

DUPLICATE ORIGINAL

Before the
Federal Communications Commission
Washington, D.C. 20054

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In the Matter of)
)
Federal-State Joint Board on)
Universal Service)

CC Docket No. 96-45
(Report to Congress)

Comments of
Access Authority, Inc.

INTRODUCTION AND SUMMARY

Access Authority, Inc. ("Access") by its undersigned counsel and pursuant to Public Notice, DA 98-2 (released January 5, 1998), as amended by Order of the Chief, Universal Service Branch,¹ submits these Comments on the questions the Federal Communications Commission ("FCC") must address in its Report to Congress on Universal Service.

Access is authorized, pursuant to Section 214 of the Act, to provide facilities-based and resold international telecommunications services, subject to Section 214 of the Communications Act of 1934, as amended ("Act"), 47 U.S.C. § 214, and the FCC's Rules. Access provides international telecommunications services that are commonly called "call-back" services.

In these Comments, Access focuses specifically on the extent to which the FCC's interpretations in the following areas are consistent with the plain language of the Act:

- Who is required to contribute to universal service under section 254(d) of the Act and related existing Federal universal service support mechanisms; and

¹Federal-State Joint Board on Universal Service, CC Docket No. 96-45 (Report to Congress), Order, DA 98-63 (rel. Jan. 14, 1998).

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- The FCC's decisions regarding the revenue base from which such support is derived.²

In summary, the FCC's determinations with regard to universal service contributions assessed on international telecommunications carriers and international telecommunications revenues are not consistent with the plain language of the Act and discriminate against certain international telecommunications carriers. The FCC's decision to assess universal service fund contributions on a carrier's end-user telecommunications revenues, without mandating an explicit recovery charge on consumer bills, also discriminates against certain carriers, primarily smaller carriers and resellers. Finally, the Universal Service Worksheet, which is used to collect the information necessary to calculate the contribution base, must be subjected to a public notice and comment period to ensure that it complies with the Universal Service Order and the Act

COMMENTS

I. The USO Discriminates Against U.S. Carriers Providing International Telecommunications

Section 254(d) of the Act states that every telecommunications carrier providing interstate telecommunications services must contribute, on an equitable and nondiscriminatory basis, to universal service mechanisms. In the Universal Service Order ("USO"),³ the FCC explains that "[t]elecommunications are 'interstate' when the communication or transmission originates in any state, territory, possession of the United States, or the District of Columbia and terminates in another

²These issues correspond to questions 3 and 5 set forth in the Public Notice.

³Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Report and Order*, 12 FCC Rcd 8776 (1997) ("USO").

state, territory, possession, or the District of Columbia.”⁴ The FCC recognized that by definition, foreign or international traffic is not “interstate” because it is not carried between states, territories, or possessions of the United States.

Purporting to be constrained by the plain language of the Act, the FCC stated that it will not require carriers providing only international telecommunications services to contribute to the universal service fund, since they do not provide interstate service.⁵ However, in reality, the FCC did not allow itself to be constrained by the interstate limitation of Section 254(d). Citing its statutory mandate to assess contributions on an equitable and nondiscriminatory basis, the FCC found that foreign telecommunications revenues of interstate carriers should be included in the universal service contribution base. The USO thus states that “carriers that provide *both* interstate and foreign telecommunications services must contribute to the extent they provide interstate and foreign telecommunications.”⁶ The FCC further clarifies:

that carriers that provide interstate services must include *all* revenues derived from interstate and international telecommunications services. Thus, international telecommunications services billed to a domestic end user will be included in the contribution base of a carrier that provides interstate telecommunications services.”⁷

⁴*Id.* at ¶778; 47 U.S.C. § 153(22).

⁵USO at ¶779.

⁶*Id.* The Act defines “foreign communications” as a “communication or transmission from or to any place in the United States to or from a foreign country, or between a station in the United States and a mobile station located outside of the United States.” 47 U.S.C. § 153(17).

⁷USO at ¶836 (emphasis added).

