

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

In the Matter of)
Metropolitan Nashville Public Schools) SLD Nos. 161054574, 161055248,
Nashville, TN) 161055512, 161055858, 161055933,
) 161056945, 161057175
Schools and Libraries Universal Service) CC Docket No. 02-6
Support Mechanism)

ORDER

Adopted: December 20, 2018

Released: December 20, 2018

By the Managing Director, Office of the Managing Director, and Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In 2016, Metropolitan Nashville Public Schools (MNPS) owed the Commission \$1,519 as a result of a prior E-Rate application error and failed to pay that debt in a timely manner. As a result, the Universal Service Administrative Company (USAC) dismissed MNPS's funding year 2016 applications seeking a total of \$3,640,923 in E-Rate support under the Commission's red light rule, which prohibits any delinquent debtor from receiving benefits from the Commission and requires the dismissal of any application or other request for benefits made by any delinquent debtor. After realizing the consequences of its error, MNPS repaid the \$1,519 debt within 15 days and filed the instant Request for Review and/or Waiver.

2. Based on our review of the record, and the special circumstances presented here, we grant a limited, one-time waiver of the Commission's red light rule and remand MNPS's funding year 2016 applications to USAC to determine compliance with program rules and requirements. A deviation from our rule is warranted and the public interest served given the grossly disproportionate penalty (where the funding lost exceeds the debt by a factor of over 2,300) that MNPS would suffer coupled with the other unique circumstances present, including MNPS's payment of the debt shortly after it claims it received notice of the debt. Therefore, we grant MNPS's Request for Review and/or Waiver and remand MNPS's funding year 2016 applications to USAC to determine compliance with program rules and requirements. In providing this extraordinary relief, we caution applicants that the waiver granted herein is limited to the

1 The E-Rate program is formally known as the schools and libraries universal service support mechanism.

2 See Request for Review and/or Waiver by Metropolitan Nashville Public Schools of Decisions of the Universal Service Administrator, CC Docket No. 02-6 (filed Oct. 20, 2017) (Request for Review and/or Waiver).

3 47 CFR § 1.1910. On February 23, 2018, the Education Network of America, Inc. (ENA), MNPS's service provider for the applications at issue, filed an appeal raising substantially the same arguments as MNPS. See generally Request for Review and/or Waiver by Education Networks of America, Inc. of Decisions of the Universal Service Administrator, CC Docket No. 02-6 (filed Feb. 23, 2018) (ENA Request for Review and/or Waiver). Given the basis of the limited waiver we grant herein, we need not specifically address ENA's Request for Review and/or Waiver, which raises many of the same issues as MNPS's Request for Review and/or Waiver.

4 47 CFR § 1.3.

specific facts presented and remind applicants of their obligations to know and diligently comply with all program rules and deadlines, including the requirement that applicants repay their debts on time.

II. BACKGROUND

A. Legal Background

3. Under the E-Rate program, eligible schools, libraries and consortia (comprised of eligible schools and libraries) may request discounts for eligible telecommunications services, Internet access, and internal connections.⁵ E-Rate discounts are only available for eligible services delivered to sites listed on the FCC Form 471 and for which USAC issued a funding commitment.⁶ If funds have been disbursed in violation of the rules, USAC is required to recover such funds.⁷

4. The Commission's red light rule, implementing the Debt Collection Improvement Act of 1996 (DCIA),⁸ requires that action be withheld on any application or other request for benefits made by an entity that is delinquent in debts owed to the Commission and dismissal of such applications or requests if the delinquent debt is not resolved.⁹ A delinquent debt is a claim or debt that has not been paid by the date specified in an initial written demand for payment unless other satisfactory payment arrangements have been made, at any time thereafter, or the debtor has failed to satisfy an obligation under a payment agreement or instrument with the agency, or pursuant to a Commission rule.¹⁰ Entities that have received notifications that they owe a delinquent debt to the Commission and fail to pay the debt within the date specified are said to be "on red light status."¹¹

