

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)
)
Assessment and Collection)
of Regulatory Fees for) MD Docket No. 98-200
Fiscal Year 1999)

To: The Commission

COMMENTS OF BELLSOUTH CORPORATION

BellSouth Corporation, on behalf of itself and its affiliates ("BellSouth"), by its attorneys, respectfully submits the following comments suggesting revisions to certain aspects of the Commission's Schedule of Regulatory Fees. These comments are filed in response to the request by the Commission in the Notice of Inquiry (FCC 98-298) released in the above captioned proceeding on December 4, 1998, 63 Fed. Reg. 70090 (December 18, 1998), corrected at 64 Fed. Reg. 204 (January 4, 1999) ("NOI"). Specifically, BellSouth recommends that the Commission (1) reclassify 900 MHz Specialized Mobile Radio Service ("SMRS") into the Commercial Mobile Radio Services ("CMRS") Messaging Services category; (2) delay a determination on the basis for assessing revenues for interstate telephone service providers until the conclusion of CC Docket No. 98-171,¹ which, in part, is addressing the basis for assessing contributions to the

¹ *In the Matter of 1998 Biennial Regulatory Review -- Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Services, North American Numbering Plan, Local Number Portability, and Universal Service Support*

Telecommunications Relay Services (“TRS”) fund; and (3) capture the costs associated with the development of a new service and assess it to the feeable category(ies) resulting from the new service—those developmental costs should not be apportioned to all feeable categories.

I. COMMERCIAL MOBILE RADIO SERVICES

The Commission has taken a bifurcated approach to the regulatory fee categories ascribed to CMRS. The CMRS Mobile Services fee of \$.29 per unit is applied to “licensees authorized for operation on broadband spectrum” and the CMRS Messaging Services fee of \$.04 per unit is applied to “licensees authorized for operation on narrowband spectrum.” NOI, *supra*, at 3-4, nn.12-15.

BellSouth Wireless Data, L.P. (formerly known as Ram Mobile Data USA Limited Partnership) (“BellSouth WD”), in 1997 and 1998, requested reconsideration of the Commission’s decision to categorize 900 MHz SMRS as a broadband service to which the higher regulatory fees apply.² The Commission, as yet, has not addressed either petition. Indeed, the NOI either overlooks or ignores the arguments set forth in BellSouth WD’s Petition in the NOI’s summary of various parties’ previously stated positions on the CMRS fee categories. *See* NOI, *supra*, at 3-5.

Mechanisms, CC Docket No. 98-171, *Notice of Proposed Rulemaking and Notice of Inquiry*, FCC 98-233, released Sept. 25, 1998, 63 Fed. Reg. 54090 (Oct. 8, 1998) (“TRS NPRM”).

² *See In the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 1997*, MD Docket No. 96-186, Petition for Reconsideration of RAM Mobile Data USA Limited Partnership, filed July 28, 1997; and *In the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 1998*, MD Docket No. 98-36, Petition for Reconsideration, filed by BellSouth Wireless Data, L.P., on July 31, 1998 (“BellSouth WD’s Petition”).

BellSouth WD's Petition carefully informs the Commission of the legal and factual bases for categorizing 900 MHz SMRS as a CMRS Messaging Service for regulatory fee purposes.³ In sum, BellSouth WD's Petition argues that Congress directed in the Omnibus Budget Reconciliation Act of 1993⁴ that "similar services are [to be] accorded similar regulatory treatment."⁵ BellSouth's WD's Petition further noted that the Commission arrived at the same conclusion "when it discussed regulatory fees in its regulatory parity docket, stating '*we believe that principles of regulatory parity dictate that [regulatory] fees for similar services be equivalent*'" (emphasis in original).⁶

In its petition, BellSouth WD also reminded the Commission that its 900 MHz SMRS system is used solely for mobile data services and delivers no voice service just as the Commission specifically recognized in its *Third Annual CMRS Competition Report*.⁷ See BellSouth WD's Petition, at 6. Thus, given that mobile data services compete against services that are assessed regulatory fees under the CMRS Messaging category, BellSouth WD's service should be assessed similarly. *Id.*

The principle of regulatory parity also argues in favor of affording BellSouth WD's mobile data service the same treatment as that received by the services with which it competes.

³ BellSouth WD's Petition is incorporated herein by reference.

⁴ Pub. L. No. 103-66, Title VI § 6002(b), 107 Stat. 312 (1993).

⁵ See H.R. Conf. Rep. No. 103-213 at 494 (1993).

⁶ See BellSouth WD's Petition, at 5, citing *Implementation of Sections 3(n) and 332 of the Communications Act*, GEN Docket No. 93-252, *Third Report and Order*, 9 FCC Rcd 7988, 8129 (1994); see also *Establishment of Rule and Policies for LMDS*, CC Docket No. 92-297, *Second Report and Order*, 12 FCC Rcd 12545, 12655-56 (1997).

