

Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of)
)
Federal-State Joint Board on)
Universal Service)
)
AMSC Subsidiary Corporation)
Request for Waiver)

CC Docket No. 96-45

MEMORANDUM OPINION AND ORDER

Adopted: November 4, 1998

Released: November 4, 1998

By the Deputy Chief, Common Carrier Bureau:

1. On March 17, 1998 AMSC Subsidiary Corporation (AMSC) filed a Request for Waiver of the requirement to contribute to the universal service support mechanisms based upon its end-user telecommunications revenues.¹ AMSC contends that it should be permitted, through the year 2000, to contribute on a per-minute basis for voice service, and per-kilobyte basis for two-way mobile data services.² For the reasons discussed below, we deny AMSC's Request.

I. BACKGROUND

2. In the Telecommunications Act of 1996 (1996 Act),³ Congress amended the Communications Act of 1934 (Act)⁴ by, among other things, adding section 254 to the Act. Section 254(b) states that, "[a]ll providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service"⁵ through "specific, predictable and sufficient Federal and State mechanisms."⁶ To

¹ AMSC Subsidiary Corporation Request for Waiver (filed Mar. 17, 1998) (Request).

² Request at 1.

³ Pub. L. No. 104-104, 110 Stat. 56.

⁴ 47 U.S.C. §§ 151, *et seq.* Hereinafter, all citations to the 1996 Act and the Act will be to the relevant section of the United States Code unless otherwise noted.

⁵ 47 U.S.C. § 254(b)(4).

accomplish these goals, the Act mandates that "[e]very telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service."⁷

3. On May 8, 1997, the Commission released the *Universal Service Order* implementing section 254 of the Act, and establishing universal service support mechanisms.⁸ The resulting Commission rules require all telecommunications carriers providing interstate telecommunications services,⁹ providers of interstate telecommunications that offer interstate telecommunications for a fee on a non-common carrier basis, and payphone providers that are

⁶ 47 U.S.C. § 254(b)(5).

⁷ 47 U.S.C. § 254(d). Section 254(d) also states that the Commission may require "[a]ny other provider of interstate telecommunications" to contribute to universal service, "if the public interest so requires." 47 U.S.C. § 254(d).

⁸ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776 (1997) (*Universal Service Order*), as corrected by *Federal-State Joint Board on Universal Service, Errata*, CC Docket No. 96-45, FCC 97-157 (rel. June 4, 1997), *consolidated appeal pending sub nom Texas Office of Public Utility Counsel v. FCC and USA*, No. 97-60421 (5th Cir. 1997); *Federal-State Joint Board on Universal Service, Order on Reconsideration*, CC Docket No. 96-45, 12 FCC Rcd 10095 (rel. July 10, 1997); *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, 96-45, Report and Order and Second Order on Reconsideration, 12 FCC Rcd 18400 (1997), as corrected by *Federal-State Joint Board on Universal Service, Errata*, CC Docket No. 96-45, DA 97-2477 (rel. Dec. 3, 1997); *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, 96-45, Order on Reconsideration, Second Report and Order and Further Notice of Proposed Rulemaking, 12 FCC Rcd 12444 (1997); *Federal-State Joint Board on Universal Service*, CC Docket Nos. 96-45, 97-160, Third Report and Order, 12 FCC Rcd 22485 (1997), as corrected by *Federal-State Joint Board on Universal Service, Erratum*, CC Docket Nos. 96-45 and 97-160 (rel. Oct. 15, 1997); *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service*, CC Docket No. 97-21, Report and Order and Second Order on Reconsideration in CC Docket 97-21, 12 FCC Rcd 22423 (1997); *Federal-State Joint Board on Universal Service*, CC Docket No. 96-24, Third Order on Reconsideration, 12 FCC Rcd 22801 (1997); *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*, CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, Fourth Order on Reconsideration, 13 FCC Rcd 5318 (1997) (*Fourth Reconsideration Order*), as corrected by *Federal-State Joint Board on Universal Service, Errata*, CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, DA 98-158 (rel. Jan 29, 1998), *appeal pending in Alenco Communications, Inc., et al. v. FCC and USA*, No. 98-60213 (5th Cir. 1998); *Federal-State Joint Board on Universal Service*, Fifth Order on Reconsideration and Fourth Report and Order in CC Docket No. 96-45, FCC 98-120 (rel. June 22, 1998); *Federal-State Joint Board on Universal Service*, Order and Order on Reconsideration, CC Docket No. 96-45, FCC 98-160 (rel. July 17, 1998).

