act of 1996 (DCIA), which directs government agencies to “try to collect a claim of the [U.S.] Government for money or property arising out of the activities of, or referred to, the agency.”¹³ The Commission’s DCIA rules generally require that entities or individuals doing business with the Commission pay their debts on time.¹⁴ In 2007, the Commission adopted rules to strengthen oversight of the USF contributions process and align it with the DCIA.¹⁵ First, the Commission restructured the rate of interest assessed against USF contributions debt that is more than 30 days delinquent, setting the interest rate for delinquent debt at U.S. prime rate plus 3.5 percent.¹⁶ The Commission designed this interest rate to be consistent with commercial practices, and to address shortcomings under the previous structure.¹⁷ Also, consistent with the Commission’s DCIA rules, the Commission established that USF debt that is more than 90 days delinquent will incur an additional penalty of six percent per year.¹⁸ Pursuant to section 54.713 of the Commission’s rules, contributors must pay the amount billed by the due date provided in invoices to avoid the assessment of interest and penalties provided under the DCIA requirements.¹⁹ If a contributor does not pay a disputed assessment, USAC cannot waive the interest or penalties unless the disputed charges are later found to be a result of a USAC error, or USAC is directed to do so by the Commission.²⁰

B. Request for Review

5. On May 4, 2010, American Broadband filed its May 2010 FCC Form 499-Q, reporting projected revenues for the third quarter of 2010.²¹ The May 2010 form had a 45-day revision deadline of June 17, 2010. On May 6, 2010, two days after receiving American Broadband’s form, USAC sent a courtesy e-mail to American Broadband, stating that the projected revenue reported on its form was substantially higher than the historical revenue reported on the form.²² USAC did not receive a response

¹³ See *Amendment of Parts 0 and 1 of the Commission’s Rules*, MD Docket No. 02-339, Report and Order, 19 FCC Rcd 6540 (2004) (*2004 DCIA Order*); 47 C.F.R. Part 1, Subpart O; 31 U.S.C. § 3711(a). Congress enacted the DCIA to strengthen federal debt collection procedures. Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, 1358 (1996).

¹⁴ *2004 DCIA Order*, 19 FCC Rcd at 6542, para. 5.

¹⁵ *Comprehensive Review of the Universal Service Fund Management, Administration, and Oversight*, WC Docket No. 05-195, Report and Order, 22 FCC Rcd 16372, 16379, paras. 1, 14 (2007) (*2007 Comprehensive Review Order*).

¹⁶ *Id.* at 16379, para. 14. Prior to the *2007 Comprehensive Review Order*, USAC had varied measures to reduce contributor delinquency and pursue debtors with outstanding contribution obligations. In the *2007 Comprehensive Review Order*, the Commission adopted a single standard to be used in assessing late fees. *Id.* at 16378, para. 12.

¹⁷ *Id.* at 16376, para. 9.

¹⁸ *Id.* at 16381, para. 17.

¹⁹ 47 C.F.R. § 54.713(a) (“A contributor that fails to file a Telecommunications Reporting Worksheet and subsequently is billed by the Administrator shall pay the amount for which it is billed”), (b) (“If a universal service fund contributor fails to make full payment on or before the date due of the monthly amount established by the contributor’s applicable Form 499-A or Form 499-Q, or the monthly invoice provided by the Administrator, the payment is delinquent. All such delinquent amounts shall incur from the date of delinquency, and until all charges and costs are paid in full, interest . . . as well as administrative charges of collection and/or penalties . . .”).

²⁰ 47 C.F.R. § 54.702(c) (prohibiting the Administrator from making policy or interpreting Commission rules); see *Universal Service Contribution Methodology; A National Broadband Plan For Our Future*, WC Docket No. 06-122, GN Docket No. 09-51, Further Notice of Proposed Rulemaking, 27 FCC Rcd 5357, 5482, para. 362 (2012).

²¹ Petition, Exhibit D (Administrator’s Decision on Contributor Appeal (dated Nov. 22, 2010)) at 2.

