BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

In the Matter of:	
Universal Service Contribution Methodology	WC Docket No. 06-122
Federal-State Joint Board on Universal Service	CC Docket No. 96-45
Requests for Review of Decisions of Universal Service Administrator by Airband Communications, Inc. *et al.*	

PETITION FOR RECONSIDERATION

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SUMMARY

The Commission's decision to reject late-filed Form 499-A revisions submitted by Airnex Communications, Inc. ("Airnex") should be reconsidered. That decision was based on an expansion of the issues raised by Airnex's *Request for Review* herein to include the question of whether Airnex had demonstrated "good cause" for a "waiver" of the Commission's rules relating to such revisions. However, such expansion of the issues was not consistent with the Commission's rules and violated Airnex's rights of due process. Further, the "good cause" standard applied by the decision was incorrect and inconsistent with the standard applied to other contributors who also submitted late-filed Form 499-A revisions. This disparity results in inequity and discrimination in violation of Congress' universal service support scheme set forth in 47 U.S.C § 253. Therefore, the decision's conclusion to reject Airnex's filing on that basis should be rejected and the Commission should proceed to properly resolve the issues actually raised by Airnex in its *Request for Review*.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

STATUTES

CASES

RULES AND REGULATIONS

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES CONTINUED

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Pursuant to Rule 1.101 *et seq.* of the Commission's Rules, 47 C.F.R. §§ 1.101 *et seq.,* Airnex Communications, Inc. ("Airnex"), by and through its attorneys, requests that the Commission reconsider its *Order*[1] denying Airnex's *Request for Review*[2] of a decision by the Universal Service Administrative Company ("USAC") rejecting revisions to Form 499-A and related filings that Airnex submitted to USAC in order to correct misclassifications of revenues between the interstate and international jurisdictions.[3] By a companion filing that is being submitted on a confidential basis, Airnex is requesting that the Commission stay the effective date of the *Order*, as to Airnex, pending consideration and action on this petition.

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[1] *In the Matter of Universal Service Contribution Methodology; Federal-State Joint Board on Universal Service; Requests for Review of Decisions of Universal Service Administrator by Airband Communications, Inc. et al.*, WC Docket No. 06-122, CC Docket No. 96-45, Order, DA 10-1514 (rel. Aug. 13, 2010) ("*Order*").

[2] Request for Review of Decision of Universal Service Administrator by Airnex Communications, Inc., CC Docket Nos. 96-45, 97-21 (filed Mar. 20, 2006) (*"Request for Review"*).

[3] Administrator's Decision on Remand, Jan. 24, 2006 ("*USAC Remand Decision*").

Airnex seeks reconsideration because the *Order* improperly reversed USAC's determination that Airnex had shown good cause for the late filing of its revisions. That determination was not within the scope of issues raised by Airnex's *Request for Review* and was reversed by the *Order* without first affording Airnex proper notice and opportunity to be heard and, as a consequence, without consideration of the full, relevant record, specifically documentation previously provided to USAC evidencing the severe financial hardship that would be imposed on Airnex as a result of the failure to allow Airnex to revise its For 499-A filings.[4]

Reconsideration is also necessary because the good-cause standard applied by the *Order* is inappropriate and differs from the standard apparently applied by USAC in its determinations of whether "good cause" existed for contributors' late revision filings. The *Order*'s reliance on an incorrect, different standard to effectively require Airnex to contribute far more into the Universal Service Fund ("USF") than other carriers violates 47 U.S.C. § 253(d), which mandates that USF contributions be made on an "equitable and nondiscriminatory basis."

I. INTRODUCTION AND BACKGROUND

Airnex provides resold international and interstate long distance voice services. Since the inception of Airnex's service in April 1998, Airnex has focused primarily on the provision of international long distance voice service.[5] In fact, at no time did Airnex's interstate revenues during the subject periods exceed 8% of its combined interstate and international

[4] The issue of hardship was addressed only tangentially in Airnex's *Request for Review* (see *Request for Review*, Exhibit 4, Declaration of Shige Yamaji at ¶ 10) because "good cause" was not an issue identified for review pursuant to Rule 54.721(b)(3), 47 C.F.R. § 54.721(b)(3). Thus, substantial documentation of the financial circumstances of Airnex and its subsidiaries that had been submitted to USAC in connection with this matter, and presumably was considered by USAC when it made its determination that Airnex had shown good reason for submitting the late revisions, was not included with the *Request for Review* because it was not relevant or material to the identified issues.

