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October 23, 1998

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VIA HAND DELIVERY

Magalie Roman Salas, Esq.  
Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Room 222  
Washington, D.C. 20554

**RECEIVED**

OCT 23 1998

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Re: In the Matter of  
Revised Universal Service Worksheet  
(FCC Form 457)  
CC Docket Nos. 97-21, 96-45

Dear Ms. Salas:

Transmitted herewith, on behalf of RSL COM U.S.A., Inc., is an original and four (4) copies of its Reply Comments in the above-captioned proceeding.

An extra copy of the filing is enclosed. Please date-stamp the extra copy and return it to the courier for return to me.

If you have any questions please contact the undersigned.

Very truly yours,

HOLLAND & KNIGHT LLP



Eric Fishman  
Counsel for RSL COM U.S.A., Inc.

ef;ewd  
Enclosures

BEFORE THE  
**Federal Communications Commission**  
WASHINGTON, D.C. 20554

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OCT 23 1998

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
)  
Revised Universal Service Worksheet ) CC Docket Nos. 97-21, 96-45  
FCC Form 457 )

To: Chief, Accounting Policy Division

**REPLY COMMENTS OF RSL COM U.S.A., INC.**

RSL COM U.S.A., Inc. ("RSL USA"), by its attorneys and pursuant to Section 1.106(h) of the Commission's Rules, 47 C.F.R. § 1.106(h), hereby files these reply comments in support of the petitions seeking reconsideration of the revised Universal Service Worksheet, *Public Notice*, DA 98-1519 (rel. July 31, 1998), filed by Metrocall, Inc. ("Metrocall") and the Personal Communications Industry Association ("PCIA") in the above-captioned proceeding. 63 Fed. Reg. 51,576 (Sept. 28, 1998). In support of the petitions for reconsideration, RSL USA submits the following:

**I. BACKGROUND.**

1. RSL USA is an interexchange carrier that resells domestic and international long distance service. Pursuant to the Commission's Universal Service rules and policies, RSL USA is required to contribute to the Universal Service support mechanism ("Universal Service Fund") and, correspondingly, to file a Universal Service Worksheet twice a year. RSL USA has an interest in this proceeding because the revised Worksheet, which adds a new charge to the Universal Service contribution base, will broaden the contribution base and increase costs to contributing carriers.

2. The Telecommunications Act of 1996 (the "1996 Act") added Section 254 to the Communications Act of 1934 (the "Act"). 47 U.S.C. § 254. Section 254 directs the Commission to establish a Universal Service Fund to ensure the delivery of affordable telecommunications service to all Americans. *Id.* In the *Universal Service Order*, the Commission adopted rules and policies to implement the Universal Service provisions of the 1996 Act. *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Report and Order*, 12 FCC Rcd 8776 (1997) ("*Universal Service Order*").

3. Section 54.703 of the Commission's Rules requires all telecommunications carriers providing interstate telecommunications services and certain other telecommunications service providers to contribute to the Universal Service Fund. 47 C.F.R. § 54.703. Section 54.709(a)(1) of the Commission's Rules provides that contributions shall be based on "revenues derived from domestic end users for telecommunications or telecommunications services." *Id.* § 54.709(a)(1).<sup>1</sup> In other words, a carrier's contribution is to be based only on end-user revenue derived from the provision of a telecommunications service.

4. All contributing carriers are required to complete and submit a mid-year revenue Worksheet on September 1 of each year and a year-end revenue Worksheet on March 31 of the following year. 47 C.F.R. § 54.711. The information provided is used by the Commission to determine contribution amounts.

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<sup>1</sup> The 1996 Act defines "telecommunications" to mean "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 sent or received." 47 U.S.C. § 153(43). "Telecommunications service" is defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available to the public, regardless of the facilities used." *Id.* § 153(46).

5. In the *Universal Service Order*, the Commission determined that it would "continue [its] historical approach to recovery of universal service support mechanisms, that is, to permit carriers to recover contributions to universal service support mechanisms through rates for interstate services only." *Universal Service Order*, ¶ 825. Nowhere in the *Universal Service Order* or in any subsequent Commission order did the Commission state that the recovery surcharge would be included in the contribution base. Nor did the Commission state in any subsequent notice of proposed rule making that it intended to include the recovery surcharge in the contribution base.

6. On July 31, 1998, the Accounting Policy Division (the "Division"), acting under delegated authority, released a revised Universal Service Worksheet that added, among other things, new Item 48. Item 48 requires contributors to report revenues derived from charges to end users to recover Universal Service contributions. Item 48 is classified as an "end-user revenue" and therefore the amount is required to be included in the contribution base. The addition of the recovery surcharge to the contribution base will increase the base and consequently the amount that carriers must pay to the Universal Service Fund.

7. Two parties have filed petitions seeking reconsideration of the Commission's decision to add Item 48 to the Universal Service Worksheet. See Metrocall Petition for Reconsideration (Aug. 31, 1998); PCIA Petition for Reconsideration (Aug. 31, 1998) (collectively, the "petitioners"). The petitioners assert that Item 48 is a new substantive rule that was added without notice and without an opportunity to comment in violation of the Administrative Procedures Act ("APA"). 5 U.S.C. § 553. In addition, Metrocall argues that the Division does not have the authority to add a new charge to the Universal Service contribution

base. The petitioners also claim that Item 48 is contrary to the public interest because it will lead to higher prices for consumers.

