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Federal Communications Commission

FCC 99-75

DISPATCHED BY

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

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| In the Matter of |) | |
| |) | |
| Federal-State Board on |) | CC Docket No. 96-45 |
| Universal Service |) | |
| |) | |
| Startec Global Communications Corporation |) | |
| Request for Forbearance or Exemption from the |) | |
| Universal Service Contribution Requirement |) | |

MEMORANDUM OPINION AND ORDER

Adopted: April 16, 1999

Released: April 16, 1999

By the Commission:

1. By letter dated April 17, 1998,¹ Startec Global Communications Corporation (Startec) requests that the Commission waive, or forbear from enforcing, the universal service contribution requirement set forth in section 54.706 of the Commission's rules.² For the reasons discussed below, we deny Startec's request.

I. BACKGROUND

2. In the Telecommunications Act of 1996 (1996 Act),³ Congress amended the

¹ Startec Global Communications Corporation Request for Forbearance/Exemption from Universal Service Fund as stated in FCC Docket 96-45 (filed April 17, 1998) (Startec Request).

² Startec requests waiver or forbearance of section 54.703 of the Commission's rules; however, as a result of the *Eighth Reconsideration Order*, section 54.703 became section 54.706, and is currently codified at 47 C.F.R. § 54.706. *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service*, Third Report and Order and Fourth Order on Reconsideration, and Eighth Order on Reconsideration, CC Docket Nos. 96-45, 97-21, FCC 98-306 (rel. Nov. 20, 1998) (*Eighth Reconsideration Order*).

³ Pub. L. No. 104-104, 110 Stat. 56.

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 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 The Act authorizes the Commission to exempt a mandatory contributor from contributing to the universal service support mechanisms only "if the carrier's telecommunications activities are limited to such an extent that the level of such carrier's contribution to the preservation and advancement of universal service would be *de minimis*."⁸

3. On May 8, 1997, the Commission released the *Universal Service Order* implementing section 254 of the Act.⁹ As required in the Act, the resulting Commission rules generally require all telecommunications carriers providing interstate telecommunications service to contribute to universal service.¹⁰ The Commission found that carriers that provide only international telecommunications services are not "telecommunications carriers that provide interstate telecommunications services," and, therefore, are exempt from the mandatory universal service contribution obligation.¹¹ Carriers who provide both interstate and international telecommunications, however, are required to contribute to the universal

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).

⁶ 47 U.S.C. § 254(b)(5).

⁷ 47 U.S.C. § 254(d).

⁸ *Id.*

⁹ *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*, No. 97-60421 (5th Cir.).

¹⁰ 47 C.F.R. § 54.706.

¹¹ *Universal Service Order*, 12 FCC Rcd at 9174, para. 779.

service support mechanism based on their total revenue from both categories of service.¹² Carriers are required to calculate their contributions by multiplying their total end-user revenues by the universal service contribution percentage announced by the Commission quarterly.¹³ In addition, pursuant to the authority to exempt mandatory contributors whose contributions would be *de minimis*, the Commission exempted from the contribution requirement all entities whose annual contribution would be less than \$10,000.¹⁴

4. Startec describes itself as a newly-public, minority-run "dial-around" international long distance carrier, that also provides a limited amount of interstate telecommunications service.¹⁵ Startec contends that, because very little of its end-user revenues comes from the provision of interstate telecommunications service, the Commission should consider Startec to be a purely international telecommunications service carrier that need not contribute to universal service.¹⁶ Startec requests, in the alternative, that the Commission limit the contribution requirement to revenue derived from domestic calls.¹⁷ Startec claims that its customers are low-income, first generation immigrants who, but for Startec, would not have access to long distance telecommunications service.¹⁸ Startec argues

¹² Specifically, for the high cost, rural and insular areas, and low-income consumers programs, carriers must contribute in proportion to their total interstate and international end-user telecommunications revenues. *Universal Service Order*, 12 FCC Rcd at 9203, para. 836. For the schools, libraries, and health care providers program, carriers must contribute in proportion to their total interstate, intrastate, and international end-user telecommunications revenues. *Universal Service Order*, 12 FCC Rcd at 9203, para. 837.

¹³ *Universal Service Order*, 12 FCC Rcd at 9211, para. 854.

