

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Request for Waiver by)	
)	
Marconi Communications, Inc.)	SLD No. 202864
Cleveland, OH)	
)	
Schools and Libraries Universal Service)	CC Docket No. 02-6
Support Mechanism)	

ORDER

Adopted: June 12, 2012

Released: June 12, 2012

By the Chief, Telecommunications Access Policy Division, Wireline Competition Bureau:

1. Consistent with precedent,¹ we grant a request for review and waiver filed by Marconi Communications, Inc. (Marconi) arising from a commitment adjustment (COMAD) decision letter issued by USAC seeking to recover funds disbursed to Marconi under the E-rate program (more formally known as the schools and libraries universal service support program) for funding year 2000.²

2. As an initial matter, we grant Marconi's request for waiver of the appeal filing deadline because we find it submitted its appeal to USAC within a reasonable period of time after receiving actual notice of USAC's adverse decision.³ Marconi did not receive notice of USAC's COMAD recovery

¹ Requests for Review of Decisions of the Universal Service Administrator by ATEK Construction, Inc., *et al.*, Schools and Libraries Universal Service Support Mechanism, File Nos. SLD-153005, *et al.*, CC Docket No. 02-6, Order, 20 FCC Rcd 4103 (Wireline Comp. Bur. 2005) (applying the Commission's direction in *the Schools and Libraries Fourth Report and Order* that recovery actions for funds disbursed in violation of the Commission's rules should be directed to the party or parties responsible for the violation, and recognizing the Commission's direction to apply that policy to all matters for which USAC has not yet issued a demand letter as of the effective date of the *Fourth Report and Order* and to all recovery actions under appeal to either USAC or the Commission at the time the *Fourth Report and Order* was adopted).

² See Letter from Randy D. Rinicella, on behalf of Marconi Communications, Inc., to Office of the Secretary, Federal Communications Commission, CC Docket No. 02-6, at 1 (filed Dec. 14, 2004) (Request for Waiver); Section 54.719(c) of the Commission's rules provides that any person aggrieved by an action taken by a division of USAC may seek review from the Commission. 47 C.F.R. § 54.719(c); Letter from USAC, Schools and Libraries Division, to Julie Braughler, Marconi Communications, Inc. (dated Oct. 15, 2004). Section 54.719(c) of the Commission's rules provides that any person aggrieved by an action taken by a division of USAC may seek review from the Commission. 47 C.F.R. § 54.719(c).

³ Generally, the Commission's rules may be waived if good cause is shown. 47 C.F.R. § 1.3. The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest. *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*). In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. (Continued...))

action until after the appeal filing deadline had already passed.⁴ After receiving notice of USAC's decision, Marconi promptly filed an appeal with USAC and, subsequently, a request for waiver with the Commission.⁵ Therefore, we find that Marconi made a good faith effort to comply with the Commission's rules as soon as it realized that USAC had issued a decision. Accordingly, we waive the 60-day deadline for filing appeals in section 54.720 of the Commission's rules.⁶

3. We also find that a waiver of the filing deadline in the instant matter is in the public interest because Marconi should prevail on the merits of its appeal. In 2001, Marconi delivered and installed internal connections equipment for the Heritage Charter School (HCS).⁷ USAC subsequently conducted an audit of HCS and determined that the school was ineligible to receive discounts during funding year 2000, because the school had returned its charter to the state in September 2000 and no students were enrolled during funding year 2000 or beyond.⁸ Because the alleged program violation occurred prior to the Commission's ruling that USAC should pursue recovery from the party USAC determines violated the Commission's rules, USAC properly commenced recovery action against Marconi under the procedures established in the *Commitment Adjustment Implementation Order*.⁹ Subsequently, however, in the *Schools and Libraries Fourth Report and Order*, the Commission directed USAC to pursue COMAD recovery actions against the party that is determined to be in violation of the Commission's rules, and specifically instructed USAC to do so with respect to any recovery actions that were under appeal to USAC or the Commission.¹⁰ This case was under appeal at the time, and USAC

