

Before the  
Federal Communications Commission  
Washington, D.C. 20554  
Oct 26 11 21 AM '99

In the Matter of )  
DISPATCHED BY )  
Federal-State Joint Board on )  
Universal Service )  
Petitions for Waiver or Reconsideration of )  
Sections 54.706, 54.709, and/or 54.711 )  
of the Commission's Rules filed by: )  
Affinity Corporation )  
Hotel Communications, Inc. )  
LDC Telecommunications, Inc. )  
MobileTel, Inc. )  
National Telephone & Communications, Inc. )  
Network Operator Services, Inc. )  
Operator Communications, Inc. )  
U.S. Network, Inc. )

CC Docket No. 96-45

**MEMORANDUM OPINION AND ORDER AND  
SEVENTEENTH ORDER ON RECONSIDERATION**

**Adopted: October 6, 1999**

**Released: October 13, 1999**

By the Commission:

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## I. INTRODUCTION

1. The above-captioned entities (collectively, Petitioners)<sup>1</sup> have filed petitions for waiver or, alternatively, reconsideration of sections 54.706,<sup>2</sup> 54.709, and/or 54.711 of the Commission's rules. Specifically, Petitioners seek waiver or reconsideration of the requirement that their contributions to the universal service support mechanisms be calculated on the basis of their prior year revenues.<sup>3</sup> For the reasons that follow, we deny the petitions.

## II. BACKGROUND

### A. Universal Service Provisions of the Communications Act

2. In section 254 of the Communications Act of 1934 (Act), as added by the Telecommunications Act of 1996 (1996 Act), Congress instructed the Commission and the states to establish support mechanisms with the goal of ensuring the delivery of affordable telecommunications service to all Americans, including low-income consumers, eligible schools and libraries, and rural health care providers.<sup>4</sup> The 1996 Act requires 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."<sup>5</sup>

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<sup>1</sup> Affinity Corporation Petition for Partial Waiver of the Universal Service Contribution Requirement (filed July 8, 1998) (Affinity Petition); Hotel Communications, Inc. Petition for Waiver (filed July 31, 1998) (HCI Petition); LDC Telecommunications, Inc. Petition for Waiver or, Reconsideration of the Requirements (filed Oct. 22, 1998) (LDC Petition); MobileTel, Inc. Petition for Partial Waiver (filed May 26, 1998) (MobileTel Petition); National Telephone & Communications, Inc. Emergency Petition for Partial Waivers (filed June 25, 1998) (NTC Petition); Network Operator Services, Inc. Petition for Waiver or, in the Alternative, for Reconsideration (filed Aug. 28, 1998) (NOS Petition); Operator Communications, Inc. d/b/a Oncor Communications, Inc. Emergency Petition for Partial Waiver and Comments in Response to National Telephone & Communications, Inc.'s Request for Partial Waiver (filed July 14, 1998) (OCI Petition); First Amended Petition of U.S. Network, Inc.'s [sic] for Waiver of Universal Service Contribution (filed Sept. 29, 1998) (U.S. Network First Amended Petition). The Accounting Policy Division issued public notices seeking comment on each of the petitions. A list of the public notices, comments, and reply comments is attached as Appendix A.

<sup>2</sup> Section 54.706 of the Commission's rules was formerly numbered as section 54.703. See 47 C.F.R. § 54.703 (1997).

<sup>3</sup> Because all of the petitions concern the same issue, we have elected to consider them in a single proceeding. See 47 C.F.R. § 1.1 (Commission shall follow procedures that best serve the purposes of the proceedings before it).

<sup>4</sup> The 1996 Act amended the Communications Act of 1934, 47 U.S.C. § 151, *et seq.* See Pub. L. No. 104-104, 110 Stat. 56 (1996).

<sup>5</sup> 47 U.S.C. § 254(d). See also 47 C.F.R. § 254 (b)(4) and (5) (Commission policy on universal service shall be based, in part, on the principles that contributions should be equitable and nondiscriminatory, and support mechanisms should be specific, predictable, and sufficient).

6. *Operator Communications, Inc. d/b/a Oncor Communications, Inc. Emergency Petition for Partial Waiver Pleading Cycle Established*, CC Docket No. 96-45, Public Notice, DA 98-1409 (rel. July 16, 1998).

Comments

AT&T (filed July 29, 1998)

BellSouth Corporation (filed July 29, 1998)

MCI Telecommunications Corporation (filed July 29, 1998)

United Native American Telecommunications, Inc. (filed July 29, 1998)

Reply Comments

Operator Communications, Inc. (filed Aug. 5, 1998)

7. *U.S. Network Inc. Petition for Waiver of Universal Service Contribution LDC Telecommunications, Inc. Petition for Waiver or Reconsideration of Requirements Pleading Cycle Established*. CC Docket No. 96-45, Public Notice, DA 98-2137 (rel. Oct. 26, 1998).

Comments

BellSouth Corporation (filed Nov. 9, 1998)

APPENDIX A**Public Notices, Comments, and Reply Comments**

1. *Affinity Corporation Petition for Partial Waiver Pleading Cycle Established*, CC Docket No. 96-45, Public Notice, DA 98-1384 (rel. July 13, 1998).

Comments

AT&T (filed July 27, 1998)

BellSouth Corporation (filed July 27, 1998)

2. *Hotel Communications, Inc. Petition for Waiver of Universal Service Contribution Pleading Cycle Established*, CC Docket No. 96-45, Public Notice, DA 98-1647 (rel. Aug. 18, 1998).