²² *Id.* at 3 and Exhibit D at 3. Consistent with its usual practice, USAC sent a courtesy e-mail to the designated contact shown on American Broadband’s May 2010 FCC Form 499-Q. American Broadband indicates that it did

(continued...)

to the e-mail, and American Broadband did not submit a timely revision to the form.²³ USAC therefore relied on the projected revenue as reported on the May 2010 FCC Form 499-Q to calculate the company's monthly USF contribution obligation for July, August and September 2010.²⁴ American Broadband did not pay these invoices on time.

6. On July 27, 2010, American Broadband submitted a revised FCC Form 499-Q, and filed an appeal with USAC requesting that USAC accept its revised form and adjust its USF contribution obligation accordingly.²⁵ In its appeal, American Broadband states that it inadvertently added an extra zero to its projected end-user telecommunications revenue on the FCC Form 499-Q, thus reporting "grossly inflated revenues."²⁶ American Broadband states that it made a typographical error, that it did not receive the courtesy e-mail from USAC alerting American Broadband to a potential reporting error, and that it was unaware of the reporting error until it received the July 2010 invoice.²⁷ On November 22, 2010, USAC denied the appeal and rejected the revised FCC Form 499-Q as untimely.²⁸

7. On December 3, 2010, American Broadband filed this petition requesting that the Commission waive the 45-day deadline for revising its FCC Form 499-Q and reverse USAC's decision to reject the company's revised FCC Form 499-Q filing.²⁹ On January 31, 2011, American Broadband made a payment to the USF equaling what it would have owed for the third quarter 2010 had USAC accepted the revised FCC Form 499-Q.³⁰ In April 2011, American Broadband submitted its FCC Form 499-A reporting historical calendar year 2010 revenues, which effectively corrected the projected interstate revenue reported in the May 2010 FCC Form 499-Q filing.³¹

8. American Broadband makes several arguments in its petition. First, American Broadband, relying on the *Aventure Order*, asserts that the circumstances of its case warrant waiver of the 45-day revision deadline because payment of the full disputed amount would cause financial harm to the

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not receive the e-mail. USAC's courtesy e-mail is just that – a courtesy notification to contributors. It is the contributor's responsibility to identify and correct any errors in its filing within the 45-day revision window. *Universal Service Contribution Methodology, Requests for Waiver of Decisions of the Universal Service Administrator by ComScape Telecommunications of Raleigh-Durham, Inc. and Millennium Telecom, LLC*, WC Docket No. 06-122, Order, 25 FCC Rcd 7399, 7401, para. 6 (Wireline Comp. Bur. 2010). Nevertheless, in the limited circumstance presented here, we find that equity and hardship considerations weigh in favor of granting American Broadband's subject waiver request. See *infra* Section III.

²³ Petition at 3.

²⁴ *Id.*

²⁵ *Id.* at 1.

²⁶ *Id.* at 1, 2.

²⁷ *Id.* at 2-3.

²⁸ *Id.* at 3.

²⁹ *Id.* at 15.

³⁰ Letter from Kimberly A. Lacey, Counsel for American Broadband, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-122 (dated Feb. 11, 2011) (portions confidential) (Feb. 2011 *Ex Parte* Letter).

³¹ See *2002 Contribution Methodology Order*, 17 FCC Rcd at 24973, para. 36 (noting that USAC will use the actual revenue data provided by contributors on the FCC Form 499-A to perform annual true-ups to the quarterly projected revenue data submitted on FCC Forms 499-Q during the prior calendar year).

company and its Lifeline customers.³² American Broadband also asserts that because the amount invoiced differs from what the company will owe after true-up, the invoiced amount does not constitute a debt.³³ American Broadband further challenges USAC's "pay-and-dispute" policy, arguing that it was not adopted pursuant to the Administrative Procedure Act.³⁴ Finally, American Broadband argues that interest and penalties should not be assessed while an appeal is pending, and interest and penalties should not accrue until a final order on the appeal is issued. Therefore, American Broadband seeks to have the interest and penalties stemming from the unpaid third quarter 2010 invoices reversed.³⁵

III. DISCUSSION

9. We find in this limited circumstance that American Broadband has demonstrated good cause to waive the filing deadline for the revised May 2010 FCC Form 499-Q.³⁶ We therefore grant the request for waiver and direct USAC to process the revised form as if timely filed.³⁷ Because we waive the revision deadline, interest and penalties will accrue only on the contribution amounts based on the revised FCC Form 499-Q, and only from the due date to American Broadband's January 2011 payment date.