⁹ 47 C.F.R. §§ 54.703, 54.711, 54.713; *Universal Service Order*, 12 FCC Rcd at 9173, para. 777.

aggregators to contribute to universal service.¹⁰ Commercial mobile radio services (CMRS), and satellite services were specifically identified by the Commission and the Joint Board as examples of interstate telecommunications.¹¹

4. Pursuant to the rules established in the *Universal Service Order*, contributions to the universal service support mechanisms must be based on contributors' end-user telecommunications revenues from the previous year, and the contribution factors determined quarterly by the Commission.¹² On July 18, 1997, the Commission released rules directing contributors to submit, *inter alia*, end-user revenue information on a Universal Service Worksheet (FCC Form 457), to the Universal Service Administrator, for the purpose of determining the contribution amount.¹³

5. AMSC is a CMRS provider that offers land, maritime, and aeronautical mobile satellite services throughout the United States.¹⁴ Through the public switched telephone network (PSTN), AMSC provides, among other things, voice and data services to people who live, work, or travel in rural and remote areas of the United States that AMSC asserts are unserved by terrestrial technologies.¹⁵ AMSC's system also offers the ability to meet rural public safety needs, and provide communications to any area during emergencies.¹⁶

6. On March 17, 1998, AMSC filed a request that the Commission "waive its rules for the next three years to permit AMSC to contribute to universal service at a level that is equivalent on a per-minute basis, for voice service, and a per-kilobyte basis, for two-way mobile data services, to the contributions of terrestrial-based wireless service providers."¹⁷ AMSC explains that the development of its system required an extraordinary investment, and

¹⁰ In the *Universal Service Order*, the Commission found, pursuant to its permissive authority over "other providers of telecommunications," that the public interest requires private service providers that offer their services to others for a fee and payphone aggregators to contribute to the federal universal service on the same basis as telecommunications carriers. *Universal Service Order* 12 FCC Rcd at 9183-9184, paras. 794-796.

¹¹ *Universal Service Order*, 12 FCC Rcd at 9175, para. 780; 47 C.F.R. § 54.703.

¹² *Id.*

¹³ *Changes to the Board of Directors of the National Exchange Carrier Association, Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 18400, 18424, 18442 (1997); see 47 C.F.R. §§ 54.709, 711.

¹⁴ Request at 2.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Request at 1.

involved considerable technology and market risks.¹⁸ AMSC contends that high costs and slower than anticipated development of the market for mobile satellite service (MSS) have resulted in a net loss to AMSC of \$119.2 million in 1997, and a cumulative net loss of \$201.5 million in 1995 and 1996.¹⁹ AMSC claims that, as a result, it must charge more and collect larger end user-revenues for its services.²⁰ Thus, AMSC contends that compelling AMSC to contribute a percentage of total end-user revenues will unfairly result in AMSC having to contribute substantially more for its mobile voice telephone and two-way mobile data services than other CMRS providers. Consequently, AMSC claims that these Commission rules are inconsistent with the goal of maintaining competitive neutrality between technologies.²¹

7. The Commission issued a public notice seeking comments on AMSC's request,²² BellSouth Corporation (BellSouth) responded with comments opposing it,²³ and AMSC filed comments in reply.²⁴

II. DISCUSSION

8. Generally the Commission's rules may be waived for good cause shown.²⁵ But, as noted by the Court of Appeals for the D.C. Circuit, agency rules are presumed valid, and "an applicant for waiver faces a high hurdle even at the starting gate."²⁶ The Commission may exercise its discretion to waive a rule, where the particular facts make strict compliance inconsistent with the public interest.²⁷ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an

¹⁸ *Id.* at 2.

¹⁹ *Id.* at 3.

²⁰ *Id.*

²¹ *Id.*

²² *AMSC Subsidiary Corporation Request for Waiver*, Public Notice, DA 98-724 (Accounting Policy Division rel. May 6, 1998).

²³ Comments of BellSouth Corporation (filed May 6, 1998) (BellSouth Comments).

²⁴ Reply Comments of AMSC Subsidiary Corporation (filed May 6, 1998) (Reply).

²⁵ 47 C.F.R. § 1.3.

²⁶ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

²⁷ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

individual basis.²⁸ Waiver is, therefore, appropriate if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule.²⁹ As further discussed below, we conclude that AMSC has failed to show that a waiver is appropriate.

9. In an effort to prove the existence of a "special circumstance," AMSC contends that its satellite-based communications system "has been a uniquely costly two-way wireless system to implement and [it] charges correspondingly higher rates than ground-based CMRS systems."³⁰ AMSC argues that, without a waiver, it would be required to contribute to the universal service fund at a rate per-minute of voice service and per-kilobyte of data service, that is higher than its terrestrial based competitors.³¹ AMSC thus concludes that "[f]ew if any carriers can present a similar combination of high-cost service focused on rural areas, unique technology, and a disproportionately burdensome universal service contribution."³²

10. BellSouth responds that AMSC's cost structure does not constitute special or unique circumstances.³³ BellSouth notes that, "[w]ithin every segment of the telecommunications industry, some providers will have higher cost structures than other providers."³⁴ According to BellSouth, if the Commission were to view cost structure as a valid basis for waiving the method for calculating a carrier's universal service contribution, "then it can well expect a continuing stream of waiver requests from carriers who believe they, like AMSC, should have a special calculation because they are high cost companies relative to others in their industry segment."³⁵

11. We agree with BellSouth that AMSC has failed to show the existence of "special circumstances." The fact that the rates that AMSC charges for its services may generate greater amounts of end-user revenues per unit of traffic, which results in greater contributions, does not make AMSC unique, nor does it justify an exemption from the obligation to contribute to universal service on the basis of end-user revenues. As BellSouth

²⁸ *WAIT Radio supra* at 1157.