5. Consistent with the red light rule, and pursuant to USAC's recovery procedures, USAC sends entities owing a debt to the Commission several notifications of the debt before their applications are dismissed. First, USAC sends a Commitment Adjustment Letter or Recovery of Improperly Disbursed Funds Letter informing the entity that it owes a debt and that USAC will follow up to collect it.¹² Following the issuance of either of those notification letters, USAC sends a first demand payment letter to the entity owing the debt informing it of the amount it owes, that the amount owed is due within 30 days, and that the red light rule requires USAC to dismiss any of the entity's pending applications if its debt becomes more than 30 days overdue.¹³ If the entity does not pay its debt within 30 days, the debt is overdue and USAC sends a second demand payment letter that reminds the entity of its debt¹⁴ and a

⁵ 47 CFR 47 §§ 54.501-54.503.

⁶ See 47 CFR § 54.504(a); *Request for Review or Waiver of a Decision of the Universal Service Administrator by RECTec Technology and Communications (Colcord Public Schools)*, CC Docket No. 02-6, Order, 29 FCC Rcd 8180, 8083, paras. 7-8 (WCB 2014); *Schools and Libraries Universal Service, Services Ordered and Certification Form*, OMB 3060-0806 (FCC Form 471).

⁷ *Schools and Libraries Universal Service Support Mechanism*, CC Docket 02-6, Fifth Report and Order and Order, 19 FCC Rcd 15815, 15823, para. 20 (2004) (*Fifth Report and Order*).

⁸ Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, 1358 (1996) (DCIA).

⁹ See 47 CFR § 1.1910(b).

¹⁰ See 47 CFR § 1.1901(i).

¹¹ See USAC, *Late Payments, DCIA, Red Light*, <https://www.usac.org/cont/late-payments/default.aspx> (last visited Dec. 6, 2018).

¹² See USAC, *Commitment Adjustments/Recoveries*, <https://www.usac.org/sl/applicants/before-youre-done/commitment-adjustments.aspx> (last visited Dec. 13, 2018).

¹³ See *Schools and Libraries (E-Rate) Program Frequently Used Terms, 1st Demand Letter*, <https://www.usac.org/res/documents/sl/pdf/handouts/SL-Glossary-of-Terms.pdf> (last visited Dec. 13, 2018) (USAC E-Rate Glossary).

¹⁴ See *id.*

Notice of Withholding of Action informing the entity that USAC will withhold action on any pending applications and dismiss those applications if the debt is not paid within 30 days.¹⁵ After the debt is more than 30 days overdue, USAC sends the Notice of Dismissal to the entity informing it that its pending applications have been dismissed.¹⁶

B. Factual Background

6. In April 2015, during a post-commitment review of MNPS's payments for funding year 2012 E-Rate applications, USAC discovered that MNPS had received E-Rate funding for services to one school that had not been listed on its FCC Form 471 applications.¹⁷ In August 2015, MNPS moved its administrative offices to a new location.¹⁸ In November 2015, USAC sent MNPS a notification of its finding of an improper payment noting that USAC may seek recovery of any improperly disbursed funds.¹⁹

7. On February 17, 2016, and pursuant to USAC's recovery procedures, USAC sent a Notification of Recovery of Improperly Disbursed Funds Letter to both MNPS's old and current address, informing MNPS that it owed \$1,519 because it received E-Rate support in funding year 2012 for a school that was omitted from its application and further stating that USAC would follow up with a demand payment letter.²⁰ On April 18, 2016 and May 19, 2016, respectively, USAC sent the first demand payment letter and second demand payment letter, providing MNPS with 30 days from the date of each letter to pay the amount owed.²¹ However, these letters were sent to MNPS's old address.²² The second demand payment letter to MNPS's old address was returned in the mail.²³

8. Meanwhile, on May 26, 2016, MNPS filed its funding year 2016 FCC Form 471 applications seeking a total of \$3,640,923 in E-Rate support.²⁴ On June 9, 2016, USAC sent a Notice of Withholding of Action to MNPS, informing MNPS that it was on red light status and stating that failure to pay its debt within 30 days of the notice would result in dismissal of its pending applications and

¹⁵ See USAC, Late Payments, DCIA, Red Light, <https://www.usac.org/cont/late-payments/default.aspx> (last visited Dec. 13, 2018).

