

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

MAR 25 1998

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In the Matter of)	
)	
Federal-State Joint Board on)	CC Docket No. 96-45
Universal Service)	
)	
Access Charge Reform,)	CC Docket Nos. 96-262,
Price Cap Performance Review)	94-1, 91-213, 95-72
for Local Exchange Carriers,)	
Transport Rate Structure and Pricing)	
End User Common Line Charge)	

**COMMENTS OF THE
PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION
ON THE PETITIONS FOR RECONSIDERATION**

**PERSONAL COMMUNICATIONS INDUSTRY
ASSOCIATION**

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The Personal Communications Industry Association¹ hereby submits its comments on the Petitions for Reconsideration and Clarification filed in the above captioned proceeding.² As detailed below, the Commission should reconsider its decisions to: (1) require facilities-based

¹ PCIA is the international trade association created to represent the interests of both the commercial and the private mobile radio service communications industries. PCIA's Federation of Councils includes: the Paging and Narrowband PCS Alliance, the Broadband PCS Alliance, the Site Owners and Managers Association, the Association of Wireless Communications Engineers and Technicians, the Private Systems Users Alliance, and the Mobile Wireless Communications Alliance. In addition, as the FCC-appointed frequency coordinator for the 450-512 MHz bands in the Business Radio Service, the 800 and 900 MHz Business Pools, the 800 MHz General Category frequencies for Business Eligibles and conventional SMR systems, and the 929 MHz paging frequencies, PCIA represents and serves the interests of tens of thousands of licensees.

² See *Federal-State Joint Board on Universal Service, Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charge* (Fourth Order On Reconsideration in CC Docket No. 96-45 and Report and Order in CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72), FCC 97-420 (Dec. 30, 1997) ("*Fourth Reconsideration Order*").

carriers to remit universal service fund contributions on behalf of their reseller customers that qualify for the *de minimis* exemption; and (2) raise the *de minimis* exemption from \$100 to \$10,000.

I. INTRODUCTION AND SUMMARY

In the *Fourth Reconsideration Order*, the Commission made two modifications to the universal service program that are of particular concern to PCIA. First, the Commission has deemed facilities-based carriers responsible for enforcing the contribution requirements and collecting revenues of any of their reseller customers that fall within the *de minimis* exemption. Under these new rules, facilities-based carriers that are notified by their reseller customers that they are exempt would be required to report and contribute to the universal service fund amounts on behalf of the exempt resellers based on the facilities-based carrier's charges to the reseller.³ Second, the Commission raised the *de minimis* contribution threshold from \$100 to \$10,000. Thus, under the new regime, if, after a reseller calculates the amount it is required to contribute, and its annual contribution requirement is less than \$10,000, the reseller will be exempt from contributing to the universal service fund directly. However, the new rules further stipulate that if such an entity qualifies for a *de minimis* "exemption," its universal service contribution is reported and remitted by its facilities-based carrier.

PCIA supports reconsideration of these sections of the *Fourth Reconsideration Order*.⁴

PCIA respectfully submits that the Commission has misapplied the *de minimis* exemption and

³ *Fourth Reconsideration Order*, ¶ 298.

⁴ See Cellular Telecommunications Industry Association Petition For Reconsideration and Clarification, CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72 (filed Feb. 12, 1998).

impermissibly discriminated against facilities-based carriers by deeming them responsible for remitting the universal service fund contributions of their reseller customers that qualify for this exemption. Specifically, by acknowledging that certain resellers are “exempt” from contributing to the universal service fund, yet then attempting to recover these universal service contributions from other carriers, the Commission has interpreted Section 254 in a manner that is inconsistent with the ordinary meaning of “exempt.”

Further, because facilities-based carriers with reseller customers are the only entities that are subject to such obligations, the Commission’s decision violates Section 254(d)’s command that universal service contributions be assessed in an “equitable and non-discriminatory” fashion. The Commission’s decision also imposes intolerable administrative burdens on facilities-based carriers because such carriers cannot ascertain whether their reseller customers are accurately representing their exempt status. In addition, the time it takes resellers to inform facilities-based carriers of whether they are eligible for the *de minimis* exemption could force facilities-based carriers to undertake the expense and effort of correcting their already filed Forms 457. Facilities-based carriers will also be forced to undergo the expense of implementing tracking procedures that treat their reseller customers differently, depending upon whether the customer qualifies for the *de minimis* exemption.

The de-regulatory benefits of the Commission’s proposal are also overstated, as entities will still have to categorize their revenues and perform the necessary calculations in order to determine whether they fall within the *de minimis* exemption. Thus, when considered as a whole, the aforementioned burdens far outweigh the less than one percent of the total universal service fund contributions that the Commission can hope to collect through the recovery of “exempt” reseller contributions from facilities-based carriers.