¹⁴ 47 C.F.R. § 54.708. The *de minimis* level was originally set at \$100. *Universal Service Order*, 12 FCC Rcd at 9186, para. 801. In its *Fourth Reconsideration Order*, the Commission revised its approach to setting a threshold for the *de minimis* exemption, and concluded that the *de minimis* threshold should be increased to \$10,000. *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*, Fourth Order on Reconsideration, CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, 13 FCC Rcd 5318, 5465 at paras. 295-297 (1997) (*Fourth Reconsideration Order*).

¹⁵ Startec Global Response to AT&T's Opposition at 1-2 (filed June 1, 1998) (Startec Reply).

¹⁶ Startec Reply at 2-3.

¹⁷ Undated letter from Anthony A. Das, Senior Vice President for Corporate and International Affairs, Startec Global Communications Corporation, to William E. Kennard, Chairman, Federal Communications Commission (filed March 25, 1999) (Startec Proposal).

¹⁸ Startec Reply at 1.

that neither it, nor its customers, can afford to contribute to universal service.¹⁹ Finally, Startec argues that, because it has no corporate customer base from which it can recover its contribution, the requirement to contribute to universal service amounts to a barrier to open competition.²⁰ Accordingly, Startec requests that the Commission either exempt Startec from the requirement, or refrain from enforcing the provisions of section 54.706 of the Commission's rules.²¹

5. The Commission issued a public notice seeking comment on Startec's request and two other petitions,²² and AT&T responded with comments in opposition.²³ Startec filed a reply, and submitted a letter to the Chairman proposing a formula for the Commission to use to identify international carriers.²⁴

II. DISCUSSION

A. Waiver

6. 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 general discretion to waive a rule where the particular facts make strict

¹⁹ Startec Request at 1.

²⁰ Startec Reply at 2.

²¹ Startec Request at 1.

²² *Petitions for Waiver of Section 54.703 Filed by: Gateway USA Holding Company, Inc.; Cosmos Telecom Marketing, Inc.; Sitel, Inc.; Microdevices Worldwide Inc.; Startec Global communications Corporation*, Public Notice, DA 98-865 (Accounting Policy Division rel. May 8, 1998) (*Public Notice*). The other two petitions will be addressed in a separate Memorandum Opinion and Order.

²³ AT&T Comments (filed May 22, 1998).

²⁴ Startec Reply at 1; Startec Proposal at 1. Although both the Startec reply and proposal were received after the due date established by the Commission in the *Public Notice*, in the interest of establishing a complete record, and because this request is being addressed in a permit-but-disclose proceeding in which *ex parte* communications are permitted subject to disclosure, we consider all submissions. See *Public Notice* at 2; 47 C.F.R. § 1.1206.

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).

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 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 Startec has failed to justify grant of a waiver.

7. Section 254(d) specifies that universal service support "should be explicit," and mandates that "every telecommunications carrier that provides interstate telecommunications services *shall* contribute, on an equitable and non-discriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service."³⁰ The statute defines the term "telecommunications carrier" as "any provider of telecommunications services,"³¹ and the term "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."³² Telecommunications are 'interstate' when the communication or transmission originates in any state, territory, possession of the United States, or the District of Columbia and terminates in another state, territory, possession, or the District of Columbia.³³

8. The statute does not permit us to treat Startec as if it were a purely international telecommunications service provider that is not subject to the statutory universal service contribution requirement. Startec does not dispute that it is a "telecommunications carrier that provides interstate telecommunications service."³⁴ The Act authorizes the Commission to exempt a "telecommunications carrier that provides interstate telecommunications services" from contributing to the universal service support mechanisms only "if the carrier's contribution to the preservation and advancement of universal service

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

²⁸ *WAIT Radio* 418 F.2d at 1157.

²⁹ *Northeast Cellular* 897 F.2d at 1166.

³⁰ 47 U.S.C. § 254(d) (emphasis added).

³¹ 47 U.S.C. § 153(44).

³² 47 U.S.C. § 153(46).

³³ 47 U.S.C. § 153(22).

³⁴ See Startec Reply at 2-3.

would be *de minimis*.³⁵ Startec does not claim, and we do not find, that Startec's contributions are *de minimis*. Moreover, there is no basis in the record to determine that Startec's level of interstate activities and/or revenues are sufficiently unique to warrant deviation from our *de minimis* standard. Nor do we find, as discussed below, that Startec's public interest arguments affect our conclusion here.

