

REDACTED FOR PUBLIC INSPECTION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Accepted / Filed

In the Matter of)
)
Tata Communications)
Request for Waiver of Section 54.706(a))
of the Commission's Rules)

MAR 29 2019

Federal Communications Commission
Office of the Secretary

PETITION FOR WAIVER

Tata Communications (America) Inc. and Tata Communications (Guam), L.L.C.¹ ("Tata Communications"), by its attorneys, hereby petitions the Commission for a limited waiver of Section 54.706(a) of the Commission's rules,² to allow Tata Communications to continue to contribute to the Universal Service Fund ("USF") based solely on its interstate end-user telecommunications revenues, as it does today pursuant to the Limited International Revenue Exemption ("LIRE") set forth in Section 54.706(c).³

INTRODUCTION AND SUMMARY

Tata Communications provides a wide range of telecommunications and data solutions to enterprise and carrier customers, including MPLS virtual private networks, voice termination service, telepresence, content delivery, and cloud offerings. To the extent that Tata

¹ Tata Communications operates in the United States through two affiliated entities: Tata Communications (America) Inc. (Filer ID 825226) and Tata Communications (Guam) L.L.C. (Filer ID 832266). While this petition is primarily focused on Tata Communications (America) Inc., it should be read to also include Tata Communications (Guam) L.L.C. due to the LIRE calculation being made across all affiliated reporting entities under 47 C.F.R. Sec. 54.706(c). Therefore, any relief granted should apply across the two affiliated reporting entities under this section.

² 47 C.F.R. § 54.706(a).

³ *Id.* § 54.706(c).

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Communications provides telecommunications subject to federal USF assessments, it has always qualified for the LIRE, given that Tata Communications' telecommunications revenues are predominantly jurisdictionally international in nature. Under the current version of the LIRE, if a carrier's assessable interstate revenues are less than 12 percent of its combined assessable interstate and international revenues, the carrier is exempt from contributing to the USF based on its international revenues (and thus contributes based only on its assessable interstate revenues).

Based on recent changes in the jurisdictional mix of Tata Communications' telecommunications revenue, the company anticipates that its assessable interstate revenues

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would no longer qualify for the LIRE. If Tata Communications were to become ineligible for the LIRE, the company would face a draconian penalty, as its USF contribution burden would increase by approximately *****BEGIN CONFIDENTIAL REDACTED END**

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Such a dramatic increase in contributions based on a very modest incremental gain in interstate revenues would violate Section 254(d) of the Communications Act of 1934, as amended (the "Act"),⁴ and established judicial precedent.⁵ Loss of Tata Communications' LIRE eligibility also would result in substantial public interest harms, including undermining Tata Communications' incentive to compete in the domestic interstate telecommunications

⁴ 47 U.S.C. § 254(d).

⁵ *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 433-35 (5th Cir. 1999) ("TOPUC").

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marketplace and likely forcing Tata Communications to pass the soaring USF contribution costs through to its customers via a surcharge, *****BEGIN CONFIDENTIAL REDACTED**

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Tata Communications therefore seeks a waiver that will allow the company to continue to contribute to the USF based only on its interstate telecommunications revenues. In particular, Tata Communications requests that the Commission or the Wireline Competition Bureau waive Section 54.706(a) insofar as it would require Tata Communications to begin contributing to the USF based on its combined interstate and international telecommunications revenues upon exceeding the 12 percent LIRE threshold.⁶ The Commission has recognized the significant, inequitable burdens that the increasing contribution factor could impose on predominantly international providers and, as a consequence, has explicitly encouraged any such provider that is faced with a contribution amount that exceeds its interstate revenues to petition for a waiver.⁷

⁶ While Tata Communications respectfully submits that partially waiving Section 54.706(a) represents the most appropriate means of providing relief, the Commission or the Wireline Competition Bureau alternatively could waive the 12 percent LIRE threshold in Section 54.706(c). In either event, as described below, to ensure that the waiver remains justified over time, Tata Communications proposes that the relief (a) expire automatically if the Commission adopts a new rule establishing an increased LIRE threshold, and (b) remain applicable only to the extent that the company would be eligible for the LIRE if it were set at the level of the quarterly contribution factor.