Second, PCIA believes that the Commission must provide a reasoned explanation for its decision to increase the *de minimis* exemption from \$100 to \$10,000. In its earlier Order in this proceeding, the Commission stated that a figure of \$100 was consistent with Congress' intent when it drafted Section 254(d) that the *de minimis* exemption was to be narrowly interpreted to exclude only carriers whose universal service contributions would exceed the administrative collection costs. The Commission further stated that this \$100 figure was consistent with the administrative collection costs for the TRS fund. In the instant Order, however, the Commission has significantly broadened this exemption to include carriers whose contributions would be exceeded by the sum of their own administrative costs of collection, *plus* the Administrator's collection costs. As a result, the exemption amount was raised to \$10,000. Reconsideration is merited because the Commission has failed to adequately explain and distinguish this new theory of statutory interpretation and the corresponding \$10,000 figure.

II. IT IS CONTRARY TO THE MEANING OF "EXEMPT" AND INEQUITABLE TO REQUIRE FACILITIES-BASED CARRIERS TO RECOVER THE UNIVERSAL SERVICE CONTRIBUTIONS OF THEIR RESELLER CUSTOMERS

A. The Commission's Decision Defies The Plain Meaning Of "Exempt"

The Commission's attempt to recover reseller contributions that it has already plainly categorized as "exempt" flies in the face of the plain statutory meaning of the *de minimis* exemption. Section 254(d) clearly states that the Commission "may exempt a carrier or class of carriers" from contributing to the universal service fund if the carrier's contribution would be *de minimis*. In both the *Universal Service Report & Order* and the instant Order, the Commission has stated that it will exempt a class of carriers whose contribution would be less than a fixed

dollar amount, \$100 and \$10,000, respectively. In the instant Order, however, the Commission seeks to oblige facilities-based carriers to recover those universal service contributions associated with the business activities of their resellers even though these entities are categorized as *de minimis*. Such unique treatment runs contrary to the plain meaning of “exempt” because the Commission is attempting to recoup the contributions that it has already decided to exclude from its contribution base. In sum, once a potential source of funds is declared “exempt,” it should, consistent with the ordinary meaning of the term, remain so.

B. The Commission’s Decision Places Unique Burdens On Facilities-Based Carriers That Are Neither Equitable Nor Non-Discriminatory

Section 254(d) further requires that contributions to the universal service fund be made on an “equitable and nondiscriminatory basis.”⁵ The Commission has violated this statutory mandate in the instant Order by singling out facilities-based carriers with reseller customers and saddling these carriers, and these carriers alone, with the burden of assuming the exempt resellers’ universal service obligations. This decision should be reconsidered, as it places enormous administrative burdens on facilities-based carriers that allow resale of their services. It is plainly discriminatory as it does not place similar burdens on other classes of contributors.

The unfair burden placed on facilities-based carriers that sell to resellers is further compounded by other factors. Significantly, facilities-based carriers will have no method to verify the accuracy of a reseller’s representation that it meets the exemption requirements. If such representations are inaccurate, the underlying carrier will be forced to make a contribution that rightfully should be made by the reseller. The Commission has determined that a facilities-

⁵ 47 U.S.C. § 254(d).

based carrier may exclude reseller revenues only if the underlying carrier has some reasonable basis for believing that the reseller is going to fulfill its independent universal service obligation.⁶ This interpretation apparently seeks to make facilities-based carriers responsible for making the universal service contributions of resellers. Because such requirements clearly extend beyond the mandates of Section 254, they should be reconsidered.

The burden on facilities-based carriers is especially pronounced in the messaging industry, in which small resellers constitute a significant portion of a facilities-based carrier's customers. Because of their small size, these resellers may qualify for the *de minimis* exemption one year (or during one quarter) and may fail to do so the next year (or during the next quarter), depending upon both the reseller's business operations and the quarterly contribution factors adopted by the Commission. Even worse, a reseller will have to complete the calculations required by Form 457 only after receiving notice of the Commission's quarterly contribution factors in order to determine whether it qualifies for the *de minimis* exemption. Of course, this process will take place simultaneous to a facility-based carrier's same determination. As a result, the need for resellers to make such calculations might force facilities-based carriers to amend their Worksheets if they receive untimely information from resellers.

The Commission's decision will require facilities-based carriers to treat their reseller customers differently, depending upon whether the reseller is subject to the *de minimis* exemption. In particular, consistent with the Commission's rules, carriers may pass through to

⁶ See FCC Public Notice, *WTB Information Bulletin, Universal Service Update: Frequently Asked Questions by Wireless Service Providers*, DA 97-2157 (rel. Oct. 6, 1997) ("*CMRS FAQ Public Notice*"). This policy is nowhere codified in the Commission's rules.

their customers a reasonable amount associated with the universal service contribution.⁷ On the other hand, a reseller, as a non-end user, is generally not assessed any universal service pass through by its facilities-based carrier, *unless* the reseller qualifies for the *de minimis* exemption. Thus, different categories of resellers must be charged different rates, depending upon whether they fall into the *de minimis* exemption category or not. That fact alone presents a significant administrative burden for facilities-based carriers because although computerized billing systems are able to recognize resellers, they cannot distinguish resellers that fall within the *de minimis* exemption from resellers that do not.

