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

In the Matter of)	
)	
Federal-State Joint Board on)	CC Docket No. 96-45
Universal Service)	(Report to Congress)
)	
)	

**COMMENTS OF THE
NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK)**

The National Railroad Passenger Corporation ("Amtrak"), by its attorneys, respectfully submits these comments on the report that the Federal Communications Commission (the "FCC" or "Commission") is required by statute to submit to Congress (the "Report to Congress") regarding the FCC's implementation of the provisions of the Telecommunications Act of 1996 (the "1996 Act") relating to universal service fund ("USF") support mechanisms.^{1/} These comments focus on the statute's mandate that the FCC report on the entities that are required to contribute to the USF and any exemptions or exclusions that should be adopted from the USF's contribution requirement.^{2/}

^{1/} See Pub. L. No. 105-119, 111 Stat. 2440 (approved November 26, 1997); Public Notice, Common Carrier Bureau Seeks Comments for Report to Congress on Universal Service Under the Telecommunications Act of 1996, DA 98-2 (Jan. 5, 1998).

^{2/} The statute provides that the FCC must report to Congress on whether its USF implementations in several areas are consistent with the plain language of the 1996 Act. One of these areas, and the area to which these comments relate, is that of:

(continued...)

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I. Background and Summary

Amtrak is a passenger railroad company operating pursuant to federal statute and federal government support.^{3/} The company uses a fiber optic and copper-wire communications network, which supports Amtrak's train signaling and other railroad operations. From time to time, Amtrak sells excess capacity to selected companies for interstate telecommunications. Such capacity is provided on an individualized, private carrier basis. Pursuant to the Commission's orders implementing the universal service provisions of the 1996 Act, Amtrak believes that it is required to contribute to the USF based on the company's end-user revenues from the sale of interstate communications capacity.^{4/}

Amtrak currently receives federal operating support for its passenger railroad services. In an effort to reduce government spending and to make Amtrak a self-sufficient entity, Congress and the Executive Branch have directed Amtrak to take

^{2/} (...continued)

[W]ho is required to contribute to universal service under section 254(d) of the Act and related existing Federal universal service support mechanisms, and of any exemption of providers or exclusion of any service that includes telecommunications from such requirement or support mechanism.

Pub. L. No. 105-119.

^{3/} See 49 U.S.C. § 24301 (1997).

^{4/} See Federal-State Joint Board on Universal Service, Report and Order, 12 FCC Rcd 8776, at ¶ 796 (1997) ("USF Order"), Order on Reconsideration, FCC 97-246 (July 10, 1997), Report and Order and Second Order on Reconsideration, FCC 97-253 (July 18, 1997), Third Order on Reconsideration, FCC 97-411 (Dec. 16, 1997), Fourth Order on Reconsideration, FCC 97-420, at ¶¶ 276-77 (Dec. 30, 1997) ("Fourth Reconsideration Order").

actions to eliminate the need for federal operating support by the year 2002, through such means as maximizing productivity, increasing efficiency, and using its resources effectively, including the most cost-effective use of its facilities and real property.^{5/}

In response to this mandate, Amtrak developed a strategic plan to lessen gradually the company's need for federal operating support. This plan calls for the establishment of sources of capital funding that would allow Amtrak, for the first time, to invest in high rate-of-return projects. Such capital funding, in tandem with increased reliance on new business opportunities such as high-speed rail and partnerships with the states, has formed the cornerstone of Amtrak's strategic plan for meeting the federal government's mandate. There are, however, additional opportunities, such as the sale of excess communications capacity, on which the company intends to rely in its efforts to meet the Congressional mandate to be self-supporting and not reliant on federal operating support by the year 2002.

Amtrak respectfully submits that, because of this mandate and because of Amtrak's unique statutory and operational status, Amtrak should be exempt from making USF contributions. Accordingly, Amtrak requests that the Commission, in its Report to Congress, explain that Amtrak has been so exempted. In the event that the Commission declines to exempt Amtrak with respect to USF contributions, Amtrak requests that the Commission explain to Congress the FCC's reasons for requiring contributions from Amtrak despite Amtrak's unique circumstances, as set forth below.

^{5/} See, e.g., Amtrak Reform and Accountability Act of 1997, P.L. No. 105-134, § 301(a), 111 Stat. 2570, 2585 (1997); 143 CONG. REC. S11,930 (daily ed. Nov. 7, 1997) (statement of Sen. Hutchison).

