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

OCT - 2 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
NETWORK OPERATOR SERVICES, INC.)	CC Docket No. 96-45
)	
Petition for Waiver or, in the Alternative, for Reconsideration)	DA No. 98-1871
)	

AT&T COMMENTS

Pursuant to the Commission's September 18, 1998 Public Notice, AT&T Corp. ("AT&T") hereby opposes the petition of Network Operator Services, Inc. ("NOS"), which requests a "waiver" or alternatively "reconsideration," so that it could deviate from the Universal Service Fund ("USF") assessment methodology which bases a carrier's current year universal service contributions on its revenues from the previous year.¹ NOS contends (at 2) that because its business end user revenues have decreased by one-third from 1997 to 1998, its contribution assessment is "inequitable and discriminatory." Accordingly, NOS maintains that it should be permitted to make USF contributions based on actual current year revenues.

For the reasons shown below, NOS has failed to demonstrate a valid basis for a waiver, and its

¹ See 47 C.F.R. Sections 54.709, 54.711.

reconsideration petition is one year out-of-time. Nonetheless, the Commission could, on its own motion, reconsider its USF assessment and recovery mechanism to address the problem identified by NOS as well as others associated with the current USF scheme.

I. NOS HAS FAILED TO SHOW GOOD CAUSE FOR A WAIVER.

NOS provides long distance services and 0+ operator services to end users and resellers and also performs billing and collection services for some customers. Petition at 1. NOS states (at 5) that "the monthly bill NOS has calculated based on its actual 1998 monthly revenues is approximately one-third less than the monthly bill NOS received from USAC." NOS contends that because it "has a smaller end user base in 1998 than it did in 1997, if NOS were to assess the full cost of its universal service assessment based on 1997 revenues on its existing, smaller end user base, it would have to charge those end users much more than NOS's competitors are charging," causing it to lose customers. NOS maintains (at 6) that these facts provide good cause for a waiver. NOS is wrong.

The Commission should reject NOS's waiver request and similar efforts to dismember piecemeal the Commission's USF contribution mechanism. The Commission

in the USF Order,² acting on a recommendation of the Federal-State Joint Board, adopted a contribution mechanism entailing assessments on carriers based on those entities' end user telecommunications revenues from the preceding year.³ Because the current telecommunications marketplace is becoming increasingly competitive, as the Commission is well-aware (and as NOS concedes), it is predictable that as carriers compete for business an individual carrier's demand, and consequently its revenues, may fluctuate considerably from year-to-year. Moreover, because competition drives prices of telecommunications services closer to their underlying economic costs, carriers may experience a reduction in their annual revenues even absent any change in demand.

Such year-to-year fluctuations will necessarily impact the levels of a carrier's USF obligation under the Commission's prior year revenue-based USF contribution scheme, and do not in themselves provide any basis for waiver or modification of the Commission's mechanism.

² Federal-State Joint Board on Universal Service, 12 FCC Rcd 8776 (1997), appeal pending sub nom. Texas Office of Public Utility Counsel v. FCC, Civ. No. 97-60421 (5th Cir.) ("USF Order").

³ See also Changes to the Board of Directors of the National Exchange Carrier Association, Inc.; Federal-State Joint Board on Universal Service, 12 FCC Rcd 18400, Appendix B at B-6 (47 C.F.R. Section 54.711(a)) (1997) ("Second Order") (directing the Universal Service Administration Company ["USAC"] to bill 1998 USF contributions based on Worksheet using calendar 1997 end user telecommunications revenues).

Had the Commission intended to do so, it could readily have mitigated the impact of such revenue disparities, for example, by adopting an assessment mechanism based on current revenues (see Point II, below).

However, because the Commission expressly opted instead for a prior year revenue-based contribution methodology, NOS and other carriers should not be heard to claim that they are entitled to waivers of that mechanism due simply to annual variations in their revenue.⁴ Such claims could equally be made by any telecommunications competitor that may suffer a reversal of fortune in the competitive marketplace.⁵ The Court of Appeals has cautioned that the Commission should not "tolerate evisceration of a rule by waivers."⁶ As the

⁴ At least four other similar petitions for waivers have already been filed by carriers to use current, rather than historical, revenue data in computing their USF obligations. See Public Notice, National Telephone & Communications, Inc., Emergency Petition for Partial Waiver, DA 98-1301, released June 30, 1998; Public Notice, Affinity Corporation, Emergency Petition for Partial Waiver, DA 98-1384, released July 13, 1998, Public Notice, Oncor Communications, Inc., Emergency Petition for Partial Waiver, DA 98-1409, released July 16, 1998, Public Notice, Hotel Communications, Inc. Petition for Waiver, DA 98-1647, released August 19, 1998.

⁵ NOS's pending petition illustrates why such revenue reductions should not be deemed adequate basis for a waiver. As a provider of "alternate operator services," NOS has long charged supracompetitive rates to customers. Increased consumer education regarding operator services providers, combined with rate disclosure requirements adopted by the Commission, can only be expected to reduce demand for NOS's services.

⁶ WATT Radio v. FCC, 418 F.2d 1153, 1159 (D.C. Cir. 1968), cert. denied, 409 U.S. 1027 (1972).

Commission has previously recognized, this is precisely the prohibited result that would follow where virtually any carrier subject to a rule could at some time qualify for such relief.⁷

II. ALTHOUGH NOS'S RECONSIDERATION REQUEST MUST BE DENIED AS UNTIMELY, THE COMMISSION SHOULD RECONSIDER THE USF ASSESSMENT METHODOLOGY ON ITS OWN MOTION.