No comments received.

3. *MobileTel, Inc. Petition for Partial Waiver Pleading Cycle Established*, CC Docket No. 96-45, Public Notice, DA 98-1098 (rel. June 9, 1998).

No comments received.

4. *National Telephone & Communications, Inc. Emergency Petition for Partial Waivers Pleading Cycle Established*, CC Docket No. 96-45, Public Notice, DA 98-1301 (rel. June 30, 1998).

Comments

Network Operator Services, Inc. (filed July 14, 1998)

Operator Communications, Inc. (filed July 14, 1998)

Reply Comments

National Telephone & Communications, Inc. (filed July 28, 1998)

5. *Network Operator Services, Inc. Petition for Waiver of Universal Service Contribution or Reconsideration Pleading Cycle Established*, CC Docket No. 96-45, Public Notice, DA 98-1871 (rel. Sept. 17, 1998).

Comments

AT&T (filed Oct. 2, 1998)

BellSouth Corporation (filed Oct. 2, 1998)

Reply Comments

Celpage, Inc. (filed Oct. 13, 1998)

Network Operator Services, Inc. (filed Oct. 13, 1998)

SEVENTEENTH ORDER ON RECONSIDERATION IS ADOPTED.

33. IT IS FURTHER ORDERED that, pursuant to the authority contained in sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 405, and section 1.429 of the Commission's rules, 47 C.F.R. § 1.429, the above-captioned petitions for reconsideration ARE DENIED.

34. IT IS FURTHER ORDERED that, pursuant to the authority contained in section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), and section 1.3 of the Commission's rules, 47 C.F.R. § 1.3, the above-captioned petitions for waiver ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas  
Secretary

experience such revenue declines from year to year."<sup>111</sup> Thus, we conclude that a decline in revenues, without more, is an insufficient basis for a waiver of the requirement that universal service contributions be based on prior year revenues. Moreover, now that carriers are familiar with the contribution process, they have the ability to ameliorate the effects of declining revenues and/or subscribers by reserving a portion of their current revenues to meet the contribution obligations that arise from those current revenues in the following year.

31. NTC, OCI, and MobileTel have attempted to explain the circumstances underlying their revenue declines, which include, respectively, regulatory action to correct improper marketing practices,<sup>112</sup> increased competition,<sup>113</sup> and an adverse Commission licensing decision.<sup>114</sup> We are not persuaded that any of these circumstances rise to the level of the special circumstances necessary to warrant a waiver. It is not unusual for a state to take corrective action against a company that improperly markets its services, or competitors to compete for subscribers and marketshare. Furthermore, although the Commission rescinded MobileTel's Louisiana 8 and 9 RSA cellular B block licenses in 1996, the Commission granted MobileTel interim authority to continue operating until qualified applicants were licensed and ready to begin service.<sup>115</sup> The grant of interim authority, while limited, allowed MobileTel to generate significant, additional revenues that it otherwise would have foregone absent such interim authority. By accepting the interim authority, however, MobileTel subjected itself to the obligations and responsibilities associated with being a provider of interstate telecommunications services in the Louisiana 8 and 9 RSAs. The fact that those obligations and responsibilities subsequently included a requirement to contribute to universal service using a methodology based on prior year revenues -- a requirement applicable to all providers of interstate telecommunications services<sup>116</sup> -- does not constitute a special circumstance warranting waiver of our contribution rules. Accordingly, we deny Petitioners' requests for waiver.

#### IV. ORDERING CLAUSES

32. IT IS ORDERED that, pursuant to the authority contained in sections 1-4, 201-205, 218-220, 254, 303(r), 403, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 201-205, 218-220, 254, 303(r), 403, and 405, section 1.429 of the Commission's rules, 47 C.F.R. § 1.429, the MEMORANDUM OPINION AND ORDER AND

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<sup>111</sup> OCI Petition at 6.

<sup>112</sup> NTC Petition at 2.

<sup>113</sup> OCI Petition at 4-5.

<sup>114</sup> MobileTel Petition at 2.

<sup>115</sup> *MobileTel, Inc.*, 11 FCC Rcd at 19111, para. 28.

<sup>116</sup> See 47 U.S.C. § 254(d); 47 C.F.R. § 54.706(a).

the general rule and such deviation will serve the public interest."<sup>102</sup> The Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy.<sup>103</sup> Although the Commission must give meaningful consideration to waiver petitions, it should not tolerate evisceration of a rule by waivers.<sup>104</sup>

29. For various reasons, each Petitioner alleges that it has experienced a decline in revenues.<sup>105</sup> Each Petitioner asks for a waiver of the contribution requirements and seeks either to exclude a portion of its prior year revenues from its revenue base or to apply the contribution factor to its decreased present year revenues.<sup>106</sup> Most Petitioners claim that, absent such waivers, they will have difficulty recovering their contributions from their shrinking subscriber bases.<sup>107</sup>

30. We are not persuaded that Petitioners' alleged inability to recover contributions is a special circumstance warranting waiver of the prior year revenue contribution requirement. The Commission does not require carriers to recover their universal service contributions from end users. Rather, the Commission has given carriers the flexibility to decide whether and how they should recover their contributions as markets become increasingly competitive.<sup>108</sup> Although the Commission permits carriers to pass through all or part of their universal service contributions to their end users, the requirement to contribute is not dependent upon a carrier's ability to successfully pass through such contributions.<sup>109</sup> We agree with AT&T and BellSouth that annual revenue variations are an inherent part of the competitive environment in the telecommunications industry.<sup>110</sup> Even OCI recognizes that "carriers with declining revenues are not unique and that there may be various circumstances which cause carriers to

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<sup>102</sup> *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

<sup>103</sup> *WAIT Radio*, 418 F.2d at 1159.