II. Given Congress' Mandate to Amtrak, Requiring Amtrak to Contribute to the USF Would be Counterproductive and Contrary to Congress' Goals.

In the Fourth Reconsideration Order, the Commission exempted numerous government and non-profit entities from the USF requirement. Recognizing that many non-profit schools, colleges, universities, libraries and health care providers that offer service on a private carriage basis will be eligible to receive USF support, the Commission concluded that "it would be counterproductive to the goals of universal service to require non-common carrier program recipients of support to contribute to universal service support because such action effectively would reduce the amount of universal service support they receive."^{6/} Amtrak submits that, just as requiring certain recipients of USF support to contribute to the fund would be counterproductive to Congress's universal service mandate, so too would requiring Amtrak to contribute to the USF contradict the command given to Amtrak by the Executive Branch and Congress, that Amtrak maximize its revenues so as to be free from the need for federal operating support by the year 2002.

Clearly, Congress did not expect that the Commission's discretion with respect to the USF would be exercised so as to contravene previously issued Congressional directives to other entities. Yet, unless Amtrak is able to recoup all of its USF contributions from its end-user resale customers, this is the precise result of the requirement that Amtrak make contributions to the USF. The Commission should therefore consider Amtrak's unique status as a government-supported entity and the mandate that has been issued to Amtrak by Congress and the Executive Branch, and,

^{6/} Fourth Reconsideration Order at ¶ 284.

in reporting to Congress on who is required to contribute to the USF, find that it is counterproductive to require Amtrak to make such contributions.

III. The Commission Should Expand the De Minimis Exemptions to Cover All Carriers Whose Communications Revenues Represent a De Minimis Portion of Their Total Revenues.

The Fourth Reconsideration Order establishes a de minimis exemption for “system integrators” that derive less than five percent of their system integration revenues from telecommunications.^{7/} In reporting to Congress on entities, such as system integrators, that have been exempted with respect to USF contributions, Amtrak hereby requests that the Commission expand this de minimis exemption to ensure that it is available to all entities that, according to the Commission’s rationale for the exemption, should not be required to contribute to the USF.

In establishing the exemption for system integrators, the FCC determined that “system integrators that obtain a de minimis amount of their revenues from the resale of telecommunications do not significantly compete with common carriers that are required to contribute to universal service. . . . [T]he provision of telecommunications is incidental to their core business.”^{8/} Amtrak is in precisely the same situation: its “provision of telecommunications is incidental to [its] core business,” it “obtain[s] a de minimis amount of [its] revenues from the resale of telecommunications,” and it “do[es] not significantly compete with common carriers.” Applying a de minimis exemption to system integrators without extending it to

^{7/} Fourth Reconsideration Order at ¶ 280.

^{8/} Id. at ¶ 279.

Amtrak and similarly situated entities amounts to treating these entities differently without a rational basis, and is thus arbitrary and capricious decisionmaking.^{2/}

In order to ensure like treatment of similar cases, the Commission must extend this de minimis exemption to all entities that are not principally in the business of providing communications services, whose provision of such services is merely incidental to their core business, and whose revenues from such services constitute a very small portion (less than five percent, the figure used by the Commission with respect to system integrators) of their total revenues. Like system integrators, such providers do not compete generally with common carriers, and should be exempt from the USF obligations for similar reasons as those applied to system integrators.

In numerous ways, Amtrak is similarly situated to a system integrator with respect to its communications services. For example, like system integrators, and unlike facilities-based carriers, traditional common carrier resellers, and CMRS providers, Amtrak is not primarily in the business of providing communications services. Such services are provided only incidentally to Amtrak's core passenger railroad business, and are made possible because Amtrak possesses a unique resource: a continuous right-of-way across and between several states along the East Coast. Revenues from Amtrak's communications services represent only a small fraction of

^{2/} See Chadmoore Communications, Inc. v. FCC, 113 F.3d 235, 242 (D.C. Cir. 1997): "We have long held that an agency must provide an adequate explanation before it treats similarly situated parties differently. . . . This rule was developed to prevent an agency from, inter alia, 'vacillat[ing] without reason in its application of a statute or the implementing regulations.'" Quoting New Orleans Channel 20, Inc. v. FCC, 830 F.2d 361, 366 (D.C. Cir. 1987), citing Petroleum Communications, Inc. v. FCC, 22 F.3d 1164, 1172 (D.C. Cir. 1994).

its total revenues.^{10/} Consequently, Amtrak cannot be said to compete with common carriers; in fact, Amtrak's largest customers are common carriers. In sum, the case for entities such as Amtrak is even stronger than for system integrators, as the provision of communications service represents an even less important aspect of the business of the former than it does for the latter.