⁷ See, e.g., Public Notice, *Proposed First Quarter 2019 Universal Service Contribution Factor*, CC Docket No. 96-45, DA 18-1249 (Dec. 12, 2018) (“The proposed contribution factor exceeds 12 percent, which we recognize could result in a contributor being required to contribute to the universal service fund an amount that exceeds its interstate end-user telecommunications revenue. Should a contributor face this situation, the contributor may petition the Commission for waiver of the LIRE threshold.”); Public Notice, *Proposed Fourth Quarter 2018 Universal Service Contribution Factor*, CC Docket No. 96-45, DA 18-944 (Sept. 12, 2018) (same); see also *TOPUC*, 183 F.3d at 434 (noting the Commission’s position that a provider of a predominantly international telecommunications should seek a waiver to allow the Commission to consider its individual circumstances).

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That is precisely the situation confronting Tata Communications. Tata Communications respectfully requests that a waiver be granted expeditiously to prevent a precipitous increase in USF liability as well as the debilitating uncertainty that will impede business planning as long as such a prospect looms.

DISCUSSION

There are compelling legal and policy grounds to grant Tata Communications a partial waiver of Section 54.706(a)—or, in the alternative, Section 54.706(c)—to enable the company to continue contributing to the USF based solely on its assessable interstate telecommunications revenues. Under Section 1.3 of the Commission’s rules, a waiver is appropriate “for good cause shown,”⁸ which requires demonstrating that (1) special circumstances warrant a deviation from the general rule, and (2) such deviation will serve the public interest.⁹ Both prongs of this standard are easily satisfied here. As an international service provider that has always been eligible for the LIRE, but now is faced with the prospect of losing its exemption and thereby being saddled with dramatically increased contribution burdens that far exceed its interstate revenues, Tata Communications not only is facing “special circumstances,” but may well be uniquely situated in the U.S. telecommunications industry. As the Fifth Circuit Court of Appeals made clear in *TOPUC*, deviating from the general rule—*i.e.*, Section 54.706(a), which generally requires contributions based on combined interstate and international revenues—is necessary in

⁸ 47 C.F.R. § 1.3.

⁹ *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969)). See also, *e.g.*, *Sandwich Isles Communications, Inc. Petition for Waiver of the Definition of “Study Area” Contained in Part 36, Appendix-Glossary and Sections 36.611, and 69.2(hh) of the Commission’s Rules*, Order, 20 FCC Rcd 8999, ¶ 8 (WCB 2005) (explaining that a waiver is appropriate where particular facts make strict compliance inconsistent with the public interest, taking into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis).

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these circumstances to avoid violating Section 254(d) of the Act. Even apart from that legal requirement made clear by the Fifth Circuit, a waiver plainly would serve the public interest here, as the alternative would be to discourage Tata Communications from competing in the domestic telecommunications marketplace against entrenched incumbents, perhaps even halting efforts altogether, in turn depriving enterprise and carrier customers of increased choice, reduced prices, innovative new service offerings, and improved service quality.

I. TATA COMMUNICATIONS FACES SPECIAL CIRCUMSTANCES THAT JUSTIFY A PARTIAL WAIVER OF SECTION 54.706 TO PREVENT THE COMPANY FROM BEING SUBJECT TO INEQUITABLE AND DISCRIMINATORY USF CONTRIBUTIONS THAT VIOLATE THE ACT AND ESTABLISHED PRECEDENT

As the Commission has repeatedly acknowledged in inviting predominantly international carriers to seek a waiver in such situations,¹⁰ Tata Communications faces special circumstances by being threatened with a precipitous increase in its USF contribution obligations to a level that will exceed its total interstate telecommunications revenues. Tata Communications projects that its assessable interstate telecommunications revenues *****BEGIN CONFIDENTIAL** REDACTED

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When the Commission first required telecommunications carriers to contribute to the USF based on their combined interstate and international revenue, COMSAT, an international carrier “specializing in providing international telephone service,” challenged assessment on

¹⁰ See *supra* n.7.

¹¹ See 47 U.S.C. § 254(d) (requiring that contributions be levied on an “equitable and nondiscriminatory” basis); *TOPUC*, 183 F.3d at 433-35.