The FCC made this decision recognizing that “some providers of international services will be treated differently from others” and implicitly acknowledged that the decision was not competitively neutral.⁸ In basing the contribution assessment on both interstate and international revenues, the FCC thus violated not only Section 254(d), but also the principle of competitive neutrality which the FCC itself added as a core principle of universal service.⁹

In addition to violating the letter and spirit of the Act, the FCC’s decision to include the international revenues of interstate carriers in the contribution base has numerous practical repercussions. First, U.S. carriers that provide both interstate and international telecommunications are disadvantaged vis-a-vis their foreign competitors that provide only international telecommunications and vis-a-vis their U.S. competitors that provide only international telecommunications in the U.S. Furthermore, U.S. carriers that provide predominantly international telecommunications, and whose interstate telecommunications comprise a small portion of their business and revenues,¹⁰ now face large incentives to block domestic interstate traffic to avoid universal service contribution obligations. Finally, by increasing the cost of a carrier’s provision of international telecommunications, the FCC has undermined its goal of using competitive pressure to

⁸USO at ¶779.

⁹USO at ¶¶46-47.

¹⁰The FCC did recognize that incidental interstate traffic created during the transmission of an international communication does not qualify as “interstate communications.” USO at ¶779. However, this small concession does nothing to address the fact that communications intended by the end user to be interstate might comprise only an incidental portion of an international carrier’s telecommunications traffic, yet subject the carrier’s entire end-user telecommunications revenue base to assessment.

reduce rates for international telecommunications services.¹¹ Overall, the decision to include international revenues in the assessment base will likely diminish competition in the market for international telecommunications services.

II. Assessing Contributions Based on End-User Telecommunications Revenues Discriminates Against Smaller Carriers

The USO imposes liability based on “end-user” revenues.¹² According to the FCC, basing the universal service contribution on end-user revenues is administratively efficient and competitively neutral. The USO also permits, but does not require, carriers to pass through their contributions to their customers.¹³ However, in reality, because the assessment is so high (nearly 4% of a carrier’s interstate and international end-user revenues, plus an additional 0.72% of a carrier’s intrastate end-user revenues, for the first quarter of 1998) and because the assessment is levied against a carrier’s end-user billed revenues (without any offset for bad debt or uncollectibles), as opposed to a carrier’s profits, most carriers are not likely to be able to absorb this enormous new cost imposed by the USO. The FCC may suppose that four or five percent is a small number and that the impact of the assessment will therefore be small. Such an assumption would be wrong. In competitive markets, where prices (and therefore gross revenues) are closely related to costs, a carrier’s profit margin may

¹¹See, e.g., Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, IB Docket No. 97-142, *Report and Order*, FCC 97-398, ¶¶7, 10 (rel. Nov. 26, 1997).

¹²USO at ¶843.

¹³USO at ¶¶825, 855.

often be less than four percent of its revenues. Thus the universal service fund "contribution" can make the difference between profit and loss for many carriers.

Obviously, carriers with greater profit margins and carriers with large and diverse customer bases are better able to absorb this new cost or spare certain classes of customers from shouldering the burden of this new cost. For instance, it was widely reported in the press that AT&T and MCI, after participating in closed-door negotiations with the FCC, decided not to pass their universal service fund contributions through to their residential end user customers for the first six months of 1998.¹⁴ By failing to mandate an explicit charge on consumer bills to represent the cost of universal service, and by encouraging the large interexchange carriers not to add an explicit universal service charge on residential customers' bills, the FCC has in effect placed enormous competitive pressure on the rest of the industry to follow suit. Unfortunately, smaller carriers with smaller and less diverse customer bases, and carriers with slimmer profit margins (such as resellers) may not be able to absorb their contribution obligations or shield certain classes of customers from the carrier's increased costs. Yet at the same time, these carriers must compete with AT&T and MCI for customers and thus run the obvious risk of losing customers to these carriers if they are not able to match AT&T's and MCI's commitment.