[5] *See* Request for Review by Airnex Communications, Inc., CC Docket No. 96-45, CC Docket No. 97-21, filed Nov. 25, 2003 ("*2003 Request for Review*"), Exhibit 4, Declaration of Shige Yamaji at ¶ 2.

revenues.[6] Consequently, under the Commission's rules, Airnex's USF contributions for those periods should have been based solely on Airnex's interstate revenues, without consideration of any international revenues.[7]

However, for reasons discussed in the *2003 Request for Review*, in Airnex's attempted revision filings, and elsewhere in the record, Airnex's original Form 499-A filings for those periods failed to properly distinguish between Airnex's interstate and international revenues and, instead, reported that all of Airnex's telecommunications revenues were interstate.[8] As a result of these errors, Airnex was billed by USAC for USF contributions in amounts far exceeding Airnex's actual liability under the Commission's rules. Airnex estimates that it was over-billed by well over $2,000,000, and that its total USF liability for the subject periods was in the range of approximately $117,000.[9]

After discovering the errors in its Form 499-A filings, Airnex attempted to submit revisions, but these revisions were rejected by USAC as untimely. Airnex then sought review of USAC's rejection of the filings through the *2003 Request for Review.* In response to the *2003 Request for Review* and similar requests by other carriers, the Commission issued its *FCC Form 499-A One-Year Deadline Order*,[10] which, among other things, remanded the matter to USAC

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[6] *Id.,* at ¶ 2. *Also, see 2003 Request for Review*, Exhibits 5, 6, and 7 (revised 2000 Form 499-A, 2001 Form 499-A, and 2002 Form 499-A, respectively).

[7] 47 C.F.R. § 54.706 (c). *See, also, In the Matters of Federal-State Joint Board On Universal Service; Access Charge Reform*, CC Docket No. 96-45; CC Docket No. 96-262, Sixteenth Order on Reconsideration in CC Docket No. 96-45, Eighth Report and Order in CC Docket 96-45, Sixth Report and Order in CC Docket 96-262, 15 FCC Rcd 1679 (1999).

[8] *2003 Request for Review,* Exhibit 4 at ¶ 5.

[9] *See 2003 Request for Review*, Exhibit 8, which demonstrates Airnex's calculation of the actual liability. This liability was paid to USAC pursuant to a deferred payment plan agreement.

[10] *See*, *Federal State Joint Board on Universal Service; 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms; Changes to the Board of Directors of the National Exchange Carrier Associations, Inc*., CC

with directions to allow the revisions "provided that: (1) the Petitioner has demonstrated good cause for submitting the revision beyond the one-year revision window; and (2) the Petitioner has provided an 'explanation of the cause for the change along with complete documentation showing how the revised figures derive from corporate financial records.'"[11]

> On remand, USAC again rejected Airnex's revisions, stating:
>
> The FCC, in remanding Airnex's FCC Appeal, directed USAC to consider two factors in establishing whether "good cause" exists to accept Airnex's Revised Worksheets: (1) the carrier's "explanation for the cause for the change"; and (2) "documentation showing how the revised figures derive from corporate financial records.' [Cite omitted.] **Airnex provides a reasonable explanation but fails to provide adequate supporting financial documentation**.[12]

Because the determination that Airnex had not provided adequate supporting documentation showing the derivation of the revised figures would have required Airnex to pay millions of dollars in USF contributions that it had no realistic ability to pay and for which it fairly should have no liability, Airnex sought review of USAC's decision. Specifically, as noted above, the questions raised by Airnex were whether USAC erred in concluding that Airnex failed to submit sufficient documentation for the revisions and whether, USAC erred, further, in concluding that USAC had no duty to request or obtain further explanation or documentation to the extent that USAC believed that Airnex's documentation was inadequate.[13] Airnex requested that the Commission address and correct those errors by finding that the documentation and information submitted by Airnex met the requirements of the *FCC Form 499-A One-Year Deadline Order* or provide Airnex with a clearer specification of what showing was required of

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Docket Nos. 96-45, 98-171, 97-21, Order, 20 FCC Rcd. 1012 (WCB 2004) ("*FCC Form 499-A One-Year Deadline Order*").

[11] *Id.* at ¶13.

[12] *USAC Remand Decision*, at p. 4 (emphasis added).