<sup>104</sup> *Id.*

<sup>105</sup> Affinity Petition at 3; HCI Petition; LDC Petition; MobileTel Petition at 4; NTC Petition at 2; NOS Petition at 3; OCI Petition at 4; U.S. Network Petition at 1.

<sup>106</sup> Affinity Petition at 5; HCI Petition; LDC Petition; MobileTel Petition at 6; NTC Petition at 8-9; NOS Petition at 11; OCI Petition at 2; U.S. Network Petition at 2.

<sup>107</sup> Affinity Petition at 3; MobileTel Petition at 5; NTC Petition at 3-4; NOS Petition at 5-6; OCI Petition at 6.

<sup>108</sup> *See Universal Service Order*, 12 FCC Rcd at 9210-11, para. 853.

<sup>109</sup> *Startec Global Communications Corp.*, FCC 99-75, para. 12 (1999) (citing *Universal Service Order*, 12 FCC Rcd at 9210-11, para. 853).

<sup>110</sup> AT&T Comments on Affinity Petition at 3; AT&T Comments on NOS Petition at 4; AT&T Comments on OCI Petition at 2; BellSouth Comments on Affinity Petition at 2; BellSouth Comments on NOS Petition at 2; BellSouth Comments on OCI Petition at 2; BellSouth Comments on LDC and U.S. Network Petitions at 2.

26. Whereas NOS's plan requires one entity (the Commission) to estimate total industry end-user telecommunications revenues, OCI's plan requires *each carrier* to submit an estimate of its end-user telecommunications revenues for the upcoming six months.<sup>95</sup> We believe that some carriers will overestimate revenues and others will underestimate revenues. As discussed above, such forecasting errors are likely to result in universal service support mechanisms that are neither specific, predictable, nor sufficient.<sup>96</sup> Such a result also is contrary to the congressional mandate that carriers make equitable and nondiscriminatory contributions.<sup>97</sup>

27. Moreover, OCI's plan would increase the administrative burden on both carriers and USAC. In addition to reporting actual prior year revenues, carriers would have to semi-annually prepare and submit revenue estimates for the upcoming six months. After entering, verifying, and potentially auditing the actual prior year revenue data, USAC also would have to process the carriers' six month revenue estimates. Furthermore, the reconciliation procedure suggested by OCI would complicate the billing process for USAC because bills would be based on data from multiple periods.<sup>98</sup> Because of the potential negative effects of forecasting errors and the increased administrative burdens, we decline to adopt OCI's plan.<sup>99</sup>

### B. Requests for Waiver

28. Section 1.3 of the Commission's rules governs petitions for waiver and provides that waiver may be granted upon "good cause shown."<sup>100</sup> Commission rules are presumed valid, however, and an applicant for waiver bears a heavy burden.<sup>101</sup> The Commission may exercise its discretion to waive a rule "only if special circumstances warrant a deviation from

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<sup>95</sup> More than 2,100 carriers submitted Universal Service Worksheets for 1998. *Monitoring Report* at 1-1.

<sup>96</sup> See 47 C.F.R. § 254(b)(5) and (d).

<sup>97</sup> See 47 U.S.C. § 254(b)(4) and (d).

<sup>98</sup> Presumably, contributions would be calculated based on estimated revenues for the upcoming period net of under/overpayments of prior period estimated revenues and prior period actual revenues. See OCI Petition at 7-8.

<sup>99</sup> In its Oppositions to the Petitions of NOS and Affinity, AT&T suggests its own alternative contribution methodology. AT&T Opposition to NOS Petition at 8; AT&T Opposition to Affinity Petition at 3. AT&T states that the Commission should require carriers to recover their universal service contributions through a line-item surcharge on the carrier's bill to its end users. *Id.* The Joint Board and the Commission have previously considered and rejected AT&T's proposal, and AT&T offers nothing new to warrant reconsideration of this issue. See *Recommended Decision*, 12 FCC Rcd. at 492-96, paras. 805-12; *Universal Service Order*, 12 FCC Rcd at 9210-11, para. 853.

<sup>100</sup> 47 C.F.R. § 1.3.

<sup>101</sup> *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969); see also *Orange Park Florida T.V., Inc. v. FCC*, 811 F.2d 664, 669 (D.C. Cir. 1987).

Thus, errors in forecasting total industry revenues will have a much greater effect on the universal service support mechanisms than on the TRS fund. Consequently, the use of forecasting increases the likelihood that universal service contributors will be overbilled in some periods and underbilled in other periods, resulting in funding surpluses or shortfalls in the universal service support mechanisms. Such a result is contrary to Congress's directive that the universal service support mechanisms be specific, predictable, and sufficient.<sup>89</sup>

24. In addition, NOS's proposal allowing carriers to make a one-time election to base their contributions on current year revenues or prior year revenues would impose significant administrative burdens on USAC. Instead of a single procedure for handling contributor reporting and assessment, USAC would need to have two sets of procedures running concurrently, one for prior year contributors and one for current year contributors. Thus, we conclude that the potential for forecasting errors and the increased administrative burdens make NOS's plan less likely than the Commission's current methodology to satisfy the congressional directive that universal service support mechanisms should be specific, predictable, and sufficient.<sup>90</sup>