²⁹ *Northeast Cellular supra* at 1166.

³⁰ Request at 5.

³¹ *Id.*

³² *Id.* at 6.

³³ BellSouth Comments at 2.

³⁴ *Id.*

³⁵ *Id.*

noted, all carriers generate different amounts of end-user revenues per unit of traffic, and, therefore, some will always have to contribute more per unit of traffic than others. This is inherent in the Commission's decision to adopt end-user revenues as the basis for apportioning the necessary universal service contributions among different service providers, as explained below.

12. We do not find that granting this request would be in the public interest. AMSC claims that granting its request is in the public interest because it would maintain competitive neutrality between different technologies, and be consistent with the congressional mandate that all contributions to the universal service fund be assessed in an equitable manner.³⁶ According to BellSouth, however, granting AMSC's waiver would have a contrary effect, and result in other carriers unfairly having to compensate for the reduction in AMSC's contribution.³⁷ We agree with BellSouth that granting AMSC's request would have the result of favoring AMSC's choice of technology, and, therefore, would not be competitively neutral. Indeed, even AMSC notes that "[a] waiver in this case also will enhance AMSC's ability to provide service."³⁸

13. The Commission has already specifically rejected the general use of the method for calculating the contribution that AMSC now requests, and AMSC has given us no reason to conclude otherwise in this particular instance. In the *NPRM* to implement section 254, the Commission suggested three different bases for assessing contributions: (1) gross revenues; (2) gross revenues net payments to other carriers; and (3) per-line or per-minute charges.³⁹ The Commission invited comment on the relative merits of these methods, and the extent to which they do, or do not, satisfy the requirements of the Act.⁴⁰ The Commission also sought comment on any alternative methodologies for calculating a carrier's, or service provider's contribution to universal service support.⁴¹ The Commission asked commenters to address which method would be the most easily administered, and competitively neutral in its effect upon contributing carriers and service providers.⁴² In addition, the Commission sought comment on how these methods could be adapted if the Commission were to require

³⁶ Request at 5.

³⁷ BellSouth Comments at 2.

³⁸ Request at 6.

³⁹ *Federal-State Joint Board on Universal Service*, Notice of Proposed Rulemaking and Order Establishing Joint Board, CC Docket No. 96-45, FCC 96-93, 11 FCC Rcd 18092, 18148, paras. 122-124 (1996)(*NPRM*).

⁴⁰ *Id.*

⁴¹ *NPRM*, 11 FCC Rcd at 18149, paras. 125-126.

⁴² *Id.*

non-carrier providers of telecommunications services to make contributions to universal service support mechanisms.⁴³

14. Based upon all of the information considered in that proceeding, the Commission rejected the suggestion that contributions be calculated entirely on non-revenue-based measures, such as a per-minute or per-line basis.⁴⁴ The Commission concluded that basing contributions from all telecommunications carriers on their gross end-user telecommunications revenues best satisfies the goals of competitive neutrality and ease of administration, as well as the statutory requirement that support be explicit.⁴⁵

15. The Commission's requirements are intended to carry out the statutory mandate that every telecommunications carrier that provides interstate telecommunications services "contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service."⁴⁶ Contrary to AMSC, we believe that the principle of competitive neutrality requires AMSC to contribute on the same basis as all other carriers.

16. Finally, AMSC does not claim, and we do not perceive, any significant adverse consequences to AMSC or the public in requiring AMSC to contribute on the basis of its end-user revenues. AMSC benefits from universal service from its use of the PSTN. Moreover, we have no reason to believe that, absent a waiver, AMSC's customers would go unserved.

17. Based upon the foregoing, we conclude that AMSC does not meet the requirements for a waiver.

III. ORDERING CLAUSE

10. Accordingly, IT IS ORDERED that, pursuant to the authority contained in section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, the Request for Waiver, filed March 17, 1998, by AMSC Subsidiary Corporation, IS DENIED.



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Deputy Chief, Common Carrier Bureau

⁴³ *Id.*

⁴⁴ *Universal Service Order*, 12 FCC Rcd at 9210, para. 852.

⁴⁵ *Id.* at para. 854.

⁴⁶ 47 U.S.C. § 254(d).