10. The Commission may waive any provision of its rules for good cause shown.³⁸ A rule may be waived where the particular facts make strict compliance inconsistent with the public interest.³⁹ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.⁴⁰ In sum, waiver is appropriate if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule.⁴¹

11. In the *2002 Contribution Methodology Order*, the Commission established a 45-day period for carriers to revise their FCC Form 499-Q filings.⁴² This deadline is necessary to eliminate incentives for contributors to revise their revenue projections after the contribution factor is announced for the upcoming quarter (thereby reducing their contribution obligations), and to reduce the likelihood of a Fund

³² Petition at 3-6 (citing *Universal Service Contribution Methodology; Aventure Communications Technology, LLC Request for Review of USAC Rejection Letter and Request for Waiver of USAC 45 Day Revision Deadline*, CC Docket No. 96-45, WC Docket No. 06-122, Order, 23 FCC Rcd 10096, 10097-98, paras. 4-5 (Wireline Comp. Bur. 2008) (*Aventure Order*) (inadvertent reporting error that required contributor to pay nearly 20 times its actual obligation caused undue hardship justifying waiver of FCC Form 499-Q deadline)).

³³ Petition at 9-10.

³⁴ *Id.* at 13 (citing 5 U.S.C. § 553).

³⁵ Petition at 9-11.

³⁶ See *Aventure Order*, 23 FCC Rcd at 10097-98, paras. 4-5.

³⁷ Because we grant American Broadband's request for waiver of the FCC Form 499-Q revision deadline and only assess interest and penalties on the contribution amounts that would be assessed based on the revised form, we do not address American Broadband's other arguments in this Order.

³⁸ 47 C.F.R. § 1.3.

³⁹ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

⁴⁰ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *aff'd*, 459 F.2d 1203 (D.C. Cir. 1972); *Northeast Cellular*, 897 F.2d at 1166.

⁴¹ *Northeast Cellular*, 897 F.2d at 1166.

⁴² *2002 Contribution Methodology Order*, 17 FCC Rcd at 24972, para. 36.

shortfall in a given calendar quarter.⁴³ In light of these regulatory policies, we do not routinely grant waivers of the 45-day revision deadline.⁴⁴

12. In the limited circumstance presented here, however, we find that equity and hardship considerations weigh in favor of granting American Broadband's request for waiver of the FCC Form 499-Q revision deadline. American Broadband states that it inadvertently made a "significant typographical error" by adding an extra zero to the projected end-user interstate revenue reported on the May 2010 FCC Form 499-Q.⁴⁵ Because of this error, American Broadband's invoices for the relevant quarter were ten times what they should have been. American Broadband states that requiring it to pay this invoiced amount would result in financial hardship to the company because the invoiced amount was disproportionately large compared to the total value of the company.⁴⁶ In fact, the invoiced amount for the *quarter* was several times the company's true-up contribution obligation for the *entire year*. Although American Broadband did not pay the invoiced amounts when due, it did pay, in January 2011, the amount that it would have owed for the third quarter based on the revised filing.⁴⁷

13. During the 2011 FCC Form A/Q true-up process, USAC reconciled the projected revenue reported on the FCC Form 499-Qs with the actual revenues reported on the 2011 FCC Form 499-A and issued credits to American Broadband in July through September of that year, per the normal course of business.⁴⁸ This process, however, does not reverse interest and penalties associated with the invoiced contribution amount resulting from the over reporting error on the FCC Form 499-Q. Due to the magnitude of the error and the length of time to true-up, the accrued interest and penalties totaled about 60 percent of the company's total annual contribution obligation after true-up.⁴⁹

