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

In the Matter of)
)
Revised Universal Service Worksheet)
FCC Form 457)

CC Docket Nos. 97-21, 96-45

To: Chief, Accounting Policy Division

PETITION FOR RECONSIDERATION

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August 31, 1998

SUMMARY

Metrocall urges the Division to reconsider its addition of Item 48 to the Universal Service Worksheet. The addition of that Item, which requires carriers to include monies they have collected from subscribers to cover past Universal Service contributions in their revenue base for future contributions, is not a mere interpretation of the Commission's existing Universal Service rules. Nor does that Item constitute a mere reporting requirement concerning revenues that the rules currently include in the Universal Service contribution base.

Instead, the Division has redefined the revenues which are to be included in the Universal Service contribution base; that redefinition imposes a new, binding obligation upon carriers, and will increase costs to carriers and their customers. Item 48 is thus a new substantive rule, and prior notice and opportunity for comment were required by the APA. Because the Division provided no notice to the public and no opportunity for comment before adding Item 48 to the Worksheet, the addition of that Item is void.

Moreover, the Division does not have authority to modify rules adopted by the Commission in a notice-and-comment rulemaking. The addition of Item 48 would constitute a modification of the Commission's rules, and is therefore beyond the Division's delegated authority.

Even if its adoption had been procedurally proper, Item 48 is contrary to the public interest. The Division is attempting to indirectly require carriers to absorb the costs of their Universal Service contributions, but, especially in the competitive CMRS market, it is simply not possible for companies to absorb costs that they will never recover. The results of the Division's action will be continuously increasing costs that will threaten the viability of some CMRS carriers, thus inhibiting competition and raising prices for consumers.

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PETITION FOR RECONSIDERATION

Metrocall, Inc. ("Metrocall"), by its attorneys and pursuant to Section 405 of the Communications Act of 1934, as amended (the "Act"), 47 U.S.C. § 405, and Section 1.106(a) of the Commission's Rules, 47 C.F.R. § 1.106(a), hereby requests that the Accounting Policy Division (the "Division") reconsider certain revisions to the Universal Service Worksheet, FCC Form 457 (the "Worksheet"), which was released on July 31, 1998. See Public Notice, DA 98-1519 (released July 31, 1998). In support hereof, the following is respectfully shown:

I. Statement of Interest

Metrocall is a publicly-traded company, and through its licensing subsidiary Metrocall USA, Inc., is the second-largest Commercial Mobile Radio Service ("CMRS") paging carrier in the United States. Metrocall currently provides paging and messaging services to over 4 million subscribers throughout the nation. Through its predecessor corporations, Metrocall has been an FCC-licensed paging carrier for more than 30 years, and continues to advance and improve its paging services through state-of-the-art technology, innovative service packages and competitive pricing plans.

The Worksheet's new "Item 48" will do no more than exert constantly increasing upward pressure on the rates of competitive carriers, making services more costly for carriers to provide -

and for consumers to receive. As a carrier whose business will be adversely affected by the Division's addition of a new cost to the Universal Service contribution base, Metrocall has standing as a "person aggrieved" to file this Petition. 47 U.S.C. § 405(a).

II. Item 48 is a New Substantive Rule.

The inclusion of line items on customer bills that recoup Universal Service contributions as part of the contribution base, added at Item 48 of the revised Worksheet, is not a mere reporting requirement, or a permissible interpretation of the existing Universal Service regulations. This new line item is a new substantive rule.¹

Nothing in the rules that the Commission adopted in its Universal Service rulemaking indicates that such line items would be included in the Universal Service contribution base. The Commission's Rules provide that Universal Service contributions will be based on "revenues derived from domestic end users for telecommunications or telecommunications services." See 47 C.F.R. § 54.709(a)(1). "Telecommunications" is defined in the Rules as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." See 47 C.F.R. § 54.5. A "telecommunications service" is defined as "the offering of telecommunications for a fee directly to the public[.]" Id.

In construing a regulation, like a statute, the express language of the regulation controls.