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international revenue as inequitable and discriminatory in contravention of Section 254(d) and the Administrative Procedure Act (“APA”), noting that its USF contribution burden would be so inflated as to exceed its total interstate revenues.¹² The Commission argued in response that a “waiver is a more appropriate remedy” than invalidating the rule, as it was unclear whether other international carriers were similarly situated.¹³ But the court held that, though a waiver appeared warranted, the rule could not stand as it was “arbitrary and capricious and manifestly contrary to the statute” to require “COMSAT and carriers like it [to] contribute more in universal service payments than they will generate from interstate service.”¹⁴

In response to the Fifth Circuit’s decision, the Commission adopted the LIRE, which was intended to ensure that carriers whose revenues are predominantly international—like Tata Communications—would not be saddled with inequitable USF contribution obligations.¹⁵ In implementing the LIRE, the Commission did not anticipate that the contribution factor ultimately would be set at levels far higher than the LIRE threshold. When the Commission amended Section 54.706 to include the LIRE, it initially set the LIRE threshold at 8 percent. In so doing, the Commission stated: “We do not anticipate that the universal service contribution factor will exceed 8 percent in the near future. Thus, this 8 percent rule ensures that a provider’s universal service contribution will not exceed the amount of its interstate end-user telecommunications revenues.”¹⁶ The Commission then increased the LIRE threshold to 12 percent in 2002 when it

¹² *TOPUC*, 183 F.3d at 433.

¹³ *Id.* at 434.

¹⁴ *Id.* at 434-35 (quoting *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984)).

¹⁵ See *Federal-State Joint Board on Universal Service*, Sixteenth Order on Reconsideration, Eighth Report and Order, and Sixth Report and Order, 15 FCC Rcd 1679, ¶¶ 19-22 (1999).

¹⁶ *Id.* ¶ 19.

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anticipated that the contribution factor would surpass 8 percent.¹⁷

Since January 2013, however, the contribution factor has remained above 15 percent, and the contribution factor exceeded 20 percent in Fourth Quarter 2018, and had been trending upward for years,¹⁸ yet there has been no corresponding change to the LIRE threshold. As the Commission has recognized, the divergence of the USF contribution factor from the LIRE threshold means that a predominantly international carrier that loses eligibility for the LIRE likely would end up with a USF contribution burden that exceeds its interstate telecommunications revenues.¹⁹ Indeed, the Commission's intent in establishing the LIRE was that it remain *higher* than the contribution factor, to provide a "margin of safety to account for any possible increases to the contribution factor over time," thus ensuring that no carrier's USF contributions would exceed its interstate revenues, as *TOPUC* made clear is unlawful.²⁰

As noted, that is precisely the situation confronting Tata Communications, given that the contribution factor is now eight percentage points higher than the LIRE threshold. Absent a waiver, Tata Communications' impending loss of eligibility for the LIRE would not only result in USF contributions in excess of the company's total interstate telecommunications revenues, but Tata Communications projects that its USF contributions would be ***BEGIN

¹⁷ See *Federal-State Board on Universal Service et al.*, Report and Order and Further Notice of Proposed Rulemaking, 17 FCC Rcd 3752, ¶¶ 125-28 (2002) ("2002 Order"). It should be noted that the USF contribution factor remained under *six percent* until 2002. When the projected rate was to reach 8.7735 percent in the Third Quarter of 2002, the Bureau froze the USF contribution factor at 7.2805 percent until the LIRE threshold was raised to 12 percent later that year. Public Notice, *Wireline Competition Bureau Announces no Change in Third Quarter 2002 Universal Service Contribution Factor*, CC Docket No. 96-45, DA 02-1409 (June 13, 2002).

¹⁸ Public Notice, *Proposed First Quarter 2019 Universal Service Contribution Factor*, CC Docket No. 96-45, DA 18-1249 (Dec. 12, 2018).

¹⁹ See *2002 Order*, ¶ 125.