25. We find similar problems with the proposal set forth by OCI. OCI claims that the current contribution method places a heavier burden on carriers with declining revenues, and therefore it is neither equitable, nondiscriminatory, nor competitively neutral.<sup>91</sup> OCI proposes that carriers estimate their revenues for the upcoming six months and USAC calculate carriers' contributions based on those estimates.<sup>92</sup> To prevent carriers from intentionally underestimating their revenues, carriers would also report their actual revenues from prior periods.<sup>93</sup> USAC could then annually compare carriers' estimated revenues with their subsequently reported actual revenues and reconcile any differences between estimated revenues and actual revenues.<sup>94</sup>

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<sup>88</sup> The 1999 net funding requirement for TRS is \$38.3 million, which is equivalent to approximately \$9.6 million per quarter. See *Telecommunications Relay Services, and the Americans with Disabilities Act of 1990*, CC Docket No. 90-571, Order, DA 98-2481 at para. 11 (Com. Car. Bur., rel. Dec. 2, 1998). The total estimated program cost for the universal service support mechanisms for the fourth quarter of 1999 is approximately \$1.098 billion. See *Proposed Fourth Quarter 1999 Universal Service Contribution Factors*, CC Docket No. 96-45, Public Notice, DA 99-1857 at 2 (Com. Car. Bur., rel. Sept. 10, 1999).

<sup>89</sup> 47 U.S.C. § 254(b)(5) and (d).

<sup>90</sup> 47 U.S.C. § 254(b)(5) and (d).

<sup>91</sup> OCI Petition at 8.

<sup>92</sup> *Id.* at 7.

<sup>93</sup> *Id.* at 7-8.

<sup>94</sup> *Id.*

universal service support mechanisms to total end-user telecommunications revenues.<sup>81</sup> Thus, contributors pay only an equitable, *pro rata* share of the total projected quarterly expenses. The fact that some carriers may have difficulty recovering their contributions from a declining customer base is the product of a competitive marketplace, not an inequitable, discriminatory, or competitively-biased Commission rule. We emphasize that using prior year revenues to calculate contributions to the universal service support mechanisms is consistent with Congress's directive that all providers of interstate telecommunications services shall contribute to the preservation and advancement of universal service on an equitable and nondiscriminatory basis.<sup>82</sup>

22. Contrary to the methodology the Commission adopted, however, NOS proposes allowing carriers to make a one-time election to base their universal service contributions on current year revenues, instead of prior year revenues.<sup>83</sup> Under this plan, the Commission would estimate total industry revenues, which, according to NOS, will remain relatively constant from year to year.<sup>84</sup> We find that NOS's proposal does not fulfill congressional objectives as well as the methodology the Commission adopted.

23. For example, under NOS's proposal, the Commission would have to forecast total end-user telecommunications revenues when calculating contribution factors for the universal service support mechanisms. Contrary to NOS's claim, we do not believe that such revenues are likely to remain relatively constant. Our most recent assessment of the telecommunications industry shows that, from 1992 to 1998, gross telecommunications revenues increased by approximately \$93 billion.<sup>85</sup> Annual increases have ranged from approximately \$10 billion to \$22 billion since 1992.<sup>86</sup> Moreover, although the Commission has used forecasts of gross industry revenues in calculating contribution factors for the TRS fund,<sup>87</sup> the universal service support mechanisms are significantly larger than the TRS fund.<sup>88</sup>

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<sup>81</sup> 47 C.F.R. § 54.709(a).

<sup>82</sup> See 47 U.S.C. § 254(b)(4) and (d).

<sup>83</sup> NOS Petition at 6.

<sup>84</sup> *Id.* at 7.

<sup>85</sup> *Monitoring Report*, CC Docket No. 98-202, Table 1.2 (FCC, June 1999). The Commission only recently began tracking end-user telecommunications revenues, and does not have data prior to 1997. For the purposes of this discussion, however, we believe that industry-wide trends in gross telecommunications revenues are sufficiently similar to industry-wide trends in end-user telecommunications revenues to provide a meaningful basis for comparison.

<sup>86</sup> *Id.*

<sup>87</sup> See note 8, *supra*.

potential contribution bases: gross interstate revenues; gross interstate revenues net of payments to other carriers; and per-line or per-minute units.<sup>74</sup> The Commission also specifically asked for comment on the approach used for the TRS fund, *i.e.*, gross interstate revenues for the prior calendar year, and provided a citation to the *TRS Third Report and Order*.<sup>75</sup>

20. Given that the Commission sought comment on two revenue-based contribution methods in the *Universal Service NPRM*, it necessarily follows that, if the Commission adopted a revenue-based method, it would also need to select some period for which revenues would be measured. Moreover, the Commission specifically directed commenters to consider the TRS approach, which was established in 1993 and assesses contributions based on prior calendar year revenues.<sup>76</sup> Indeed, in response to the *Universal Service NPRM*, commenters stated that the industry was already familiar with the TRS approach.<sup>77</sup> Considering the Commission's expressed interest in a revenue-based contribution method and its reference to the TRS approach, we believe that the question of what period's revenues to use was necessarily raised for comment. Accordingly, we find that the Commission's *Universal Service NPRM* satisfies the APA's notice requirement.