Given the incidental and de minimis nature of the communications service and attendant revenues that have placed Amtrak within the bounds of the Commission's USF orders, Amtrak can discern no rational basis for not excusing Amtrak, and similarly situated entities, from the USF requirement, in light of the exemption granted to system integrators. Because Amtrak's provision of communication service is indeed de minimis, under any standard, it should be excluded from the obligation to contribute to the USF

IV. Amtrak is Exempt From the USF Charge Pursuant to its Authorizing Statute.

Amtrak's authorizing statute provides an independent basis for exempting the company from the USF requirement. That statute provides that "Amtrak is not required to pay an additional tax because of an expenditure to acquire or improve real property, equipment, a facility, or right-of-way material or structures used in providing rail passenger transportation, even if that use is indirect."^{11/} The statute defines an "additional tax" as "a tax or fee -- (i) on the acquisition,

^{10/} In 1996, the last full year for which Amtrak has audited financial statements, Amtrak's end-user telecommunications revenues were substantially less than one percent of its total revenues.

^{11/} 49 U.S.C. § 24301(k)(2).

improvement, ownership or operation of personal property of Amtrak; and (ii) on real property”^{12/} Amtrak submits that the USF obligation constitutes an “additional tax” on the ownership and operation of Amtrak’s real and personal property, from which Amtrak is exempt.

The installation of the communications networks which support Amtrak’s operations along the Northeast corridor represents an expenditure by Amtrak to improve its real property, facilities, structures, and right-of-way. Amtrak indirectly funded this expenditure through an in-kind exchange with certain third parties: in exchange for the right to occupy, and install fiber optic communication system in, Amtrak’s valuable Northeast corridor right-of-way, those third parties are required to dedicate a part of their communication systems to Amtrak’s use. The parts of these communications systems dedicated to Amtrak’s use are then used to support railroad operations and Amtrak’s “. . . provi[sion] of rail passenger transportation.”^{13/} The portions of these systems dedicated to Amtrak’s use produce an incidental amount of excess capacity, which Amtrak resells.

The incidental provision of communications capacity on Amtrak’s network is therefore part and parcel of a comprehensive strategy by Amtrak to improve its property and acquire equipment and facilities to be used in providing service to its passengers. Accordingly, under the terms of its authorizing statute, Amtrak is exempt from fees, such as the USF contribution, imposed on the sale of

^{12/} 49 U.S.C. § 24301(k)(1)(A)(i).

^{13/} 49 U.S.C. § 24301(k)(2).

excess capacity incidentally produced in the operation of the communications network that supports Amtrak's core operations.

Amtrak's tax exempt status, as set forth in its authorizing statute, provides additional evidence that, as discussed above, Congress did not intend for a corporation that it supports to be subject to certain taxes or fees. Because such corporations are spending taxpayers' money, Congress decided that it would be counterproductive to allow other agencies to impose taxes and fees on such funds. In the case of Amtrak, Congress made such taxes and fees unlawful, allowing Amtrak to maximize the use of its government support for the purpose of providing quality service to the ultimate beneficiaries of such operating support -- Amtrak's railroad passengers. The USF obligation that has been imposed on Amtrak represents a sharp departure from this framework established by Congress. Thus, in reporting to Congress on who must contribute to the USF, the Commission should deem Amtrak to be exempt from such contributions.

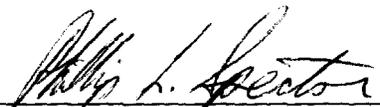
CONCLUSION

For the foregoing reasons, the Commission should, in reporting to Congress on the entities required to contribute to the USF, exempt Amtrak from such contributions. To the extent that the Commission believes that Amtrak should still be

required to contribute to the USF, Amtrak requests that the Commission set forth the reasons for that decision in the Report to Congress.

Respectfully submitted,

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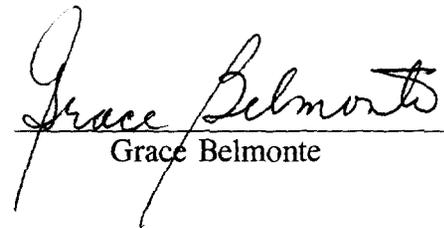
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Comments of the National Railroad Passenger Corporation (Amtrak) was hand delivered on this 26th day of January, 1998, to the parties listed below:

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