¹⁶ See *id.* While we recognize USAC's practice is to allot more than 30 days for an applicant to pay its debt or make other satisfactory arrangements to pay its debt after it is notified of the debt, neither the Commission nor USAC is required to provide the applicant more than 30 days. See 47 CFR § 1.1910(b)(3).

¹⁷ See First Payment Quality Assessment (PQA) Assessment Email from USAC to Thomas Bayersdorfer, dated April 6, 2015; Second PQA Assessment Email from USAC to Thomas Bayersdorfer, dated June 5, 2015.

¹⁸ See Request for Review and/or Waiver, Attachment C, page 1. For purposes of this appeal, the "old address" refers to MNPS's address for the contact listed on the funding year 2012 applications, and the "current address" refers to MNPS's address for the contact listed on the funding year 2016 applications.

¹⁹ See Notification of Federal Universal Service Fund Schools and Libraries Program Payment Quality Assessment Closed from USAC to Thomas Bayersdorfer, Metropolitan Nashville Public Schools, dated November 20, 2015.

²⁰ See Notification of Recovery of Improperly Disbursed Funds Letter from USAC to Thomas Bayersdorfer, Metropolitan Nashville Public Schools, dated February 16, 2016.

²¹ See First Demand Payment Letter from USAC to Thomas Bayersdorfer, Metropolitan Nashville Public Schools, dated April 18, 2016; Second Demand Payment Letter from USAC to Thomas Bayersdorfer, Metropolitan Nashville Public Schools, dated May 19, 2016.

²² See *id.*

²³ See USAC FCC Form 471 Notes, dated May 26, 2016.

²⁴ See 2016 FCC Form 471, Metropolitan Nashville Public Schools, filed (May 26, 2016), (File No. CLD-161054574); 2016 FCC Form 471, Metropolitan Nashville Public Schools, filed (May 26, 2016), (File No. CLD-

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appeals.²⁵ After USAC discovered that the second demand payment letter had been returned in the mail, it withdrew the Notice of Withholding of Action on July 26, 2016, and subsequently removed MNPS from red light status.²⁶

9. USAC then began the debt collection process anew. On October 20, 2016, USAC sent a new, first demand payment letter to MNPS's current address via standard mail, providing MNPS with 30 days from the date of the letter to pay the amount owed.²⁷ MNPS claims that it did not receive that letter.²⁸ On November 21, 2016, USAC sent a new, second demand payment letter via standard mail and a new Notice of Withholding of Action via Federal Express mail to MNPS's current address, which explained that MNPS was on red light status and that any of its pending applications would be dismissed if it did not pay its debt within 30 days.²⁹ MNPS claims that it also did not receive these letters.³⁰ A delivery confirmation for the Notice of Withholding of Action letter to MNPS's current address was signed by "M. Jackson," but MNPS denies that it has an employee named "M. Jackson" who would have been in a position to sign for the letters.³¹ Additionally, that month USAC called the contact person listed on MNPS's applications to advise him that MNPS's funding year 2016 applications would be dismissed if MNPS did not pay its debt.³² MNPS states that the contact person did not receive this voicemail because MNPS migrated to a new phone system that week.³³

10. On January 10, 2017, after hearing nothing from MNPS, USAC sent MNPS a Notice of Dismissal, dismissing MNPS's funding year 2016 applications requesting \$3,640,923 based on the applicant's failure to pay its \$1,519 debt within 30 days of the notification in violation of the Commission's red light rule.³⁴ MNPS claims that this Notice of Dismissal is the first communication it received about the debt.³⁵ The next day, an MNPS representative contacted the USAC Client Services Bureau to discuss payment arrangements.³⁶ On January 25, 2017, 15 days after the Notice of Dismissal, MNPS paid its debt.³⁷