[13] *Request for Review*, at p. 2.

Airnex and a reasonable opportunity for Airnex to provide documentation or other information that met those requirements.[14]

The *Order* does not reach the issues raised by Airnex because, under the *Order*'s interpretation of the *de novo* review provisions of Rule 54.723(a), 47 C.F.R. § 54.723(a), the scope of issues was expanded to include the issue of whether Airnex had shown good cause for filing the late revisions and, based on the *Order*'s conclusion that Airnex had not done so[15] (in contrast to USAC's finding that there was good reason for Airnex's late submission of revisions), the issues actually raised by Airnex were deemed moot. Thus, Airnex once more is in a position of being required to pay millions of dollars that it does not have, cannot realistically pay, and which it really does not owe.

As Airnex explains below, the *Order*'s *sua sponte* expansion of the issues under review was inconsistent with the Commission's rules and resulted in an improper failure by the Commission to consider the extreme financial hardship that would result from denying Airnex the right to submit its revisions. Moreover, the *Order* applied an inappropriate "good cause" standard that was apparently different from the standard applied by USAC, which results in unlawfully discriminatory and inequitable disparity in treatment between contributors whose late-filing requests were granted by USAC and those whose requests were addressed by the *Order*. Therefore, the *Order* should be reconsidered.

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[14] *Id.*

[15] *Order*, at n.19.

II. THE ORDER SHOULD BE RECONSIDERED

A. The Order's Sua Sponte Consideration of the Good Cause Issue was Improper.

As noted above, USAC found that Airnex had provided good reasons for its late-filed revisions but that Airnex had not provided sufficient documentation demonstrating the source of the changes. Thus, in accordance with Rule 54.721(b)(3), 47 C.F.R. § 54.721(b)(3), Airnex identified USAC's holdings with respect to the sufficiency of Airnex's documentation as the "question[s] presented for review." Specifically, Airnex stated those issues as follows:

> The questions presented for review are: (1) whether Airnex provided sufficient documentation showing how the revised figures derive from corporate financial records; and (2) whether, to the extent the Airnex's documentation is deemed insufficient, Airnex should be permitted a reasonable opportunity to submit further information and documentation to overcome any alleged deficiencies.[16]

Notwithstanding the scope of issues identified by *Airnex* in its *Request for Review*, the *Order*, without prior notice to Airnex, considered anew the issue of whether Airnex had shown good reason for revising its Form 499-A filings. Citing Rule 54.723(a), the *Order* explains: "We note that even if USAC found that a petitioner met the good-cause standard, we must address that question *de novo*."

Rule 54.723(a) does indeed provide a *de novo* review standard, but it does not authorize the expansion of issues beyond those for which review is requested. The rule states that the Wireline Competition Bureau will "conduct *de novo* review of requests for review of decisions issued by the Administrator." Thus, the language of the rule, itself, narrowly ties the *de novo* review standard to the issues raised in a request for review rather than broadly stating

[16] *Request for Review*, at p. 6.

that the matters addressed in the Administrator's decision will be addressed *de novo* in their entirety irrespective of the issues specified in the request.

Further, the Commission's other rules relating to review of USAC decisions also indicate that a more narrow construction of Rule 54.723(a) than the construction given by the *Order* is intended. If, for example, the Commission had intended that a request for review would automatically place the decision, in its entirety, at issue, there would be no reason for the requirement in Rule 54.721(b)(3), that a party requesting review specify the questions presented for review. Moreover, the construction given to the *de novo* standard by the *Order* could lead to monstrous filings by parties seeking to comply with the requirement of Rule 54.721(b)(2), 47 C.F.R. § 54.721(b)(2), that they provide a "full statement of relevant, material facts with supporting affidavits and documentation." Not only would they need to address the issues actually raised in their requests for review, but, because they would not know in advance what other issues the Commission might decide to address, or have a later opportunity to present other facts and supporting documentation relevant and material to those other issues, they would have to include everything but the kitchen sink in their filings. Clearly, this is not what the Commission intended or desired when it established the *de novo* review standard.