## 2. Substantive Proposals for Alternative Calculation Methodologies

21. Although we deny the petitions for reconsideration as untimely, we also take this opportunity to explain why we believe that the calculation methodologies proposed by Petitioners do not present viable alternatives to the methodology the Commission adopted in the *Universal Service Second Order on Reconsideration*.<sup>78</sup> Consistent with the directives of section 254, the Commission adopted a contribution methodology that is equitable, nondiscriminatory, and competitively neutral.<sup>79</sup> Pursuant to the Act and our rules, all entities that provide interstate telecommunications are required to contribute to the universal service support mechanisms.<sup>80</sup> The contribution methodology does not discriminate against one class of carrier or favor one market segment over another. Contributions are calculated using a contribution factor, which is based on the ratio of total projected quarterly expenses of the

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<sup>74</sup> *Id.* at 18148, paras. 122-24.

<sup>75</sup> *Id.* at para. 122 (citing *TRS Third Report and Order*).

<sup>76</sup> *Universal Service NPRM*, 11 FCC Rcd at 18148-49, paras. 122, 126.

<sup>77</sup> *Recommended Decision*, 12 FCC Rcd at 492, para. 804.

<sup>78</sup> Although LDC seeks reconsideration, it has not proposed a specific, alternative calculation methodology. Thus, we address only the methodologies proposed by NOS and OCI.

<sup>79</sup> 47 U.S.C. § 254(b) and (d).

<sup>80</sup> 47 U.S.C. § 254(d); 47 C.F.R. § 54.706(a).

reconciliations.<sup>64</sup> As NOS recognizes,<sup>65</sup> however, a petition for reconsideration in a rulemaking proceeding must be filed within 30 days after public notice of the Commission action.<sup>66</sup> The Commission's rules provide that public notice in a rulemaking proceeding occurs upon publication of the document, or a summary thereof, in the Federal Register.<sup>67</sup> Even if we assume that NOS, LDC, and OCI seek reconsideration of the *Universal Service Second Order on Reconsideration*, our last decision concerning this issue, that decision was published in the Federal Register on August 1, 1997.<sup>68</sup> Thus, petitions for reconsideration of the *Universal Service Second Order on Reconsideration* were due on or before September 1, 1997. OCI, NOS, and LDC filed their petitions for reconsideration on July 14, 1998, August 28, 1998, and October 22, 1998, respectively, and they are therefore untimely. Recognizing this untimeliness, NOS urges the Commission to reconsider the issue of prior year revenues on our own motion.<sup>69</sup> For the reasons discussed below in section III.A.2, however, we decline to reconsider on our own motion our decision to assess universal service contributions on prior year revenues.

18. Although the petitions for reconsideration are untimely, we wish to take this opportunity to address NOS's claim that "it is not clear . . . [whether] the Commission followed the [notice] requirements of the Administrative Procedure Act (APA)" in establishing the universal service assessment methodology, and the Commission should therefore reconsider its decision.<sup>70</sup> Section 553(b) of the APA requires an agency to provide published notice of its proposed rulemaking in the Federal Register.<sup>71</sup> The notice must include "either the terms or substance of the proposed rule or a description of the subjects and issues involved."<sup>72</sup>

19. Here, the Commission sought comment in the *Universal Service NPRM* on how universal service contributions should be assessed.<sup>73</sup> The Commission described three

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<sup>64</sup> LDC Petition; NOS Petition at 6-11; OCI Petition at 7-8. To the extent OCI's petition seeks a waiver rather than reconsideration, we will address it as such with the other waiver petitions in section III. B., below.

<sup>65</sup> NOS Petition at 7.

<sup>66</sup> See 47 U.S.C. § 405(a); 47 C.F.R. § 1.429(d).

<sup>67</sup> 47 C.F.R. § 1.4(b)(1).

<sup>68</sup> 62 Fed. Reg. 41294 (1997).

<sup>69</sup> NOS Petition at 10.

<sup>70</sup> NOS Petition at 7-8.

<sup>71</sup> See 5 U.S.C. § 553(b).

<sup>72</sup> *Id.*

<sup>73</sup> *Universal Service NPRM*, 11 FCC Rcd at 18147-49, paras. 121-26.

telephones.<sup>56</sup> OCI states that its revenues for the first six months of 1998 declined by 45 percent compared to the first six months of 1997.<sup>57</sup> OCI attributes this decline to the growth of the prepaid calling card industry, the increase in "dial-around" calling, and the expansion of wireless telecommunications services.<sup>58</sup> OCI proposes that its contributions be based on estimated revenues with periodic reconciliations, which "will allow carriers experiencing declining revenues to match contributions . . . with the revenue on which the contributions are based."<sup>59</sup> Although styled as a waiver request, OCI's petition also appears to seek reconsideration when it asks the Commission "to consider the impact of the current contribution methods on those telecommunications carriers" with declining revenues and "to adopt the alternative contribution methods described above."<sup>60</sup>

16. U.S. Network, Inc. (U.S. Network) is an operator services provider.<sup>61</sup> U.S. Network alleges that its current revenues are considerably smaller than the historical revenues upon which its universal service contribution is based.<sup>62</sup> U.S. Network requests that it be permitted to calculate its universal service contribution on the basis of its current revenues.<sup>63</sup>

### III. DISCUSSION

#### A. Reconsideration of the Method for Calculating Contributions

##### 1. Timeliness of Petitions

17. NOS and LDC have petitioned the Commission to reconsider its decision to assess contributions on prior year revenues instead of current year revenues, and OCI has asked the Commission to consider assessing contributions on estimated future revenues with periodic

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<sup>56</sup> OCI Petition at 4.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 4-5.