11. On May 10, 2017, MNPS appealed USAC's dismissal.³⁸ USAC denied that appeal on

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161055248); 2016 FCC Form 471, Metropolitan Nashville Public Schools, filed (May 26, 2016), (File No. CLD-161055512); 2016 FCC Form 471, Metropolitan Nashville Public Schools, filed (May 26, 2016), (File No. CLD-161055858); 2016 FCC Form 471, Metropolitan Nashville Public Schools, filed (May 26, 2016), (File No. CLD-161055933); 2016 FCC Form 471, Metropolitan Nashville Public Schools, filed (May 26, 2016), (File No. CLD-161056945); 2016 FCC Form 471, Metropolitan Nashville Public Schools, filed (May 26, 2016), (File No. CLD-161057175).

²⁵ See Notification of Withholding of Action from USAC to Thomas Bayersdorfer, Metropolitan Nashville Public Schools, dated June 9, 2016; see also Federal Express receipt for Notification of Withholding of Action from USAC to Thomas Bayersdorfer, Metropolitan Nashville Public Schools, dated June 10, 2016 (confirming delivery of the notification and signed by T. Derrick, an employee of MNPS); Request for Review and/or Waiver at 5-6 (acknowledging that T. Derrick is an employee of MNPS).

²⁶ See Withdrawal of Notification of Withholding of Action from USAC to Thomas Bayersdorfer, Metropolitan Nashville Public Schools, dated July 26, 2016. USAC provided a FedEx receipt for a delivery dated July 27, 2016 and signed by D. Johnson, an employee verified by MNPS. See Federal Express receipt for Withdrawal of Notification of Withholding of Action from USAC to Thomas Bayersdorfer, Metropolitan Nashville Public Schools, dated July 28, 2016.

²⁷ See First Demand Payment Letter from USAC to Thomas Bayersdorfer, Metropolitan Nashville Public Schools, dated October 20, 2016 (re-sent).

²⁸ See Request for Review and/or Waiver, Attachment C, at 2.

²⁹ See Second Demand Payment Letter from USAC to Thomas Bayersdorfer, Metropolitan Nashville Public Schools, dated November 21, 2016 (re-sent); Notification of Withholding of Action from USAC to Thomas Bayersdorfer, Metropolitan Nashville Public Schools, dated November 21, 2016 (re-sent).

³⁰ See Request for Review and/or Waiver, Attachment C, at 2.

August 23, 2017 because MNPS was on red light status when USAC dismissed its funding year 2016 applications.³⁹

12. On October 17, 2017, MNPS filed a Request for Review and/or Waiver, seeking a reversal of USAC's decision or, alternatively, a waiver of the Commission's red light rule.⁴⁰ In its Request, MNPS argues that it should never have been placed on red light status because it did not have notice of its debt to the Commission until it received the January 10, 2017 Notice of Dismissal and it paid its debt within 30 days of receiving that letter.⁴¹ Alternatively, MNPS requests a waiver of the Commission's red light rule, arguing that the underlying purpose of the red light rule was served when MNPS paid the debt, it paid the debt within a reasonable time period after receiving actual notice, and denying a funding request that is significantly disproportionate to the debt owed would be contrary to the public interest.⁴²

III. DISCUSSION

13. We grant MNPS a limited, one-time waiver of the red light rule, and remand MNPS's funding year 2016 applications to USAC to determine compliance with program rules and requirements. We find good cause to waive the red light rule given the unique circumstances here, including the grossly disproportionate disparity between the amount owed and the amount of funding dismissed as a result of the delinquent debt (a 2,300-fold difference) and MNPS's payment of its debt shortly after it claims it received notice of the debt.⁴³

14. Generally, the Commission's rules may be waived for good cause shown.⁴⁴ The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.⁴⁵ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an overall basis.⁴⁶ The extreme

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³¹ See Federal Express receipt for Notification of Withholding of Action from USAC to Thomas Bayersdorfer, Metropolitan Nashville Public Schools, dated November 22, 2016; Request for Review and/or Waiver at 5.

³² See Request for Review and/or Waiver at 5.