Alternatively, NOS contends that the Commission should reconsider its USF assessment methodology by permitting carriers to make a one-time election to base their USF contributions on current year revenues. NOS maintains (at 6-7) that allowing "carriers to base their universal service contributions on current year revenues would better tailor each carrier's liability to match its ability to pay." In support of this request, NOS observes (at 7) that although "an individual carrier's revenues might vary widely from year to year, total industry revenues should remain relatively constant. Thus adopting a current year election should not hinder the Commission's ability to predict total interstate, intrastate, and international revenues which are used to set contribution factors on a quarterly basis."

⁷ See, e.g., National Exchange Carrier Association (Petition for Waiver), 3 FCC Rcd 6042 (1988) (denying waiver of equal access cost recovery rules where "a waiver for 1300 [NECA] carriers would effectively undermine the validity of the rule").

As NOS concedes (at 7 and n.15), a petition for reconsideration in a rulemaking proceeding must be filed within 30 days of publication of the relevant Order (or summary of that Order) in the Federal Register. See 47 C.F.R. Section 1.106(f) (1997). In this instance, the Commission's Second Order directed USAC to bill 1998 USF contributions based on a Worksheet using 1997 end user revenues. A summary of that order was published in the Federal Register on August 1, 1997, and thus petitions for reconsideration were due on September 1, 1997 (NOS at 7 n.15).

NOS alleges (at 8-10), however, that because these amendments were in appendices to the Second Order and a final approved USF Worksheet was not published until August 12, 1997, there was uncertainty as to the "public notice" of the Commission's determination. To the contrary, rules generally appear in an Appendix, as would items such as the detailed USF Worksheet. In any event, at the very latest, the final Worksheet was published and distributed to carriers in mid-August 1997, and NOS's petition was filed August 28, 1998, over one year later. Thus, under any view of the facts, NOS's petition for reconsideration is untimely. Nonetheless, as NOS points out (at 10), because petitions for reconsideration remain pending in the USF proceeding,

"the Commission retains jurisdiction to reconsider its own rules on its own motion."⁸

On the merits, NOS's proposal to allow carriers a one-time election to have their USF contributions based on current revenues should be categorically rejected. If carriers had the ability to choose the time period which would be used to determine their assessments, they would choose whatever time frame would minimize their USF obligation. Thus, to avoid creating a mechanism that would not be competitively neutral and that would allow carriers to game the process, the Commission must adhere to a uniform assessment base.

Current year revenues are a preferable basis for assessing USF obligations than prior year revenues under the existing rule. For example, in the proceedings leading up to the USF Order, AT&T urged the Joint Board and the Commission to recover universal service costs through a retail surcharge on end users' bills, applied to customer-specific retail revenues, and has a petition for reconsideration that remains pending on this issue. Such a contribution mechanism, had it been adopted, would have been based on current year revenues and would ameliorate the effects on a carrier of a substantial

⁸ Changes to the Board of Directors of the National Exchange Carrier Association, Inc.; Federal-State Joint Board on Universal Service, CC Docket Nos. 97-21 and 96-45, Second Order on Reconsideration in CC Docket No. 97-21, FCC 97-400, para. 3, n.8, released November 26, 1998 (citations omitted).

reduction in year-to-year revenues, such as NOS claims here.

Thus, AT&T has no objection and, indeed, strongly supports, a current year assessment methodology. Under this approach, to ensure competitive neutrality, there should be simultaneous assessment and recovery of the carrier's USF obligation, without any discretion on the part of the carrier as to how recovery will be made as between different classes of customers. Thus, the Commission should require USAC to set the quarterly factor assessed against carriers (as it does today) and require carriers to recover their USF obligation as a line-item on the carrier's retail bill to end users.⁹

⁹ For example, the Commission could require each interstate telecommunications carrier to submit twice each year to the USF administrator a verified accounting of its retail revenues on a Form 457 Worksheet. The administrator would then estimate the total federal support that will be needed for the following quarter. Based on this estimate, the administrator would then develop a factor that is equal to the ratio of the federal support requirement to total retail revenues for the period. Each telecommunications service provider would then be required to use the factor as a rate element, which is applied to its retail revenues. Specifically, each telecommunications service provider would be required to apply the rate element to the retail revenues of each of its end user customers, with the rate element appearing as a line-item on the end user's monthly bill. As an alternative to a revenue-based surcharge, and, indeed, likely a preferable option, the Commission could allow both assessment and recovery of federal universal service support from interstate service providers via an end user per-line charge.

Such a carrier surcharge would be competitively neutral and would avoid several problems, including the ILEC flowback (which enables ILECs to recover their USF obligations from IXCs through access charges), as well as the carrier revenue fluctuations identified in NOS's petition.

Under AT&T's proposal, as end user revenues shift among carriers, so would their USF contribution obligation. In other words, the carrier contribution obligation would be portable, just as USF support distribution is, under the Commission's program.

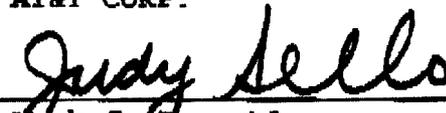
CONCLUSION

For the reasons stated above, the Commission should deny NOS's petition for waiver or reconsideration. Instead, the Commission should adopt, on its own motion, a carrier surcharge based on current revenues and require that it be collected as a line-item on the end user bill.

Respectfully submitted,

AT&T CORP.

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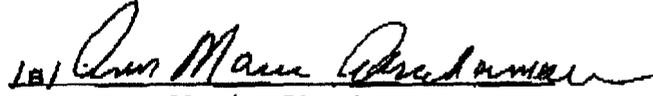
Its Attorneys

October 2, 1998

CERTIFICATE OF SERVICE

I, Ann Marie Abrahamson, do hereby certify that on this 2nd day of October, 1998, a copy of the foregoing "AT&T Comments" was mailed by U.S. first class mail, postage prepaid, to the parties listed below.

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