Indeed, the history underlying the Commission's adoption of Rule 54.723(a) reveals that the Commission's purpose in adopting that rule was merely to define *how* it is going to decide issues raised through requests for review, not *what* issues it is going to consider. The discussion relating to the Commission's adoption of the *de novo* standard focused on a choice between two alternatives: the *de novo* standard and a deferential standard that would have limited review to an inquiry as to whether or not USAC exceeded its authority and acted consistently

with the Commission's rules.[17] The Commission selected the former as being more consistent with its "ultimate responsibility over the universal service support mechanisms,"[18] but nowhere did the Commission suggest that such responsibility also required it to extend its review to issues beyond those raised by the parties. In fact, if that were a requirement, it would seem that no USAC decision, whether appealed or not, could become effective absent full *de novo* review.[19]

As a consequence of the *Order*'s overly-expansive view of the issues subject to review, the determination that Airnex had failed to show "good cause" for its late-filed Form 499-A revisions was made on less than a complete record, specifically documentation previously submitted to USAC that would show the severe degree of hardship that would be incurred by Airnex if the 499-A revisions were disallowed.

Assuming, for sake of argument, that the *Order* correctly relied on the "good cause" standard that applies to waivers of Commission rules,[20] the degree of financial hardship that would be incurred by Airnex in the absence of the "waiver" should have been considered as a "special circumstance" relevant to the waiver request.[21] In fact, the Commission has regularly acknowledged that hardship effects are appropriately considered in reviewing requests for waivers of universal service rules.

> The Commission may waive any provision of its rules on its own motion and for good cause shown. 47 C.F.R. § 1.3. A rule may be

[17] *In the Matters of: Changes to the Board of Directors of the National Exchange Carrier Association, Inc.; Federal-State Joint Board on Universal* Service, CC Docket No. 97-21; CC Docket No. 96-45, Third Report and Order in CC Docket No. 97-21, Fourth Order on Reconsideration in CC Docket No. 97-21, and Eighth Order of Reconsideration in CC Docket No. 96-45, 13 FCC Rcd 25058 at ¶ 69 (rel. Nov. 20, 1998).

[18] *Id.*

[19] Of course, the Commission always has the right to review USAC decisions on its own motion pursuant to 47 U.S.C. § 403 (see, id. at ¶ 68); however, the exercise of such authority presumes the provision of due notice and an opportunity for affected parties to be heard before the Commission issues an order affecting their rights, which is not what has occurred here.

[20] As Airnex explains below, this is not the applicable standard.

[21] See, e.g., *WAIT Radio v. Federal Communications Com.*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

> waived where the particular facts make strict compliance inconsistent with the public interest. *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166, 283 U.S. App. D.C. 142 (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, 1157, 135 U.S. App. D.C. 317, (D.C. Cir. 1969). 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. *Northeast Cellular*, 897 F.2d at 1166; accord *NetworkIP, LLC v. FCC*, 548 F.3d 116, 127, 383 U.S. App. D.C. 310 (D.C. Cir. 2008).[22]

Thus, the unnoticed, *sua sponte* expansion of issues operated both to deprive Airnex of a fair opportunity to be heard and placed the Commission in a position of failing to properly determine whether a waiver of its rules should be granted. Therefore, the *Order* should be reconsidered.

B. The Good Cause Standard Applied by the Order is Improper and Subjects Airnex to Unlawful Discrimination.

The *Order* rejects Airnex's and other carriers' late-filed revisions on the grounds that they failed to show the existence of special circumstances sufficient to justify a waiver of the Commission's rules.[23] Citing to Rule 1.3, 47 C.F.R. § 1.3, and the court's decision in *NetworkIP, LLC v. FCC*, *supra*, the *Order* concludes that "simple negligence on the part of a filer is insufficiently unique to justify waiver of the deadlines for revising FCC Forms 499."[24] In answer to arguments that a showing of "good cause" was not required under the Form 499-A

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[22] *In the Matter of Requests for Waiver and Review of Decisions of the Universal Service Administrator by Beth Rivka School, Brooklyn, NY; Buffalo City School District, Buffalo, NY; Chicago Public Schools, Chicago, IL; Dale County School District, Ozark, AL; Edison School Consortium, New York, NY; Schools and Libraries Universal Service Support Mechanism*, File No. SLD-631977; File No. SLD-628914; File Nos. SLD-600949, 601096, 601110, 601134, 622915; File No. SLD-659474; File No. SLD-632313; CC Docket No. 02-6, DA 10-1447 (rel. Aug. 6, 2010)

[23] *Order* at 4.