³³ See *id.* MNPS states its E-Rate contact person was not in the office from Monday, November 21, 2016 through Friday, November 25, 2016, as he was on vacation Monday through Wednesday, and MNPS was closed Thanksgiving Thursday and Friday of that week. *Id.* Additionally, MNPS states that, during this same week, it was in the process of converting to a new Voice Over Internet Protocol telephone and voicemail system, and therefore, the voicemail to their E-Rate contact person would have been lost during the conversion. *Id.*

³⁴ See Notice of Dismissal from USAC to Thomas Bayersdorfer, Metropolitan Nashville Public Schools, dated January 10, 2017 (regarding FCC Form 471 application numbers 161054574, 161055248, 161055512, 161055858, 161055933, 161056945, 161057175); see also Federal Express receipt for Notice of Dismissal from USAC to Thomas Bayersdorfer, Metropolitan Nashville Public Schools, dated January 11, 2017 (confirming delivery of the notification and signed by S. Kennard, an employee of MNPS); Request for Review and/or Waiver at 6 (acknowledging that S. Kennard is an employee of MNPS).

³⁵ See Request for Review and/or Waiver, Attachment C, at 2.

³⁶ See Client Services Case Record, dated January 11, 2017.

³⁷ See Email from Yvie Mondenge, USAC to Tom Bayersdorfer, dated February 3, 2017.

³⁸ See Letter of Appeal from Tom Bayersdorfer, Metropolitan Nashville Public Schools to Universal Service Administrative Company, dated March 10, 2017 (*MNPS USAC Appeal*).

disparity between MNPS's delinquent debt (i.e., approximately \$1,500) and the amount of E-Rate funding dismissed as a result of MNPS's failure to pay the debt in a timely manner (i.e., approximately \$3.6 million) makes strict compliance with our rule inconsistent with the public interest in this matter. Under these specific circumstances, we find that dismissing a funding request that is more than 2,300 times the amount owed would create an undue hardship on MNPS and would not promote the overall policies of the E-Rate program.⁴⁷

15. Moreover, granting a limited waiver under these extreme circumstances is consistent with the policy considerations underlying the red light rule. The purpose of the red light rule is to encourage the repayment of debts and prevent entities indebted to the government from receiving further benefits.⁴⁸ Neither policy consideration requires us to deny MNPS's waiver request. MNPS has already paid its debt to the Commission, so it does not need further incentive to do so. In addition, although entities owing debts to the government generally should not receive further benefits from it, we find that the gross disproportion between the benefit denied and the debt owed justifies an exception in this case. We caution that it is unlikely that we would grant a waiver of the red light rule in less extreme circumstances. Granting a waiver of the red light rule in less extreme circumstances could undermine the purpose of the red light rule by discouraging the repayment of delinquent debts as applicants would know that they could seek a waiver of the rule to receive E-Rate support.⁴⁹

16. Finally, we find no evidence of waste, fraud, or abuse in this instance. Although we grant this request for waiver, this action does not affect the authority of the Commission or USAC to conduct audits or investigations to determine compliance with the E-Rate program rules and requirements. We emphasize that the Commission is committed to guarding against waste, fraud, and abuse and ensuring that funds disbursed through the E-Rate program are used for appropriate purposes.

17. For the foregoing reasons, we waive the application of the red light rule to MNPS's

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³⁹ See Revised Funding Commitment Decision Letter for 128285 Metropolitan Nashville Public Schools, dated August 23, 2017.

⁴⁰ See generally Request for Review and/or Waiver.

⁴¹ *Id.* at 7-8.

⁴² *Id.* at 8-10. MNPS supplemented its Request with a number of *ex parte* filings. See Letter from Corey Harkey, Metropolitan Government of Nashville and Davidson County, to Marlene Dortch, Secretary, FCC, CC Docket No. 02-6, at 1-3 (filed Mar. 21, 2018) (*MNPS Ex Parte I*); See Letter from Corey Harkey, Metropolitan Government of Nashville and Davidson County, to Marlene Dortch, Secretary, FCC, CC Docket No. 02-6, at 1-2 (filed June 15, 2018) (*MNPS Ex Parte II*).