Thus, while the Commission has ruled that the reseller must report to the underlying facilities-based carrier that it is exempt from universal service filing and contribution requirements,⁸ the mechanics of that process have been left wholly undefined. Indeed, the revised rules adopted with the *Fourth Reconsideration Order* do not include any provisions setting forth the notification obligation the Commission has imposed. If the Commission does not eliminate the unique treatment it has given to resale revenues, it should, at a minimum, promulgate a date certain by which resellers must inform facilities-based carriers that they are exempt. This date should, of course, allow facilities-based carriers ample time to consider that notification plus complete and return their own worksheet in a timely manner.

⁷ *Federal-State Joint Board On Universal Service* (Report and Order), 12 FCC Rcd 8776, ¶ 855 (1997) ("*Universal Service Report & Order*").

⁸ Although this obligation is reflected in the text of the *Fourth Reconsideration Order*, it does not appear to be embodied in any of the rule modifications adopted in that order.

C. The Administrative Costs Of The Commission's Decision Will Outweigh Any De-regulatory Benefits

The FCC should also reconsider this decision because the aforementioned administrative costs far outweigh any de-regulatory benefit the Commission anticipates by attempting to recoup these putatively "exempt" reseller contributions. Regarding the monetary benefits, assuming that *all* of the 1,600 exempt entities⁹ are resellers, *and* that *all* of these entities would have contributed the maximum of \$10,000 to the universal service fund, the Commission would be foregoing a maximum of \$16 million dollars in lost contributions on an annual basis. Even this conservative figure represents a mere 0.86 percent of the total annual contributions to the universal service fund, which are expected to total \$1.85 billion during 1998.¹⁰

The de-regulatory benefits are similarly illusory. In particular, the potentially exempt entities that fall anywhere near the \$10,000 threshold will still have to perform two specific administrative tasks each quarter: (1) categorize their revenues as interstate, intrastate, end user, and non-end user; and (2) make the necessary contribution calculations. Therefore, given that raising the exemption will do little to reduce the regulatory burden on many entities, and the Commission will only, at most, recover 0.86 percent of the total annual universal service contributions, the FCC should determine that "exempt" reseller contributions are truly exempt, and need not be reported and remitted by facilities-based carriers.

⁹ See *Fourth Reconsideration Order*, ¶ 297.

¹⁰ See FCC Public Notice, *Proposed Second Quarter 1998 Universal Service Contribution Factors Announced*, DA 98-413, C Docket No. 96-45 (rel. Feb. 27, 1998) (estimating that the low income support mechanism will cost \$500 million in 1998, the schools and libraries mechanism will cost \$625 million for the first 6 months of 1998, and rural health care support mechanism will cost \$50 million for the first 6 months of 1998; on an annual basis, this totals \$1.85 billion).

III. THE COMMISSION DID NOT PROVIDE A PERSUASIVE JUSTIFICATION FOR RAISING THE *DE MINIMIS* EXEMPTION

The Commission has failed to adequately explain why it chose to raise the *de minimis* exemption one hundred-fold — from \$100 to \$10,000. It is well settled that “an agency changing its course must supply a reasoned analysis” for doing so.¹¹ Therefore, on reconsideration, the Commission should either provide a persuasive justification for its sudden change of course, or return to the \$100 figure for the *de minimis* exemption.

In its *Universal Service Report & Order*, the Commission determined that pursuant to Section 254(d), a carrier would qualify for the *de minimis* exemption if its annual contribution to the universal service fund would be less than \$100.¹² Section 254(d) states that the Commission can exempt carriers or classes of carriers if “the level of such carrier’s contribution to the preservation and advancement of universal service would be *de minimis*.”¹³ Given the lack of specificity of the statutory language, the Commission turned to Congress’ Joint Explanatory Statement, which stated that the *de minimis* exemption should only apply “in cases where the administrative cost of collecting contributions from a carrier or carriers would exceed the contribution that carrier would otherwise have to make”¹⁴ Because Congress intended “that this exemption be narrowly construed,” the Commission interpreted Congress’ phrase

¹¹ *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). See also *Committee For Community Access v. FCC*, 737 F.2d 74, 77 (D.C. Cir. 1984) (quoting *id.*).

¹² *Universal Service Report & Order*, ¶ 803.

¹³ 47 U.S.C. § 254(d).

¹⁴ *Universal Service Report & Order*, ¶ 802 (quoting H.R. Rep. 104-458 at 131 (1996)

(Continued...)