[24] *Id.*

instructions for late filings submitted prior to the *FCC Form 499-A One-Year Deadline Order*,[25] the *Order* states that a filer's merely explaining the cause of the delay, rather than showing "good cause," would be "no standard at all" and, for that reason, concludes that, in light of the rule governing waivers, such a reading of the instructions would be "untenable."[26]

What the *Order* fails to recognize is that, prior to the effective date of the *FCC Form 499-A One-Year Deadline Order*, the submission of revisions did not require a waiver of any Commission rule. The Commission's rule, as set forth in the Form 499-A instructions, permitted late revisions without a need to obtain a "waiver." It simply provided that certain supporting information needed to be included with such revisions. Therefore, the "good cause" requirements of Rule 1.3 and underlying judicial decisions prescribing the requisite showing for waivers had no application to Airnex's revisions.

Thus, there is no basis for the *Order*'s strained interpretation of the Form 499-A instructions. The *Order* is wrong; it is not necessary, from a legal standpoint, to read a Rule 1.3 "good cause" requirement into the instructions.

Moreover, the *Order* is wrong in contending that the instructions would serve no purpose, absent the construction it gives them. Providing an explanation of the cause for the change serves to help USAC ensure that the revisions are valid. Filing revisions after an extensive delay, well after most filers have closed their books, is undoubtedly an unusual occurrence and it is reasonable to inquire into the reasons for any changes before accepting them: Did, for example, the carrier make a fundamental revision in the manner in which it classifies

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[25] The instructions in stated: "Filers should submit revised FCC Form 499-A revenue data by December 1 of the same filing year. Revisions filed after that must be accompanied by an explanation of the cause for the change along with complete documentation showing how the revised figures derive from corporate financial records."

[26] *Order* at p. 4.

revenues, such as revising a filing to split T-1 revenues between telecommunications services and non-contributing information services rather than reporting 100% of the revenues in a telecommunications service category and, if so, was the re-classification consistent with Commission rules?; Did the carrier allege an error in its initial filing and, if so, was the belated discovery credible? Requiring late filers to include this type of information with their revisions clearly has a valuable purpose in that it provides USAC with an opportunity to engage in relevant, substantive review of potentially-questionable revisions before it accepts them.

Therefore, contrary to the *Order*, construing the instructions in accordance with the plain meaning of the language used is appropriate and fully consistent with applicable rules of construction. By contrast, the *Order* relies on inapt reasoning to derive an interpretation that fails to comport with the plain language of the instruction. As a consequence, the *Order*'s reliance on its interpretation of the instructions as the sole basis for rejecting Airnex's revisions is reversible error.[27]

Even if the *Order* had a sound rationale for its interpreting the Form 499-A instructions as incorporating the Rule 1.3 good-cause standard, the retrospective application of that standard to Airnex and certain other carriers, but not to carriers whose revisions were allowed by USAC (and therefore were not the subject of requests for review), would be error because it would result in disparate treatment among similarly-situated contributors: those, like Airnex, whose showings of the "explanation of the cause for the change" were judged on the basis of the *Order*'s Rule 1.3 standard; and those whose showings were judged based on USAC's interpretation of the instructions. Such disparate treatment of contributors violates 47 U.S.C. §

[27] See, e.g., *Conn. Gen. Life Ins. Co. v. Comm'r of Internal Revenue*, 177 F.3d 136, 144 (3d Cir. 1999) (court will not defer to agency's interpretation that is not consistent with the plain text of the regulation).

253(d) because it is inequitable and discriminatory.[28] Airnex would end up contributing proportionately far more to the USF than its competitors, including contributors whose late revisions were accepted by USAC based upon a different standard from that applied by the *Order*, and, because of the very small portion of its revenues that are derived from interstate service, far more than it could generate from such service.

Therefore, even had Airnex been provided proper notice and an opportunity to be heard with respect to the issue of good cause, the manner in which the *Order* resolves the issue would be unlawful and cannot be permitted to stand.

III. CONCLUSION

For the foregoing reasons, Airnex respectfully submits that the *Order* should be reconsidered. Specifically, the *Order*'s conclusions should be rejected in all respects and the Commission should proceed to properly address the issues raised by Airnex in its *Request for Review*.

Respectfully submitted September 8, 2010 at San Francisco, California.

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[28] *Texas Office of Public Utility Counsel v. FCC,* 183 F.3d 393, 434-435 (5th Cir. 1999), *cert denied*, 530 U.S. 1210 (2000); *AT&T v. PUC,* 373 F.3d 641, 647 (5th Cir. 2004).