⁷ *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Conditions With Respect to Commercial Mobile Services, Third Report*, FCC 98-91, at 59, 12 Comm. Reg. 623, at 660-61 (released June 11, 1998).

Recently, the Commission again recognized that the mobile data offering of BellSouth WD does not compete against the real-time, two-way switched voice service offerings of cellular, broadband PCS and certain SMR licensees. In an order released October 20, 1998, the Commission, agreeing with RAM Mobile Data, excluded “data-only systems and other systems that do not offer two-way, real-time voice services, regardless of the type of CMRS system used,” from the telephone number portability requirements of the Act.⁸ The Commission earlier had reached the same conclusion concerning data only services.⁹ This reaffirmation by the Commission strengthens BellSouth’s position that regulatory parity dictates that any 900 MHz SMR mobile data service like that offered by BellSouth WD should be classified for regulatory fee purposes in the CMRS Messaging category.

The BellSouth WD’s Petition also addressed the Commission’s declination to reclassify certain mobile data services into the CMRS Messaging category on the basis that it would not base “fees on the predominant use of assigned spectrum and on a licensee by licensee basis.”¹⁰ The Commission argued in the 1998 R&O and in the NOI that it is not “aware of any existing records or other sources of information that would permit development of a sub-category of CMRS Mobile Services for those CMRS licensees who use broadband spectrum to deliver CMRS Messaging Services.” *Id.*, and NOI, *supra*, at 5. BellSouth WD pointed out that the

⁸ See *In the Matter of Telephone Number Portability*, CC Docket No. 95-116, RM 8535, *Second Memorandum Opinion and Order on Reconsideration*, FCC 98-275, released October 20, 1998, ¶ 54.

⁹ See *Telephone Number Portability*, 11 FCC Rcd 8352, 8433 (1996) (*subsequent history omitted*).

¹⁰ See *In the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 1998*, MD Docket 98-36, FCC 98-115, released June 16, 1998, 63 FR 35847 (July 1, 1998) (“1998 R&O”), ¶ 46, and BellSouth WD’s Petition, at 7.

information it provided in the record in the proceeding supplied the Commission with ample information upon which to reclassify the services offered by 900 MHz SMR licensees.¹¹

BellSouth WD's Petition, at 7.

Since the filing of the BellSouth WD's Petition, the Commission itself has contributed its own solution to its perceived lack of information. In its recent decision concerning the Universal Licensing System ("ULS"), the Commission stated, "The enhanced information collection capabilities of ULS will, in turn, enable the Commission staff to easily monitor spectrum use and competitive conditions in the wireless marketplace and will promote effective implementation of our spectrum management policies."¹² Thus, the Commission is, or shortly will be, in possession of all the information it needs to determine the utilization of the 900 MHz SMR spectrum for purposes of categorizing those services into the CMRS Messaging Services fee category. Implementation of ULS, however, is not essential for the Commission to have the information it perceives it needs prior to properly classifying BellSouth WD's service. The BellSouth WD's Petition demonstrates that adequate information is already at hand for that purpose.

The Commission also has sufficient data upon which to calculate the number of feeable units being transferred from the higher fee category to the lower fee category. Currently, 900 MHz SMR licensees are identifiable by the Commission through its existing databases.

¹¹ The BellSouth WD's Petition offered an alternative to this proposal in the event the Commission decided against reclassifying the 900 MHz SMR mobile data services into the CMRS Messaging Services category. It suggested the creation of a new CMRS Broadband Messaging Services fee category. That alternative is not discussed in the instant comments because the Commission did not specifically seek comment on it in the NOI.

¹² See *In the Matter of Biennial Regulatory Review—Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 97, and 101 of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services*, WT Docket No. 98-20, WT Docket No. 96-188, RM-8677, FCC 98-234, ¶ 4 (Oct. 21, 1998).

Implementation of ULS, as noted above, will give the Commission additional and more detailed information about those licensees. As the Commission does with other categories with high growth rates for feeable units, the Commission can achieve a “degree of precision” by extrapolating feeable units for successive years based on the previous year’s feeable units. Identification of the licensees makes the desired calculations readily achievable.