¹ A rule is "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing[.]" 5 U.S.C. § 551(4).

See, e.g., S.G. Loewendick & Sons, Inc. v. Reich, 70 F.3d 1291, 1294 (D.C. Cir. 1995); Reno v. National Transportation Safety Board, 45 F.3d 1375 (9th Cir. 1995). The express language of the Commission's Rules indicates that the monies on which a carrier's Universal Service contribution is to be based are only the amounts charged to subscribers *for the provision of a telecommunications service*. Moreover, nothing in the rulemaking order which adopted the Universal Service rules (nor any subsequent order) contradicts that common-sense reading of Section 54.709(a)(1)'s text. See Federal State Joint Board on Universal Service, Report and Order in CC Docket No. 96-45, 12 FCC Rcd. 8776 (1997) (the "R&O").

Nowhere in the R&O's lengthy discussion of the proper basis for assessing Universal Service contributions, and the ways of recovering those contributions, is there any indication that methods of passing through contributions, or monies derived from any source other than the direct provision of telecommunications services to the ultimate end user, were intended to come within the definition of "end user telecommunications revenues." See, generally, R&O at ¶¶ 842-857. Indeed, the Worksheet itself excludes from the contribution base amounts derived from the provision of a number of "non-telecommunications" products and services, such as enhanced services (*i.e.*, information services) and customer premises equipment. See Worksheet at Item 50.

Item 48 of the revised Worksheet thus imposes a new, binding obligation and increases costs on regulated entities; as such, it is a new substantive rule. See, e.g., Kennecott Utah Copper Corp. v. Dept. of the Interior, 88 F.3d 1191, 1207 (D.C. Cir. 1996) (defining a "regulation" as a "statement that has 'general applicability' and that has the 'legal effect' of 'binding' the agency and other parties"); Phillips Petroleum Co. v. Johnson, 22 F.3d 616, 620 (5th Cir. 1994) (holding that an agency statement that binds and has a substantial impact on the regulated industry is a rule

requiring notice and comment procedures). This new rule is invalid on at least two grounds: it was adopted without notice and public comment, as required by the Administrative Procedures Act ("APA"); and it exceeds the Common Carrier Bureau's delegated authority.

A. The Adoption of Item 48 Violates the APA.

The APA establishes the procedures an agency must follow before it adopts a substantive rule: notice of the proposed rulemaking describing the proposed rule must be published in the Federal Register, and, opportunity must be provided for public comment. 5 U.S.C. § 553(b)-(c). Once adopted, the final rule must be published and, unless the rule falls within one of the statutory exceptions, the final rule may not become effective until 30 days thereafter. 5 U.S.C. § 553(c)-(d).

The Worksheet's inclusion of end user surcharges as "end user telecommunications revenues," and increasing the amount of funds on which carriers' Universal Service contributions will be based, establishes a new "binding norm" with which carriers must comply, or face sanctions. See, Worksheet, Instructions at 8. The Division has left no discretion to itself or USAC to omit the surcharge amounts reported at Item 48 from the contribution base. Such an agency statement, that compels adherence by the agency and others, is a substantive, legislative rule that requires prior notice and comment under section 553 of the APA. See Kennecott Utah Copper, supra, United States Telephone Assoc. v. FCC, 28 F.3d 1232, 1234 (D.C. Cir. 1994). Indeed, the Commission itself has essentially admitted that the inclusion of funds recovered through the "pass through" of Universal Service contributions in the Universal Service contribution base requires a formal rulemaking proceeding: it has referred this precise issue to the Federal-State Joint Board for recommendations. *Federal State Joint Board on Universal Service,*

Order and Order on Reconsideration in CC Docket No. 96-45, FCC 98-160 (released July 17, 1998).

The addition of Item 48 to the Worksheet without notice and the prior opportunity for public comment therefore violates the APA, and cannot stand.² No carrier should be assessed Universal Service contributions based on end-user surcharges unless and until the Commission, in consultation with the Joint Board, modifies its Universal Service rules in a proceeding that complies with 5 U.S.C. § 553.