Levying an explicit charge on telecommunications carriers to support universal service while hiding from consumers the costs the new universal service mechanism imposes on carriers does not

¹⁴See, e.g., AT&T Announces New Business Charge to Pay for Universal Service, *Communications Daily* 4-5 (Dec. 19, 1997); Federal-State Joint Board on Universal Service, CC Docket 96-45, *Third Order on Reconsideration*, FCC 97-411, Dissenting Statement of Commissioner Harold Furchtgott-Roth (rel. Dec. 16, 1997).

comply with the spirit or intent of the Act to make universal service support explicit. All carriers should be required to identify their universal service support contribution obligation on consumer bills.

III. The Universal Service Worksheet Should Be Subjected to a Public Notice and Comment Period

Access acknowledges that the deadlines imposed on the FCC by the Telecommunications Act of 1996 required the FCC to take quick action to reform a complex system of implicit subsidies into an equitable and sufficient system of explicit subsidies to support universal service. Nonetheless, the full impact of the FCC's May 8, 1997 USO was not widely or commonly understood until the Universal Service Worksheet ("Form 457" or "Worksheet"), which included estimated contribution factors for the purpose of determining whether a carrier's contribution would be *de minimis*, was released on July 18.¹⁵ The FCC's brief postponement of carriers' first contribution payments, from January 1998 to February 1998,¹⁶ did little to help smaller carriers such as Access develop a business plan to recover these extraordinary new costs that are collected in advance.

In addition, the lack of a public comment period on the proposed Worksheet precluded the robust, on-the-record examination necessary to determine whether or not the Worksheet complies with the USO and the Act. For instance, although the USO did not provide an exemplary list¹⁷ of the

¹⁵Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Second Order on Reconsideration*, FCC 97-253, App. C (rel. July 18, 1997) ("Second Recon Order").

¹⁶*Id.* at ¶4.

¹⁷The USO did include an exemplary list of interstate telecommunications. USO at ¶780.

types of international revenues subject to assessment, “international call-back” was specifically identified on the Worksheet as a type of operator or toll revenue subject to assessment.¹⁸ Other discrepancies between the USO and the Worksheet exist, raising the question of whether the Worksheet, by creating an entirely new standard, created new substantive rules in violation of the Administrative Procedure Act’s notice and comment requirements.¹⁹ In order to ensure that carriers, and more importantly, the Universal Service Administrator, interpret and apply the Worksheet consistently and in accordance with the requirements of the Act and the USO, the FCC should request public comment on the Worksheet.

CONCLUSION

While the goal of providing universal service to all Americans is a laudable one, the FCC’s implementation of the new universal service mechanism has imposed disproportionate burdens on smaller carriers and providers of international telecommunications services. Access urges the FCC to recognize, in its Report to Congress, the dissenting voices that disagree with the FCC’s implementation of Section 254. Access further urges the FCC to take the necessary steps to correct those aspects of the USO that do not comply with the mandates of the Act or the principle of competitive neutrality. As Commissioner Furchtgott-Roth argued in his recent dissenting statement,

¹⁸Worksheet pg. 2, line 43.

¹⁹For example, although both the statute and the USO call for contributions to be assessed on carriers and other providers of “interstate telecommunications,” the Worksheet purports to require contributions by entities that do *not* provide any interstate telecommunications if they have an affiliate that is such a provider.

Section 254 "should be precisely implemented within the letter of the law, and fully implemented according to all -- not just part -- of its language."²⁰

Respectfully submitted,



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²⁰Federal-State Joint Board on Universal Service, CC 96-45, *Fourth Order on Reconsideration*, FCC 97-420, Dissenting Statement of Commissioner Harold Furchtgott-Roth (rel. Dec. 30, 1997).

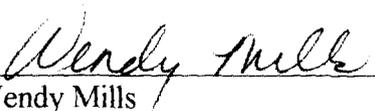
CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of January, 1998, true and correct copies of the foregoing Comments of Access Authority, Inc. in CC Docket 96-45 (Report to Congress) were hand-delivered to the following:

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