²⁰ *Id.*

CONFIDENTIAL REDACTED END CONFIDENTIAL*** its interstate telecommunications revenues. Such a “bizarre outcome”²¹ would justify a waiver in any event, as the Commission implicitly conceded in *TOPUC*,²² but a waiver in these circumstances is *required* in light of the Fifth Circuit’s holding that such an outcome violates Section 254(d) and the APA.²³

To restore the “margin of safety” the Commission called for in its *2002 Order*, the Commission ultimately should revise Section 54.706(c) to ensure that the LIRE is higher than contribution factor, or at least at the same level. But such prospective changes will not provide Tata Communications with the relief it requires now. Thus, while the Commission is considering a revision to Section 54.706(c), it should waive Section 54.706(a) (or, in the alternative, the 12 percent threshold in Section 54.706(c)) to prevent Tata Communications from being required to contribute to the USF based on its combined interstate and international revenues once its interstate revenues exceed 12 percent of that total.

II. THE REQUESTED WAIVER WOULD SERVE THE PUBLIC INTEREST

As the foregoing analysis makes clear, the requested waiver plainly will serve the public interest, as relief that is required by the Act and binding judicial precedent necessarily is in the public interest. But even apart from the need to comply with Section 254(d) and *TOPUC*, the requested relief is necessary to avoid substantial public interest harms to competition and more broadly.

²¹ *TOPUC*, 183 F.3d at 433.

²² *Id.* at 434.

²³ *Id.* at 435.

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If a modest increase in Tata Communications' interstate telecommunications revenues were to subject the company to dramatically higher USF contribution burdens (as would occur if Tata Communications were to lose its LIRE eligibility), the company naturally would have an incentive to halt further expansion of its interstate telecommunications business and even to terminate existing relationships to avoid the massive financial penalty. Indeed, Tata Communications projects that losing the LIRE would subject the company to a projected increase of *****BEGIN CONFIDENTIAL REDACTED END CONFIDENTIAL***** to its contribution burden—a staggering *****BEGIN CONFIDENTIAL REDACTED END CONFIDENTIAL***** percent increase that far exceeds any incremental revenue that could be derived from serving an additional purchaser of interstate service or expanding an existing relationship with such a customer.

As a result, customers would lose out on the competitive benefits flowing from Tata Communications' participation in the enterprise and carrier services marketplace—which has long been dominated by a handful of dominant incumbent providers—including lower prices, innovative technology solutions, and improved service quality. Moreover, Tata Communications currently *****BEGIN CONFIDENTIAL REDACTED REDACTED END CONFIDENTIAL*****—an approach the Commission has encouraged.²⁴ A massive increase in its USF contributions almost certainly would force Tata Communications *****BEGIN CONFIDENTIAL REDACTED REDACTED END CONFIDENTIAL*****.

²⁴ See, e.g., *Truth-in-Billing and Billing Format*, First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 7492 ¶¶ 49-64 (1999) (describing consumer confusion that can result from separate line items recovering regulatory costs and imposing requirements to ensure full and non-misleading descriptions of charges).

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Importantly, capping Tata Communications' USF contributions at the level of its interstate telecommunications revenues, while the bare minimum necessary to comply with *TOPUC*,²⁵ would not be sufficient to serve the public interest in promoting competition and avoiding inequitable and discriminatory contribution burdens (as required by Section 254(d)). To be sure, limiting any increase in USF contribution burdens stemming from the loss of LIRE eligibility to the level of Tata Communications' interstate revenue would be slightly less calamitous than allowing such contributions to spike even more dramatically. But if Tata Communications' contribution burden were to increase to a level commensurate with its interstate revenues, that increase would amount to *****BEGIN CONFIDENTIAL**

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Moreover, the prospect of losing eligibility for the LIRE *already* is causing harm to Tata Communications and to competition, given the debilitating uncertainty caused by such impending harms. *****BEGIN CONFIDENTIAL**

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²⁵ *TOPUC*, 183 F.3d at 433–35.

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CONFIDENTIAL*.** Accordingly, the Commission or the Wireline Competition Bureau should promptly grant the relief requested herein to restore the company's ability to compete and innovate without unwarranted regulatory distortions.

In short, as the Commission anticipated might be necessary in establishing the obligation to contribute based on interstate and international revenues and in announcing contribution factors in recent years, a limited waiver is needed to prevent Tata Communications from becoming subject to inequitable and discriminatory contribution obligations.