⁴³ 47 CFR § 1.3 (the Commission may waive any provision of its rules "if good cause therefore is shown"); *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) ("waiver is appropriate . . . if special circumstances warrant a deviation from the . . . rule and such deviation will serve the public interest"); *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969); 47 U.S.C. § 310(d). See also 47 CFR § 0.231(f); *Amendment of Parts 0 and 1 of the Commission's Rules*, Report and Order, MD Dkt. No. 02-339, 19 FCC Rcd 6540, 6545-46, para. 16 (2004). The red light rule has been waived only three times. See Procedures for Broadcast Incentive Auction Scheduled to Begin on March 29, 2016, Technical Formulas for Competitive Bidding, Public Notice, FCC Rcd 11034, 11041, para. 11-14 (2016); *Applications of Northstar Technology, LLC for Renewal of Licenses for PCS Stations KNLH637 and KNLH638; Application for Consent to Assignment of PCS Licenses KNLH637 and KNLH638 from Northstar Technology, LLC to Bellevue Wireless, LLC*; File Nos. 0002985324, 0002985321, 0003694576, Memorandum Opinion and Order, 23 FCC Rcd 13476, 13481-2, para. 11-16 (WTB 2009); *Application for Consent to Assignment of PCS Licenses KNLH651 and KNLH653 from Northstar Technology, LLC to Banana Communications, LLC; Applications of Northstar Technology, LLC for Renewal of Licenses for PCS Stations KNLH651 and KNLH653*, File Nos. 0001941306, 0002985320, 0002985315, Memorandum Opinion and Order, 23 FCC Rcd 9122, 9128, para. 12-14 (WTB 2008).

⁴⁴ 47 CFR § 1.3.

funding year 2016 E-Rate applications and we remand the applications to USAC to process in accordance with program rules and requirements. Although we grant this request for waiver, this order does not alter the obligation of participants in the E-Rate program to comply with the Commission's rules.⁵⁰

IV. ORDERING CLAUSES

18. Accordingly, IT IS ORDERED, 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 sections 0.11, 0.91, 0.231, 0.291, 1.3 and 54.722(a) of the Commission's rules, 47 CFR §§ 0.11, 0.91, 0.231, 0.291, 1.3 and 54.722(a), the Request for Review and/or Waiver filed by the petitioner listed is GRANTED to the extent discussed herein, and the underlying funding year 2016 applications ARE REMANDED to USAC for further consideration in accordance with the terms of this Order.

19. IT IS FURTHER ORDERED that the request for waiver of 47 CFR § 1.1910 in connection with the dismissal of MNPS's funding year 2016 E-Rate applications IS GRANTED.

20. IT IS FURTHER ORDERED that, pursuant to section 1.102(b)(1) of the Commission's rules, 47 CFR § 1.102(b)(1), this Order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Mark Stephens
Managing Director
Office of the Managing Director

Kris Anne Monteith
Chief
Wireline Competition Bureau

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⁴⁵ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

⁴⁶ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166.

⁴⁷ We find the specific facts in this case present unique circumstances distinguishing them from other requests for waiver of the red light rule that we have denied. See, e.g., *Requests for Review of Decisions of the Universal Service Administrator by Net56, Inc. Palatine, IL, Wheeling School District 21, Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, 28 FCC Rcd. 13122, 13126, para. 6 (WCB 2013) (denying E-Rate applicant's request for a waiver of the red light rule and dismissing their funding year 2010 request where: (1) the applicant's only justification for not paying the debt was that it was never notified because USAC sent the Commitment Adjustment Letter to a retired employee and (2) the applicant violated the competitive bidding rules).

⁴⁸ See *Fifth Report and Order*, 19 FCC Rcd at 15821-22, para. 42.

⁴⁹ We also note that none of the arguments MNPS set forth in its *ex-partes* form the basis for this waiver.

⁵⁰ 47 CFR § 1.1910.