<sup>59</sup> *Id.* at 7.

<sup>60</sup> *Id.* at 9. We note that the Commission released a Notice of Apparent Liability for Forfeiture against OCI on August 14, 1998 for OCI's failure to pay its universal service bill from USAC for January 1998. *See Operator Communications, Inc.*, 13 FCC Rcd 16082 (1998). OCI's petition for waiver or reconsideration, which was not filed until July 14, 1998, does not excuse OCI from complying with its contribution obligations and does not affect our decision to impose a forfeiture against OCI. *See* 47 C.F.R. § 1.430(k) (without special order of the Commission, the filing of a petition for reconsideration shall not excuse any person from complying with any rule).

<sup>61</sup> U.S. Network First Amended Petition at 1.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 2.

some of its sales representatives improperly marketed its services, resulting in a civil consumer protection lawsuit brought by the State of California and an administrative action brought by the California Public Utilities Commission.<sup>45</sup> NTC revised its marketing guidelines and settled both actions.<sup>46</sup> In the process, NTC contends that it lost a significant number of sales representatives and customers.<sup>47</sup> NTC maintains that its revenues have steadily declined from \$9,809,139 in May 1997 to \$4,928,321 in May 1998.<sup>48</sup> NTC also claims that it is in default on the minimum usage requirements under its agreement with its underlying carrier and on certain covenants under its credit facility with its principal lender.<sup>49</sup> NTC seeks a waiver to "re-calculate its [universal service] contributions for 1998 by excluding 1997 revenues exceeding corresponding revenues during 1998; or, otherwise equitably adjusting revenues as reported on NTC's 1998 Universal Service Worksheets as deemed appropriate by the Commission."<sup>50</sup>

14. Network Operator Services, Inc. (NOS) is an interexchange carrier that provides long distance and 0+ operator services to resellers and end users, and also performs billing and collections services for some customers.<sup>51</sup> NOS claims that its end-user revenues have decreased by approximately one-third from 1997 to 1998, but does not provide an explanation for the decrease.<sup>52</sup> NOS seeks a waiver so that it may contribute based on actual revenues, instead of prior year revenues.<sup>53</sup> In the alternative, NOS asks the Commission to reconsider its decision to base contributions on prior year revenues.<sup>54</sup> NOS also claims that the Commission violated the Administrative Procedure Act by failing to give sufficient notice that contributions would be based on prior year revenues.<sup>55</sup>

15. Operator Communications, Inc. d/b/a Oncor Communications (OCI) is primarily a provider of operator-assisted interexchange service from aggregator locations, mainly public

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<sup>45</sup> *Id.* at 2.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 5-6.

<sup>50</sup> *Id.* at 8-9.

<sup>51</sup> NOS Petition at 1-2.

<sup>52</sup> *Id.* at 3.

<sup>53</sup> *Id.* at 11.

<sup>54</sup> *Id.* at 11-12.

<sup>55</sup> *Id.* at 7-10.

12. MobileTel, Inc. (MobileTel) is a provider of cellular service.<sup>35</sup> On October 11, 1990, the Common Carrier Bureau's Mobile Services Division (MSD) released an order granting to MobileTel the B block cellular licenses for the Louisiana 8 and 9 Rural Service Areas (RSAs) based on its conclusion that MobileTel qualified as a wireline common carrier eligible for B block cellular licenses under former section 22.902(b) of the Commission's rules.<sup>36</sup> On August 14, 1996, the Commission released an order reversing the MSD's decision and rescinding MobileTel's licenses, because it concluded that MobileTel did not qualify as a wireline common carrier under former section 22.902(b).<sup>37</sup> The Commission granted MobileTel interim authority to continue operating until qualified applicants were licensed and ready to begin service.<sup>38</sup> Subsequently, the Wireless Telecommunications Bureau granted the license for the Louisiana 8 RSA to Louisiana RSA No. 8 Limited Partnership and the license for the Louisiana 9 RSA to BellSouth Mobility, Inc.<sup>39</sup> These entities began service in March 1998.<sup>40</sup> MobileTel points out that because universal service contributions are assessed on prior year revenues, its 1998 and 1999 contributions will be based, in part, on revenues generated from customers in the Louisiana 8 and 9 RSAs in 1997 and 1998, respectively, even though it no longer provides service to those customers.<sup>41</sup> MobileTel seeks to exclude its Louisiana 8 and 9 RSA revenues from the calculation of its 1998 and 1999 universal service contributions.<sup>42</sup> MobileTel estimates that excluding the subject revenues will reduce its total contributions for 1998 and 1999 by approximately \$97,000.<sup>43</sup>

13. National Telephone & Communications, Inc. (NTC) resells intrastate and interstate interexchange services through a network of independent representatives.<sup>44</sup> NTC claims that

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<sup>35</sup> MobileTel Petition at 1.

<sup>36</sup> *MobileTel, Inc.*, 5 FCC Rcd 5854 (MSD 1990).

<sup>37</sup> *MobileTel, Inc.*, 11 FCC Rcd 19098 (1996), *aff'd sub nom MobileTel, Inc. v. FCC*, 107 F.3d 888 (D.C. Cir. 1997), *cert. denied*, 118 S.Ct. 366 (1997).

<sup>38</sup> *Id.* at 19111, para. 28.