B. The Adoption of Item 48 Exceeds the Division's Delegated Authority.

In the R&O, the Commission delegated to the Common Carrier Bureau certain authority to administer the Universal Service program. See, e.g., R&O at ¶ 989. In a subsequent order, the Commission delegated additional authority to the Bureau to adopt reporting requirements the Bureau believed necessary to the administration of the Universal Service program, and to revise or eliminate unnecessary reporting requirements. *Changes to the Board of Directors of the National Exchange Carrier Association, Inc.; Federal-State Joint Board on Universal Service, Report and Order and Second Order on Reconsideration*, 12 FCC Rcd. 18400, ¶ 81 (1997). The Chief of the Common Carrier Bureau has authority to sub-delegate powers to subordinate officials, see 47 C.F.R. § 0.204(b); and has apparently sub-delegated the Bureau's authority over Universal Service to the Division.

² Even if the inclusion of subscriber bill line items in the Universal Service contribution base were considered a mere "interpretation" of the existing Universal Service rules, it would represent a significant departure from the way those rules have been interpreted to date. Such a significant change in the Commission's views must be supported by a "reasoned analysis" to demonstrate that its prior interpretations are being "deliberately changed, not casually ignored." Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970). The Division engaged in *no* analysis whatsoever.

The adoption of a requirement to assess Universal Service contributions against funds that were not previously subject to assessment exceeds the authority delegated to the Bureau. New Item 48 is no mere "reporting requirement;" the Division has not included a line item on the amounts of Universal Service surcharges for informational purposes. Rather, it subjects the amounts listed there to taxation as "revenues from telecommunications," despite the fact those surcharges are not obtained from the provision of "telecommunications" as that term is defined in the Commission's Rules.

The Division is thus using this new line on the Worksheet as a means to increase the Universal Service contribution base with funds that the Commission's validly-adopted rules do not include in the contribution base. Even the Commission *en banc* cannot simply ignore the Rules it adopted in an APA rulemaking. See Reuters Ltd. v. FCC, 781 F.2d 946, 951 (D.C. Cir. 1986) ("Simply stated, rules are rules, and fidelity to the rules which have been properly promulgated ... is required of those to whom Congress has entrusted the regulatory missions of modern life."). The Division, as a subordinate office of the Commission, has no power to ignore or modify the substantive rules the Commission has adopted. See 47 C.F.R. § 0.291(g). See also, Responsible Accounting Office Letter 20, Memorandum Opinion and Order and Notice of Proposed Rule Making, 11 FCC Rcd. 2957, ¶ 25 (1996), recon. denied, Report and Order, 12 FCC Rcd. 2321, ¶ 28 (1997).

Because the Division exceeded its delegated authority in adding a new amount to the Universal Service contribution base, that action is void. The Division should eliminate Item 48 from the Worksheet, and ignore end user surcharges in assessing carriers' Universal Service contributions.

III. Item 48 Disserves the Public Interest.

In addition to the legal infirmities attending the adoption of Item 48, Metrocall respectfully submits that the decision to assess future Universal Service contributions against amounts collected to recoup past Universal Service contributions is poor public policy. It seems clear that Item 48 is intended to discourage carriers from passing their Universal Service costs through to their customers, or at least from letting customers know that the costs of Universal Service are being passed through to them. As unpopular as adding line items to consumer bills may make the Commission and carriers, however, it is impossible to implement a multi-billion dollar subsidy program without obtaining the money somewhere. Metrocall respectfully submits that attempts to discourage carriers from passing through their Universal Service costs are doomed to failure, and Item 48 will do no more than artificially inflate the amount of costs that carriers need to recover from their customers.³

For carriers in highly competitive markets, it is simply not possible to absorb the costs of Universal Service contributions.⁴ In a competitive market, such as the CMRS market, prices are

³ A table estimating the increased costs on \$10.00 of end-user telecommunications revenue is attached hereto as Exhibit One.