II. INTERSTATE TELEPHONE SERVICE PROVIDERS

The Commission is considering the “use of end user revenues—the same contribution base used for the Universal Service Fund—to calculate the annual fees” paid by interstate telephone providers. NOI, *supra*, at 6. The Commission also seeks comment “on the feasibility of relying on end user revenues as provided to the Universal Services Fund, as opposed to net revenues based upon the TRS Fund.” NOI, *supra*, at 7. However, the Commission expressed hesitancy about such a change because of concern that it does “not have adequate data to estimate total common carrier interstate end user revenue.” *Id.*

Albeit not mentioned in the NOI, on September 25, 1998, the Commission initiated the TRS NPRM, in which, among other things, the Commission is proposing “to modify the revenue basis for contributions to the TRS Fund, so that contributions would be based on end-user telecommunications revenue.” TRS NPRM, *supra*, ¶ 26. The Commission noted therein that the “change would satisfy the underlying statutory provisions and would make [its] treatment of contributions to the TRS Fund consistent with contributions to the universal service support mechanisms and the LNP [Local Number Portability] cost recovery mechanisms. . . .” and “. . . reduce confusion and result in a more competitively neutral distribution of costs.” *Id.*

In its comments in the TRS NPRM, BellSouth supported the Commission's proposal to assess contributions to the TRS Fund on end-user revenue. *See* TRS NPRM, *supra*, Comments of BellSouth filed October 30, 1998, at 4. Many other commenters also were in favor of this modification.¹³

It is premature to project what final action the Commission will take in this regard. However, if the Commission adopts its tentative conclusion to harmonize the method for assessing contributions to the Universal Service Fund and the TRS Fund, the answer to the question in this docket about altering the methodology for calculating regulatory fees for interstate telephone service providers will be quite clear. Accordingly, BellSouth encourages the Commission to delay action in this docket until it has reached a decision in the TRS NPRM.

Final action in the TRS NPRM likely will result in the Commission having ample data available upon which to base the proposed assessment methodology. The Telecommunications Reporting Worksheet proposed in the TRS NPRM should give the Commission the information it will need. *See* TRS NPRM, *supra*, ¶¶ 19-29, and Appendix B. Again, concluding the TRS NPRM first will aid greatly in adoption of the alternative assessment methodology proposed in this proceeding.

III. TREATMENT OF NEW SERVICES IN ALL FEEABLE CATEGORIES

In response to concerns expressed by Geostationary Orbit fee payors, the Commission seeks comments on "whether a regulatory category for 'new services,' which would impact payors in all services, should be added to [its] cost accounting system." NOI, *supra*, at 7. In

¹³ *See, e.g.*, Comments of AT&T Corp., at 3; Comments of GTE, at 2; Comments of STAR Telecommunications, Inc., at 2; and Comments of United States Cellular Corporation, at 2.

other words, should the cost of developing the policy and rules for a new service be borne by all fee payors or only those who benefit from the new service?

The enabling legislation provides a road map to the appropriate answer to the foregoing query. Section 9(a)(1) of the Communications Act of 1934, as amended (the "Act"), 47 U.S.C. §159(a)(1) (1998), states: "The Commission, in accordance with this section, shall assess and collect regulatory fees to recover the costs of the following regulatory activities of the Commission: enforcement activities, policy and rulemaking activities, user information services, and international activities." Thus, recovery of the costs associated with the development of a new service would appear to be permissible under the statute. However, the Commission has not been given unfettered discretion in assessing fees. It is limited by the verbiage in Section 9(b)(1)(A) of the Act, 47 U.S.C. §159(b)(1)(A) (1998), which provides that fees:

shall be derived by determining the full-time equivalent number of employees performing the activities described in subsection (a) within the Private Radio Bureau, Mass Media Bureau, Common Carrier Bureau, and other offices of the Commission, *adjusted to take into account factors that are reasonably related to the benefits provided to the payor of the fee by the Commission's activities, including such factors as service area coverage, shared use versus exclusive use, and other factors that the Commission determines are necessary in the public interest (emphasis added).*

Accordingly, dispersing the costs of development of a new service across all regulatory fee payors would run counter to the express guidance in the enabling statute. Fee payors other than those taking advantage of the new service would be receiving *no* benefit from the Commission's activities, the cost of which is otherwise recoverable under the Act.

BellSouth suggests that the Act does not authorize the Commission to spread the costs of the new services to all fee payors; it may impose the fee only on payors receiving a benefit. Fundamental fairness also militates against the suggested approach.

IV. CONCLUSION

Based on the foregoing, BellSouth recommends that the Commission (1) reclassify 900 MHz SMR services into the CMRS Messaging Services category; (2) delay a determination on the basis for assessing revenues for interstate telephone service providers until the conclusion of CC Docket No. 98-171, which, in part, is addressing the basis for assessing contributions to the TRS fund; and (3) capture the costs associated with the development of a new service and assess it to the feeable category(ies) resulting from the new service—those developmental costs should not be apportioned to all feeable categories.

Respectfully submitted,

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January 7, 1999

CERTIFICATE OF SERVICE

I hereby certify that I have this 7th day of January, 1999, served a copy of the foregoing
COMMENTS OF BELLSOUTH CORPORATION in MD Docket No. 98-200, by hand-delivery,
on the persons listed below.

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