9. Startec argues in the alternative that the Commission should permit carriers with less than fifteen percent of their revenue from interstate telecommunications services to base their contributions solely on the end-user revenue from the provision of interstate telecommunications services. We are not persuaded that Startec's argument is substantially different from the arguments that we have already carefully considered and rejected in the rulemaking.³⁶ A waiver applicant traditionally has a heavy burden to demonstrate that the arguments advanced in support of the waiver request are substantially different from those that have been carefully considered at the rulemaking stage.³⁷ Generally, the Commission need not re-study a matter and reconsider policy every time it receives an application for a waiver.³⁸ The Commission, in the rulemaking proceeding that implemented the statutory contribution requirement, considered and rejected the proposition that revenue from the provision of international telecommunications service should be excluded.³⁹ Startec does not

³⁵ 47 U.S.C. § 254(d). Pursuant to the authority to exempt mandatory contributors whose contributions would be *de minimis*, the Commission's rules exempt from the contribution requirement all entities whose annual contribution would be less than \$10,000. 47 C.F.R. § 54.708.

³⁶ See Startec proposal at 1.

³⁷ *Industrial Broadcasting Co. v. FCC*, 437 F.2d 680, 683 (D.C. Cir. 1970); see also, e.g., *Wait Radio* 418 F.2d at 1156.

³⁸ *Wait Radio* 418 F.2d at 1157.

³⁹ In adopting the section 54.706 requirement that interstate carriers include the revenues derived from international services in the assessment base, the Commission explained the underlying policy as follows:

Although we agree with PanAmSat that by definition, foreign or international telecommunications are not "interstate" because they are not carried between states, territories, or possessions of the United States, we find that, pursuant to our statutory authority to assess contributions to universal service on an equitable and nondiscriminatory basis, we shall include the foreign telecommunications revenues of interstate carriers within the revenue base. Contributors that provide international telecommunications services benefit from universal service because they must either terminate or originate telecommunications on the domestic PSTN [public switched telephone network]. Therefore, we find that contributors that provide international telecommunications services should contribute to universal service on the basis of revenues derived from those services.

explain why the Commission should now adopt a proposal to exclude that revenue from the calculation base of carriers that receive less than fifteen percent of their revenue from interstate telecommunications services. Thus, we find no reason to deviate from our previous conclusion.

10. Moreover, we note that "[t]he very essence of waiver is the assumed validity of the [agency's] general rule,"⁴⁰ and Startec has failed to establish the existence of any special circumstances warranting waiver of the rule. Although Startec does not provide a substantial amount of interstate telecommunications service in comparison to its total end-user revenues, it is, nonetheless, an interstate telecommunications service provider. Accordingly, we find that Startec should contribute to universal service on the basis of revenues derived from providing international telecommunications services. While it is Startec's relatively minimal amount of domestic revenue that triggers its statutory obligation to contribute to the universal service mechanisms, we note that Startec's substantial international revenues depend upon the integrity of universal service, because Startec's international calls "must either terminate or originate ...on the domestic PSTN"⁴¹ that universal service supports.

11. We disagree with Startec that, the public interest would be better served by granting the petition, because it would preserve Startec's ability to provide "low cost telecommunications services to the very communities that the USF [universal service fund] was designed to assist."⁴² In the Act, Congress directed the Commission and states to take the steps necessary to establish support mechanisms to ensure the delivery of affordable telecommunications service to all regions of the nation, including low-income consumers, those living in high-cost areas, eligible schools and libraries, and rural health care providers.⁴³ To 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."⁴⁴ As the Commission has repeatedly stated, we believe it is in the public interest to construe broadly this statutory mandate to encompass an expansive class of contributors, so as to ensure the sufficiency of

Universal Service Order, 12 FCC Rcd at 9174, para. 779 (citations omitted).

⁴⁰ *Wait Radio* 481 F.2d at 1158.

⁴¹ *Universal Service Order*, 12 FCC Rcd at 9174, para. 779.

⁴² Startec Request at 1-2.

⁴³ 47 U.S.C. § 254.

⁴⁴ 47 U.S.C. § 254(d).

the fund and to lessen the burden on each contributor.⁴⁵ Consistent with section 254, all interstate telecommunications service providers must contribute to universal service. In light of the underlying purpose of the contribution rules, mere allegations that service to Startec's customers might be foreclosed will not suffice. We find that, in this case, given the diverse purposes of the Act, the public interest is better served by adherence to the general rule.