“administrative cost” to “encompass *only* the administrator’s costs to bill and collect individual carrier contributions,” and not the carriers’ compliance costs.¹⁵ Based on this statutory analysis, the Commission adopted “the \$100.00 minimum contribution requirement used for TRS contribution purposes because [the Commission] assum[ed] that the administrator’s administrative costs of collection could possibly equal as much as \$100.00”¹⁶

In the *Fourth Reconsideration Order*, the Commission suddenly changed its course. After first concluding that the phrase “administrative cost” actually referred to *both* the “Administrator’s costs of collecting contributions and contributors’ costs of complying with the reporting requirements,” the Commission then raised the *de minimis* contribution threshold to \$10,000.¹⁷ The Commission asserted that a \$10,000 threshold would take into account the additional costs of carrier cooperation in the collection process and ensure that the total costs of collecting an entity’s universal service contribution would not exceed the amount contributed.¹⁸

Notably absent from this decision, however, is an explanation as to both why the Commission changed its interpretation of Section 254(d) and its legislative history, and how the Commission decided on the amount of \$10,000. Regarding the interpretation of Section 254(d), the Commission had previously cited the Joint Explanatory Statement as standing for the

(...Continued)
 (“Joint Explanatory Statement”)) .

¹⁵ *Universal Service Report & Order*, ¶¶ 802-803 (emphasis added).

¹⁶ *Id.*, ¶ 803.

¹⁷ *Fourth Reconsideration Order*, ¶¶ 295, 297.

¹⁸ *Id.*

proposition that the *de minimis* exemption was to be narrowly construed.¹⁹ In the instant Order, however, the Commission has broadened this exemption by one hundred times, increasing it from \$100 to \$10,000. In so doing, the Commission has offered no explanation as to why this is consistent with a “narrow” interpretation of the *de minimis* exemption.

Regarding the \$10,000 figure itself, the *Fourth Reconsideration Order* is similarly devoid of a reasoned explanation for the increase. In the May 8, 1997 *Universal Service Report & Order*, the Commission posited that based on its TRS experience, the administrator’s administrative costs of collection “could possibly equal ... \$100.00,” but further stated that the “\$100.00 estimate is high.”²⁰ In the instant Order, however, the Commission unexpectedly reversed this decision, stating that “the contribution collection costs incurred by the Administrator in many cases will exceed \$100 per contributor.”²¹ While these increased costs are attributed to “identifying contributors, processing and collecting contributions, and providing guidance on how to complete the Universal Service Worksheet,”²² there is no explanation of which, if any, of these costs were not included in the previous, TRS-based estimate.

Finally, the Commission has failed to provide any explanation as to how it has estimated a carrier’s compliance costs. A reasonable estimate of these costs can, however, be drawn from Form 457, which states that it should take five hours to complete. Assuming that it costs \$150 an hour to complete the Form 457, a carrier’s compliance cost will be approximately \$750 semi-

¹⁹ *Universal Service Report & Order*, ¶ 802.

²⁰ *Id.*, ¶ 803.

²¹ *Fourth Reconsideration Order*, ¶ 296.

²² *Id.*

annually, or \$1,500 per year. On reconsideration, the Commission should explain why and by how much a carrier's compliance costs are expected to exceed this figure, or it should reduce the *de minimis* exemption accordingly.

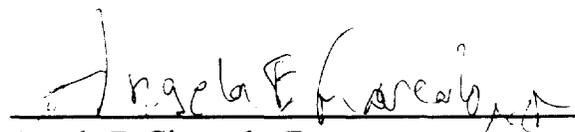
IV. CONCLUSION

As discussed above, facilities-based carriers with reseller customers should not have to make contributions on behalf of resellers that are exempt from contributing themselves. Reconsideration of this anomalous situation is necessary because such disparate treatment is inconsistent with the concept of a *de minimis* exemption and represents impermissible discrimination against facilities-based carriers, in violation of Section 254(d). In addition, the Commission should reconsider its decision to raise the *de minimis* exemption from \$100 to \$10,000.

Respectfully submitted,

**PERSONAL COMMUNICATIONS INDUSTRY
ASSOCIATION**

By:



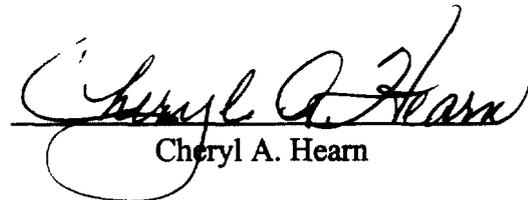
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March 25, 1998

CERTIFICATE OF SERVICE

I hereby certify that on March 25, 1998 I caused copies of Comments Of The Personal Communications Industry Association On The Petitions For Reconsideration to be served via U.S. First Class Mail, postage prepaid, upon:

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