⁴ Absent the ability to pass through its Universal Service contributions, a CMRS carrier's only options are likely to be seeking additional loans or capital to cover those contributions, or diverting funds otherwise used in upgrading, improving and maintaining its networks. Neither of those options is viable. First of all, lenders want at least some assurances that they will be repaid, with interest; and, investors expect a return on their investment. A company seeking additional funds simply to meet new costs, that add no value to the company, is unlikely to attract the interest of lenders or investors. Secondly, diverting funds from a carrier's investment in its network serves no one's interests: neither the interests of carriers' shareholders and creditors in a return on their monetary investments, nor the interests of the public in maintaining the quality of their existing telecommunications services and in the prompt availability of new technologies and services.

highly related to cost, and if the costs of providing a product or service increase, the price charged for the product or service must increase as well. Not only does the Universal Service program impose a new cost on CMRS carriers, cf. R&O at ¶ 851 (finding that the Universal Service program justified adjustments to existing contracts, because the new rules "create an expense or cost of doing business that was not anticipated"); but, because contributions are based on *gross* amounts *billed* to end users, the program ignores such marketplace realities as uncollectible accounts and subscriber "churn." Put simply, Universal Service contributions are assessed against carriers based on funds the carriers may never have.

Unlike carriers in less competitive sectors of the telecommunications industry (*e.g.*, LECs), CMRS carriers have no captive group of ratepayers. See, *e.g.*, Third Annual Report on CMRS Competition, FCC 98-91 (released June 11, 1998) ("Third Annual CMRS Report") at 3-4 (noting decrease in prices for mobile telephone services as new competitors enter the market); 51 (noting the large number of paging providers and the high subscriber churn). Nonetheless, like all other companies, CMRS carriers must try to recoup their costs of providing services through their prices for those services, if they are to remain in business. Cf. id. at 42-43 (restructuring in the paging industry). Since CMRS paging carriers are not eligible for subsidies from the Universal Service Fund, and have never had guaranteed returns from which they might have surplus funds, they have only one way to meet the exorbitant new costs imposed by their Universal Service obligations: through their rates.

The Division's approach compounds the problem of how these government-imposed costs will be borne by carriers in competitive markets. Treating amounts passed through to recoup Universal Service costs as revenues will increase the amounts carriers will be required to pay in

future contributions; competitive carriers must then increase the amounts they charge to their customers to cover those amounts; those carriers will then be subject to increased assessments based on their next Worksheet filings; and those increased assessments will need to be recovered from consumers. The Division's new rule requires competitive carriers to attempt to recover through their bills the funds that they have paid in ever increasing amounts. This "vicious cycle" will lead to upwardly-spiraling costs for carriers, which will in turn lead to higher prices for consumers.⁵

Congress has ordered the Commission to make Universal Service subsidies "specific, predictable and sufficient", 47 U.S.C. § 254(b)(5); while keeping telecommunications rates "just, reasonable, and affordable." 47 U.S.C. § 254(b)(1). New Item 48, by requiring carriers to cover ever-increasing Universal Service contribution rates, and encouraging them to remain silent as to the source of those mounting costs, defies both the letter and the spirit of Section 254.

Ultimately, the public will pay for Universal Service, either through line-item surcharges; or through undifferentiated rate increases; or through the loss of investment by telecommunications companies in developing new technologies and services and creating new markets and new jobs. Even under the prior regime, the public paid for Universal Service -- some telephone subscribers paid more to subsidize others, in a complex program of implicit subsidies.

⁵ Since many paging customers sign long term service contracts, the Division's improper revisions to the contribution base will also put carriers in the difficult position of trying to collect additional government-imposed charges that are not covered in those contracts. Although the Commission permits customer contracts to be revised to cover Universal Service, it has not preempted possible state contract law claims arising from such contract revisions. R&O at ¶ 851. Moreover, since customers have multiple paging carriers from which to choose, a paging carrier may be unable to adjust its contract rates as a practical matter -- the affected customer may refuse to agree to the contract modification, and turn elsewhere for service (or forego paging services entirely).