12. Finally, we are not persuaded by Startec's claim that it should not have to contribute to universal service because it cannot recover its contributions from its customers, and absorbing the costs would jeopardize the viability of the company.⁴⁶ We agree with AT&T that Startec's ability to recover, or absorb, the cost of its contributions is not a special circumstance warranting waiver of section 54.706 of our rules. Section 54.706 of the Commission's rules is intended to carry out the statutory mandate that every telecommunications carrier that provides interstate telecommunications service "contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service."⁴⁷ Although the Commission's rules permit carriers to pass through all or part of their universal service contributions to their end-users in customer bills, the statutory requirement to contribute is not dependent upon a carrier's ability successfully to do so.⁴⁸ Carriers have the flexibility to decide how they recover their contributions.⁴⁹ Moreover, the record on these claims are little more than mere assertions, and thus, insufficient for finding special circumstances. Accordingly, we reject Startec's contention that its claimed inability to pass through its contribution requirement is a special circumstance justifying grant of a waiver.

B. Forbearance

13. Although the Commission has the authority to refrain from enforcing the contribution requirements of section 54.706 of the Commission's rules, pursuant to the forbearance authority of section 10 of the Act, we decline to do so in this instance because

⁴⁵ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, 11565, para. 132 (1998) (*April 10 Report to Congress*); see also *Universal Service Order*, 12 FCC Rcd at 9177, 9183, paras. 783, 795; *Fourth Reconsideration Order*, 13 FCC Rcd at 5465, para. 263.

⁴⁶ Startec Request at 1.

⁴⁷ 47 U.S.C. § 254(d).

⁴⁸ See *Universal Service Order*, 12 FCC Rcd at 9210-12, paras. 853-857; *Federal-State Joint Board on Universal Service, United Native American Telecommunications, Inc. Request for Waiver*, CC Docket No. 96-45, Memorandum Opinion and Order, 13 FCC Rcd. 22438 (1998).

⁴⁹ *Universal Service Order*, 12 FCC Rcd at 9210-12, para. 853.

Startec has not met the statutory standard for the grant of forbearance.⁵⁰ Section 10(a) of the Act sets forth a three-part standard to be applied in addressing petitions for forbearance. A carrier may petition the Commission for forbearance from any statutory provision or regulation, and the Commission shall grant such petition if it determines that: (1) enforcement of the requirement is not necessary to ensure that rates are just and reasonable, and are not unjustly and unreasonably discriminatory; (2) the regulation is not necessary to protect consumers; and (3) forbearance is consistent with the public interest.⁵¹ In evaluating whether forbearance is consistent with the public interest, we must consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers.⁵² In making this assessment, we may consider the benefits a regulation bestows upon the public, along with any potential detrimental effects or costs of enforcing a provision.

14. Startec's petition does not address specifically any of the standards for forbearance, nor set forth any substantive showing that would support the findings required by section 10 to justify exercise of our forbearance authority. Startec generally claims that, because it is a minority-run business that caters to under-served minority residential communities, the public interest would be served by granting its request.⁵³ As discussed above, Startec has failed to establish that granting its request for waiver is in the public interest; for the same reasons we also find that Startec has failed to establish that granting forbearance is consistent with the public interest. Given that Startec has failed to show that forbearance from application of section 54.706 would serve the public interest, we find that it is not necessary to provide an analysis of the remaining requirements of section 10 of the Act. Based upon the foregoing, we conclude that Startec does not meet the requirements for waiver or forbearance.

ORDERING CLAUSE

15. Accordingly, IT IS ORDERED, that, pursuant to the authority contained in sections 1-4, 10, 201-205, 254, 303(r), and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 160, 201-205, 254, 303(r), and 405, and section 1.3 of the Commission's rules, 47 C.F.R. § 1.3, the Request for Forbearance or Exemption from the Universal Service Contribution Requirement filed by Startec Global Communications

⁵⁰ See 47 U.S.C. § 160.

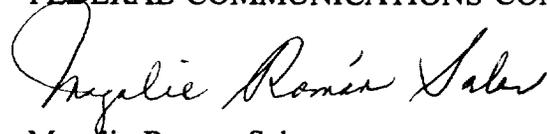
⁵¹ *Id.*

⁵² See 47 U.S.C. § 160(b).

⁵³ Startec Request at 2.

Corporation, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in cursive script that reads "Magalie Roman Salas".

Magalie Roman Salas
Secretary