III. TATA COMMUNICATIONS WOULD SUPPORT SAFEGUARDS TO ENSURE THAT THE REQUESTED WAIVER REMAINS JUSTIFIED

While a waiver is legally required in the current circumstances as Tata Communications' contribution obligations would far exceed its interstate telecommunications revenues in the absence of a waiver, the company is mindful that the Commission or the Bureau might wish to condition the relief in a manner that will ensure that the exemption from contributing to the USF based on international revenues remains justified. Accordingly, Tata Communications proposes two safeguards to ensure that the waiver relief will remain consistent with the public interest.

First, in the event the Commission adopts a rule revising the LIRE on an industry-wide basis that provides the relief sought herein, it would be reasonable to terminate the waiver granted to Tata Communications upon the effectiveness of such a new rule. Given that the principal rationale for the waiver requested herein is that the current LIRE threshold is *not* sufficient to prevent the public interest harms recognized in *TOPUC*, adoption of a revised rule

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that adequately protects the interests of international carriers would obviate the need for waiver relief.

Second, to guard against the possibility that Tata Communications could remain exempt from contributing to the USF based on its international revenues even if its domestic interstate revenues were to grow substantially, the Commission or the Bureau could condition the continued applicability of a waiver on Tata Communications' percentage of interstate revenue remaining below the current contribution factor. For example, under the current contribution factor of 20 percent, Tata Communications would remain eligible for LIRE if its assessable interstate revenues are no more than 20 percent of its combined assessable interstate and international revenues. While USAC can certainly monitor this fact based on the company's reporting, Tata Communications would be willing to periodically self-certify its continued meeting of this threshold to USAC and the Bureau. Such a capping mechanism would ensure that the waiver requested herein would continue to satisfy the purpose of the LIRE rule as initially adopted—under which the exemption threshold was intended to be at least as high as the contribution factor²⁶—but would cease to apply if Tata Communications' interstate revenues grew to the extent that it would not qualify for the LIRE even if it were set at the same level as the contribution factor.

CONCLUSION


For the foregoing reasons, Tata Communications hereby requests a waiver of Section 54.706(a), or in the alternative Section 54.706(c), to allow it to continue contributing to the universal service fund based solely on its interstate telecommunications revenues.

²⁶ See 2002 Order, ¶ 125.

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March 29, 2019

Respectfully submitted,



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DECLARATION OF DAVID RYAN

I, David M. Ryan, hereby make the following declarations, under penalty of perjury, in support of the foregoing Petition of Tata Communications (America) Inc. and Tata Communications (Guam), L.L.C. for a Waiver of Section 54.706(a) of the Commission's Rules ("Petition"):

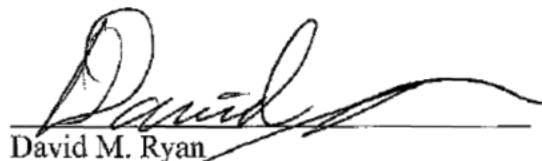
1. I am Executive Vice President of Tata Communications (America) Inc. and I am familiar with Tata Communications (America), Inc.'s operations and those of Tata Communications (Guam), L.L.C. (collectively, "Tata Communications").

2. Tata Communications has historically qualified for the Limited International Revenue Exemption ("LIRE") set forth in Section 54.706(c) of the Commission's Rules, because Tata Communications' assessable interstate revenues have never exceeded 12% of its combined assessable interstate and international revenue.

3. Based on recent changes to Tata Communications' telecommunications revenue, the Company anticipates that its assessable interstate revenues may exceed the 12% of its combined assessable interstate and international revenue for the first time.

4. If Tata Communications becomes ineligible for the LIRE, the Company would be subject to an increase of approximately ***BEGIN CONFIDENTIAL REDACTED REDACTED END CONFIDENTIAL*** in its contributions to the Universal Service Fund. Tata Communications thus would be required to contribute to the Universal Service Fund an amount that exceeds its total interstate telecommunications revenues; indeed, Tata Communications' contributions would be approximately ***BEGIN CONFIDENTIAL REDACTED REDACTED END CONFIDENTIAL*** its interstate revenues.

The foregoing is true and accurate to the best of my information, knowledge and belief, as of the date of this declaration.


David M. Ryan

Executed: March 29 2019