14. By processing the revised form as if timely filed, USAC would substitute the projected revenue on the revised May 2010 FCC Form 499-Q for the projected revenue originally reported in error, which will have the effect of reversing the interest and penalties associated with the erroneously reported revenue. Because American Broadband did not timely pay its third quarter 2010 invoices, however, interest and penalties will accrue on the revised contribution amount from the due date of each monthly invoice until January 31, 2011, when American Broadband paid the amounts that would have been due had the revised FCC Form 499-Q been accepted.⁵⁰ The interest and penalties resulting from this action are more proportionate to American Broadband's true-up contribution obligation, but will still significantly exceed American Broadband's average monthly contribution for 2010.⁵¹ We find that these significant interest and penalty payments are appropriate, given that they resulted directly from American Broadband's delay in payment.

⁴³ *Id.*

⁴⁴ See *Aventure Order*, 23 FCC Rcd at 10098, para. 7.

⁴⁵ Petition at 1, 2.

⁴⁶ *Id.* at 5. The invoiced amount as a percentage of the total value of the company is provided in the confidential version of American Broadband's petition.

⁴⁷ See Feb. 2011 *Ex Parte* Letter.

⁴⁸ See *2002 Contribution Methodology Order*, 17 FCC Rcd at 24972, para. 36.

⁴⁹ See e-mail from Fred Theobald, Senior Manager of Contributions, USAC, to Carol Pomponio, Attorney Advisor, FCC, dated Apr. 12, 2013 (USAC Apr. 12 e-mail) (confidential) (on file with Wireline Competition Bureau, Telecommunications Access Policy Division staff).

⁵⁰ See 47 C.F.R. § 54.713(b).

⁵¹ See USAC Apr. 12 e-mail.

15. Based on these facts, we conclude that strict enforcement of the revision filing deadline and the resulting interest and penalties would disproportionately penalize American Broadband. Given the clerical nature and the magnitude of the error, we find that good cause exists to waive the filing deadline for the revised May 2010 FCC Form 499-Q. We direct USAC to accept the revised filing as if timely filed and to process it accordingly. American Broadband's arguments regarding interest and penalties accruing on the original invoiced amounts are moot because we waive the revision filing deadline and allow USAC to process the revised form.⁵² Likewise, because we waive the deadline, we need not address its argument that enforcement of USAC's pay-and-dispute policy violates the Administrative Procedures Act.⁵³ As discussed above, we find that interest and penalties on contribution amounts based on the revised form are appropriate, since they resulted directly from American Broadband's delay in payment.

IV. ORDERING CLAUSES

16. ACCORDINGLY, IT IS ORDERED that, pursuant to the authority contained in sections 1-4 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154 and 254, and pursuant to authority granted in sections 0.91, 0.291, 1.3 and 54.722 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 1.3 and 54.722, the request for review and waiver filed by American Broadband & Telecommunications is hereby GRANTED to the extent discussed herein.

17. IT IS FURTHER ORDERED that, pursuant to section 1.102(b)(1) of the Commission's rules, 47 C.F.R. § 1.102(b)(1), this order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Carol E. Matthey
Deputy Chief
Wireline Competition Bureau

⁵² Section 1.1910 of the Commission's rules does not suspend accrual of interest and penalties associated with the unpaid universal service obligation, contrary to American Broadband's argument. Petition at 10. Section 1.1910 addresses the Commission's "red light" rule, which provides that the Commission will withhold action on applications filed by any entity that is found delinquent on its debt to the Commission. 47 C.F.R. § 1.1910(b)(2). Section 1.1910(b)(3)(i) provides a limited exception, whereby the red light rule will not apply if the delinquent entity has timely filed an appeal of a disputed debt. 47 C.F.R. § 1.1910(b)(3)(i). The limited exception does *not* suspend accrual of interest and penalties associated with unpaid universal service obligations. Thus, section 1.1910 does not provide a basis for finding that a debt is not delinquent for purposes of interest and penalties.

⁵³ Petition at 13-14.