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1969); *Northeast Cellular*, 897 F.2d at 1166. Waiver of the Commission's rules is appropriate only if both (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest. *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008); *Northeast Cellular*, 897 F.2d at 1166. See, e.g., Requests for Review and/or Waiver of Decisions of the Universal Service Administrator by Albuquerque School District, *et al.*, Schools and Libraries Universal Service Support Mechanism, File Nos. SLD-548427, *et al.*, CC Docket No. 02-6, Order, 26 FCC Rcd 5878 (Wireline Comp. Bur. 2011) (waiving the Commission's filing deadline for six applicants because the Bureau found that these applicants could not submit their appeals to the Commission in a timely manner due to circumstances beyond their control or because the petitioner submitted its appeal to USAC within a reasonable period of time after receiving actual notice of USAC's adverse decision).

⁴ See Request for Waiver at 3. In fact, at the time Marconi filed its appeal with USAC, it requested a copy of the COMAD letter from USAC and USAC was unable to locate a copy. *Id.*

⁵ See USAC Appeal at 1; Request for Waiver at 3.

⁶ See 47 C.F.R. § 54.720.

⁷ See Request for Waiver at 2.

⁸ See Letter from USAC, Schools and Libraries Division, to Heather Wilkey, Marconi Communications, Inc. (dated Feb. 28, 2003) (Marconi COMAD Letter). USAC thus sought recovery of \$504,448.67 in improperly disbursed funds. *Id.*

⁹ *Id.* In 2001, in the *Commitment Adjustment Implementation Order*, the Commission established procedures to recover funds disbursed to parties that obtained the funds in violation of the Commission's E-rate program rules. See *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service*, 15 FCC Rcd 22975, 22980, para. 11 (2001) (*Commitment Adjustment Implementation Order*). In that order, the Commission only authorized USAC to commence commitment adjustment recovery actions against the service provider. See *id.* at 22980, para. 11.

¹⁰ See *Federal-State Joint Board on Universal Service, Changes to the Board of Directors for the National Exchange Carrier Association, Inc., Schools and Libraries Universal Service Support Mechanism*, CC Docket Nos. 96-45, 97-21 and 02-6, Order on Reconsideration and Fourth Report and Order, 19 FCC Rcd 15252, 15255-15257, para. 10-15 (2004) (*Schools and Libraries Fourth Report and Order*). The Commission stated that the modified (Continued...)

should have determined that HSC, not Marconi was the entity in violation of the Commission's rules. It was HSC that returned its charter to the state in September 2000 and no students were enrolled during funding year 2000 or beyond.¹¹ By contrast, when Marconi installed the equipment it had no way of knowing that HCS was no longer eligible for E-rate discounts due to the loss of its charter. We therefore find that USAC should not continue to seek recovery against Marconi, because in this instance, Marconi was not the entity that violated the E-rate program rules. We therefore direct USAC to discontinue recovery actions against Marconi and to instead seek recovery against HCS, if it is feasible to do so.

4. 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 pursuant to authority delegated in sections 0.91, 0.291, 1.3 and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 1.3 and 54.722(a), that the request for waiver filed by Marconi Communications, Inc., on December 14, 2004 IS GRANTED and the underlying application IS REMANDED to USAC for further action consistent with the terms of this order.

5. IT IS FURTHER 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 pursuant to authority delegated in sections 0.91, 0.291, and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 54.722(a), that sections 54.720(a) and 54.720(b) of the Commission's rules, ARE WAIVED to the limited extent provided herein.

6. IT IS FURTHER 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 pursuant to authority delegated in sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91 and 0.291, that USAC SHALL discontinue its recovery actions against Marconi Communications, Inc. and, if appropriate, SHALL ISSUE a revised COMAD letter consistent with this Order no later than 60 calendar days from the release date of this order.

FEDERAL COMMUNICATIONS COMMISSION

Trent B. Harkrader
Chief
Telecommunications Access Policy Division
Wireline Competition Bureau

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rules should apply to COMAD recovery actions that were under appeal to USAC or the Commission. *See id.* at 15255-15256, para. 10.

¹¹ *See* Marconi COMAD letter.