<sup>39</sup> *Louisiana RSA No. 8 L.P., et al*, 12 FCC Rcd 20182 (WTB 1997), *application for review denied*, FCC 99-228 (rel. Aug. 30, 1999).

<sup>40</sup> FCC Form 489 filed by Louisiana RSA No. 8 Limited Partnership, File No. 00141-CL-P-461-B-97 (filed March 9, 1998) (service commenced in Louisiana 8 RSA on March 7, 1998); FCC Form 489 filed by BellSouth Mobility, Inc., File No. 00140-CL-P-462-B-97 (filed April 2, 1998) (service commenced in Louisiana 9 RSA on March 29, 1998).

<sup>41</sup> MobileTel Petition at 4.

<sup>42</sup> *Id.* at 6.

<sup>43</sup> *Id.* at 4.

<sup>44</sup> NTC Petition at 1.

9. Affinity Corporation (Affinity) is a reseller of long distance services.<sup>24</sup> Affinity claims that its revenues are declining, but does not offer a reason for the decline.<sup>25</sup> Affinity asserts that it "must either maintain current rates to retain [its] customer base and lose money by paying the [universal service] fees [itself] (and not passing that cost along to the consumer), or Affinity must raise the rates [it charges] customers and risk alienating and losing customers in its highly competitive market."<sup>26</sup> Affinity contends that, if it were permitted to base its contributions on current revenues instead of prior year revenues, its contributions would be approximately \$10,000 less per month.<sup>27</sup> Affinity seeks a waiver to have its contributions assessed on the basis of its current year revenues.<sup>28</sup>

10. Hotel Communications, Inc. (HCI) describes itself as a supplier of telephone services to the hospitality industry.<sup>29</sup> HCI alleges that its 1997 average monthly revenues for universal service reporting requirements were \$177,622, but its monthly revenues through June 30, 1998 have averaged only \$100,960.<sup>30</sup> HCI does not provide an explanation for the decline in revenues. HCI states that its monthly universal service contribution based on prior year revenues is approximately \$8,741, which is almost double the estimated \$4,967 that it would owe based on current year revenues.<sup>31</sup> HCI seeks a waiver to base its contributions on current year revenues.<sup>32</sup>

11. LDC Telecommunications, Inc. (LDC) neither identifies the nature of its business nor provides any revenue figures, but asserts that it "has been undergoing an enormous reduction in revenue for the past fourteen months since LDC stopped using any type of marketing to seek new accounts," and expects that its revenue "will continue to drastically reduce in the future."<sup>33</sup> LDC requests either waiver or reconsideration of the requirement that contributions be based on prior year revenues.<sup>34</sup>

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<sup>24</sup> Affinity Petition at 3.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 4.

<sup>28</sup> *Id.* at 5.

<sup>29</sup> HCI Petition.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> LDC Petition.

<sup>34</sup> *Id.*

Universal Service Worksheets will be due each year as follows:

- September 1 Containing data for the six-month period from January 1 through June 30 of the current calendar year
- March 31 Containing data for the prior calendar year

Data for the period from January 1 through June 30, filed September 1 of that same year, will be used to calculate universal service support contributions for January through June of the following year. Data filed on March 31 for the entire prior calendar year will be used to calculate universal service support contributions for July through December of the same year in which the data was filed. USAC will base the July through December contributions on data for the second half of the prior calendar year. USAC will calculate second half data as annual data minus the previously filed first half data. . . .

Information filed on Universal Service Worksheets will be compiled and used to calculate the universal service contribution factors that will be used as the actual basis for contributions. Contribution factors will be announced in a Public Notice each quarter. USAC will collect and bill quarterly contributions in equal monthly payments. Payments must be made by the date listed on USAC's bills.

#### **B. Petitioners**

8. Petitioners are providers of interstate telecommunications services, and as such, they are required to contribute to the universal service support mechanisms.<sup>23</sup> Each Petitioner claims that it has experienced a decline in revenues. Although the reasons for their declining revenues vary, Petitioners maintain that they will have difficulty paying their monthly contribution bills from USAC if the Commission assesses their contributions on the basis of their prior year revenues. Petitioners seek either to exclude a portion of their prior year revenues from their revenue bases or to apply the contribution factor to their decreased present year revenues. A description of each Petitioner's position follows.

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Fund, the cost recovery mechanism for administration of the North American Numbering Plan, and the cost recovery mechanism for administration of long-term local number portability into a single Telecommunications Reporting Worksheet. *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 Mechanisms*, CC Docket No. 98-171, Report and Order, FCC 99-175 (1999) (*TRW Order*). See also *Common Carrier Bureau Announces Release of September Version of Telecommunications Reporting Worksheet (FCC Form 499-S) for Contributions to the Universal Service Support Mechanisms*, CC Docket No. 98-171, Public Notice, DA 99-1520 (rel. July 30, 1999).