In the case of CMRS services, which are not "essential," the Division's actions may force thousands of consumers to simply abandon those services altogether.

Metrocall respectfully submits that the public interest is better served when carriers can recoup the funds they pay to support Universal Service from their customers, and consumers are fully informed about the reasons for collecting those funds.⁶ The Division's attempt to indirectly require carriers to absorb the costs of their Universal Service contributions will clearly backfire. CMRS carriers will continue to lose money; and, unrecoverable Universal Service costs will threaten the viability of many carriers, thereby eliminating competition. Consumers will suffer as now-affordable wireless services become more expensive due to government-imposed charges and the resulting loss of competing firms; some consumers may be forced to abandon these services altogether. The Division's approach will cost the public far more than the surcharges carriers place on their bills, not only in terms of money, but also in the loss of competing and innovative service options.

⁶ Since most carriers will have no choice but to pass Universal Service costs through to their customers, the Commission should encourage the use of separate line items, rather than undifferentiated rate increases. One of the core values of our Nation is that society is better served by the availability of more information rather than less; and, this principle applies with full force to commercial information. See, e.g., Central Hudson Gas and Electric Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980). There is no legitimate reason for consumers to be "left in the dark" about the amount of their money which will be used to foster Universal Service.

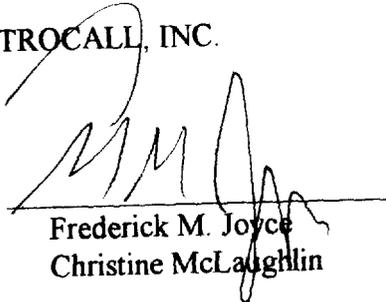
CONCLUSION

WHEREFORE, all the foregoing premises considered, Metrocall respectfully requests that the Division reconsider the addition of line items on end-user bills to the Universal Service contribution base, and instruct USAC to disregard the figures at Item 48 of the revised Worksheet in calculating Universal Service contributions.

Respectfully submitted,

METROCALL, INC.

By:


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August 31, 1998

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Calculation of Universal Service TAX based on Revised Universal Service Worksheet, FCC Form 487												
	Quarter 1	Quarter 2	Quarter 3	Quarter 4	Quarter 1	Quarter 2	Quarter 3	Quarter 4	Quarter 1	Quarter 2	Quarter 3	Quarter 4
Actual Service Revenue	\$ 10.00	\$ 10.00	\$ 10.00	\$ 10.00	\$ 10.00	\$ 10.00	\$ 10.00	\$ 10.00	\$ 10.00	\$ 10.00	\$ 10.00	\$ 10.00
Revenue for USF Tax calculation this quarter	10.00	10.36	11.28	12.13	12.00	13.10	13.81	14.15	14.70	15.28	15.88	16.53
USF Tax rate	3.85%	3.85%	3.85%	3.85%	3.85%	3.85%	3.85%	3.85%	3.85%	3.85%	3.85%	3.85%
Tax amount passed through to subscriber (see item 1)	\$ 0.39	\$ 0.41	\$ 0.44	\$ 0.46	\$ 0.46	\$ 0.51	\$ 0.53	\$ 0.56	\$ 0.56	\$ 0.60	\$ 0.62	\$ 0.64
Percentage of actual service revenue	3.85%	4.03%	4.24%	4.41%	4.65%	5.15%	5.28%	5.68%	5.78%	6.01%	6.24%	6.17%
On July 31, 1980, without affecting for comments, the FCC announced on public notice DA 80-1619 and their action to the Universal Service Worksheet Form Line 48, items 48.1 through 48.12 that the revenues derived from charges submitted on end-user's to recover contributors to state of federal universal service support mechanisms.												

CERTIFICATE OF SERVICE

I, Rhonda Johnson, a secretary with the law firm of Joyce & Jacobs, Attorneys at Law, LLP, do hereby certify that on the 31st day of August, 1998, copies of the foregoing Petition for Reconsideration were sent by First Class U.S. Mail, postage prepaid, to the following:

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