8. GTE Service Corporation ("GTE") and the United States Telecommunication Association ("USTA") filed comments in support of the petitions for reconsideration. *See* GTE Comments in Support of Petitions for Reconsideration (Sept. 10, 1998); USTA Comments in Support of PCIA Petition for Reconsideration (Oct. 13, 1998). Echoing the procedural and substantive concerns raised by the petitioners, GTE submits that inclusion of the recovery surcharge in the contribution base amounts to an unfair double recovery that is inconsistent with Section 254 of the Act. Similarly, USTA agrees with PCIA that classification of the recovery surcharge as an end-user revenue results in an improper and unfair double recovery and is inconsistent with the Universal Service provisions of the 1996 Act.

9. No oppositions were filed.

## **II. NEW ITEM 48 IS INVALID AND CONTRARY TO THE PUBLIC INTEREST.**

10. RSL USA agrees with the petitioners that the Commission was without authority to add Item 48 to the Universal Service Worksheet and, therefore, the new line item is invalid. The Commission's action violated the APA because the Commission added a new substantive rule without first giving the public notice and an opportunity to comment on Item 48. In addition, the Division exceeded its delegated authority by adding a new charge to the Universal Service contribution base. Even if Item 48 is deemed valid, we agree with the petitioners that the inclusion of the recovery surcharge in the contribution base is contrary to the public interest because it will increase the price of interstate telecommunications services.

11. Prior to the addition of Item 48, carriers were not required to include the recovery surcharge in the Universal Service Fund contribution base. This is consistent with Section 54.709(a)(1) of the Commission's Rules, which provides that contributions are to be based on revenues derived from the provision of a "telecommunications service." 47 C.F.R. § 54.709(a)(1). A recovery surcharge does not fall within the definition of "telecommunications service" as defined by the 1996 Act. The Commission's recent revision of the Worksheet purports to now require carriers to include the surcharge in the contribution base. Item 48 substantively changes the way in which the contribution base is calculated. Therefore, the Commission's addition of Item 48 to the Worksheet violates the APA.

12. Section 553 of the APA requires a federal agency to institute a rule making proceeding each time it proposes to adopt a new rule. 5 U.S.C. § 553. A rule making proceeding is intended to provide the public with notice of a proposed rule and an opportunity for parties, especially those who may be adversely affected, to comment on the rule. Here, the Commission amended the contribution base calculation without first giving the public notice of the proposed change or an opportunity to comment on the change. Instead, the Commission has attempted to impose this new, binding obligation by simply adding a new line item to the Worksheet. The addition of a new cost to the contribution base is not a "de minimis" change. The new charge will broaden the contribution base and increase costs to carriers. Therefore, the Commission violated the APA by substantively changing the Universal Service Fund rules without first instituting a rule making proceeding. Accordingly, Item 48 is invalid.

13. In addition, Item 48 is invalid because the Division lacks the authority to add a new charge to the contribution base. The Division has been given the authority only to modify

the Universal Service "reporting requirements." See *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. 18,400, ¶ 81 (1997); 47 C.F.R. § 0.204(b). That authority is limited to waiving, reducing, eliminating or adding contributor reporting requirements as deemed necessary to administer the Universal Service programs. *Id.* In this case, the Division had the authority to add item 48 to the Worksheet as a *reporting requirement* provided that the amount reported is not included in the contribution base. Item 48, however, is more than a modest "reporting requirement." The revised Worksheet requires carriers to include a new, additional charge in the contribution base, thereby increasing the base and costs to carriers. The Division does not have the authority to substantively change the Commission's contribution base calculation. Consequently, Item 48 is invalid.

14. Finally, even if Item 48 is deemed valid, the requirement that carriers must include the recovery surcharge in the contribution base is contrary to the public interest. As mentioned above, carriers are permitted to pass the cost of their Universal Service contributions on to their customers. This is a reasonable public policy because the customer is the ultimate beneficiary of the telecommunications services being provided by the carrier. It makes no sense to require carriers to include the recovery surcharge in the contribution base. The carriers and the consumers have already borne the cost of their Universal Service Fund contributions. To now require additional contributions based upon payments already made to the Universal Service Fund amounts to a double recovery that will lead to a cycle of increased costs for carriers and higher prices for consumers. The addition of the recovery surcharge to the contribution base will increase the base which, in turn, will increase the amounts that carriers must pay to the Universal

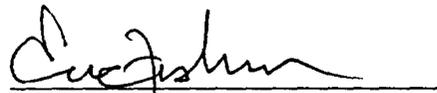
Service Fund. Carriers will then pass this cost on to customers who will then have to pay higher prices for interstate telecommunications service. This cycle will continue to repeat itself, causing an upward spiral of prices to consumers. This result is contrary to the goal of the Universal Service provisions of the 1996 Act to ensure the delivery of affordable telecommunications services to all Americans.

### III. CONCLUSION.

For all these reasons, the Commission should eliminate Item 48 from the Universal Service Worksheet and instruct the Universal Service Administrative Company to disregard the amounts reported in Item 48 of the revised Worksheet in calculating Universal Service contributions.

Respectfully submitted,

RSL COM U.S.A., Inc.



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October 23, 1998

WAS1-389661

CERTIFICATION OF SERVICE

I, Ellen Dorsey, an employee of the firm Holland & Knight LLP, do hereby certify that on October 23, 1998, a copy of the foregoing Reply Comments of RSL COM U.S.A., Inc. was served by first class U.S. mail, postage prepaid, to the following:

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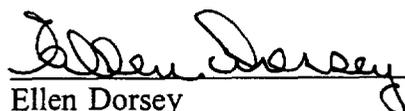
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