<sup>23</sup> See 47 C.F.R. § 54.706.

universal service contribution factor shall be based on the ratio of total projected quarterly expenses of the universal service support programs to total end-user telecommunications revenues.<sup>19</sup> Thus, contributions are the product of a contributor's end-user telecommunications revenues multiplied by a contribution factor that is equal to the ratio of total projected quarterly expenses of the universal service support mechanisms to total end-user telecommunications revenues.<sup>20</sup>

7. To collect information about end-user telecommunications revenues from contributors, the Commission adopted a rule requiring contributors to submit a Universal Service Worksheet (Worksheet) at regular intervals.<sup>21</sup> The Worksheet explains that contributions are based on prior year end-user telecommunications revenues:<sup>22</sup>

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54.709 (1997). On petitions for review of the *Universal Service Order*, the United States Court of Appeals for the Fifth Circuit reversed the Commission's decision to assess contributors' intrastate revenues, and reversed and remanded for further consideration the Commission's decision to assess contributors' international revenues. *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d at 433-35, 446-48. On October 8, 1999, in response to the Fifth Circuit's decision, the Commission adopted an order eliminating intrastate revenues from the contribution base and establishing a single contribution factor to be applied to contributors' interstate and international end-user telecommunications revenues. *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Access Charge Reform*, CC Docket No. 96-262, Sixteenth Order on Reconsideration in CC Docket No. 96-45, Eighth Report and Order in CC Docket No. 96-45, Sixth Report and Order in CC Docket No. 96-262, FCC 99-290 at paras. 15-18 (rel. Oct. 8, 1999) (*Universal Service Remand Order*). The Commission also created a limited international revenues exception, whereby contributors whose interstate end-user telecommunications revenues account for less than 8 percent of their combined interstate and international end-user telecommunications revenues are not required to contribute on the basis of their international revenues. *Universal Service Remand Order*, FCC 99-290 at paras. 19-29. The instant matter, however, does not concern the Commission's decisions to assess contributions on particular revenue bases. Instead, it concerns a specific aspect of the Commission's underlying contribution methodology. Thus, neither the Fifth Circuit's decision, nor the *Universal Service Remand Order*, affect our decision here.

<sup>19</sup> 47 C.F.R. § 54.709(a).

<sup>20</sup> See 47 C.F.R. § 54.709(a).

<sup>21</sup> *Universal Service Second Order on Reconsideration*, 12 FCC Rcd 18400, Appendix B. See also 47 C.F.R. § 54.711(a) ("Contributions shall be calculated and filed in accordance with the Universal Service Worksheet. The Universal Service Worksheet sets forth information that the contributor must submit to the Administrator [(USAC)] on a semi-annual basis. . . .").

<sup>22</sup> *Universal Service Second Order on Reconsideration*, 12 FCC Rcd at 18424, para. 43, 18442, para. 80, 18501-02, Appendix C. The Commission adopted the Worksheet and attached it as Appendix C to the *Universal Service Second Order on Reconsideration*. The Worksheet was adopted in draft form pending approval from the Office of Management and Budget (OMB) pursuant to the Paperwork Reduction Act of 1995. *Id.* at 18442, para. 80. A summary of the *Universal Service Second Order on Reconsideration* was published in the Federal Register on August 1, 1997. 62 Fed. Reg. 41294 (1997). On August 4, 1997, the Commission announced that it had received OMB approval, and officially released the Worksheet. *FCC Announces Release of Universal Service Worksheet, FCC Form 457*, CC Docket Nos. 97-21, 96-45, Public Notice, DA 97-1671 (rel. Aug. 4, 1997). Subsequently, in an effort to reduce administrative burdens on contributors, the Commission consolidated the reporting requirements for the universal service support mechanisms, the Telecommunications Relay Services

thereon, the Commission released the *Universal Service Order*.<sup>12</sup> In the *Universal Service Order*, the Commission decided, *inter alia*, to base contributions on end-user telecommunications revenues.<sup>13</sup> The Commission concluded that the end-user telecommunications revenues method is competitively neutral,<sup>14</sup> easy to administer, and eliminates some economic distortions associated with gross telecommunications revenues net of payments to other carriers.<sup>15</sup> The Commission also adopted a rule defining the range of contributors required to contribute to the universal service support mechanisms.<sup>16</sup>

6. In the *Universal Service Second Order on Reconsideration*, the Commission adopted a rule setting forth the specific method of computation for universal service contributions.<sup>17</sup> Section 54.709(a) provides, in relevant part, that contributions to the universal service support mechanisms shall be based on contributors' end-user telecommunications revenues and a contribution factor determined quarterly by the Administrator, the Universal Service Administrative Company (USAC).<sup>18</sup> The rule further provides that the quarterly

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<sup>12</sup> *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776 (1997), as corrected by *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Erratum, FCC 97-157 (rel. June 4, 1997), *aff'd in part, rev'd in part, remanded in part sub nom. Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir., 1999) *motion for stay granted in part* (Sept. 28, 1999), *petitions for rehearing and rehearing en banc denied* (Sept. 28, 1999) (*Universal Service Order*).

<sup>13</sup> *Id.* at 9206, para. 844.

<sup>14</sup> In addition to the universal service principles specified in the 1996 Act, Congress directed that the Joint Board and the Commission shall be guided by such other principles that they determine to be consistent with the Act, and necessary and appropriate for the protection of the public interest, convenience, and necessity. 47 U.S.C. § 254(b)(7). At the recommendation of the Joint Board, the Commission adopted competitive neutrality as an additional principle for universal service. *Universal Service Order*, 12 FCC Rcd at 8801-03, paras. 46-51.

<sup>15</sup> *Universal Service Order*, 12 FCC Rcd at 9206-09, paras. 844-50.

<sup>16</sup> 47 C.F.R. § 54.706(a) ("Entities that provide interstate telecommunications to the public, or to such classes of users as to be effectively available to the public, for a fee will be considered telecommunications carriers providing interstate telecommunications services and must contribute to the universal service support programs. . . .").

<sup>17</sup> *Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, CC Docket No. 97-21, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order and Second Order on Reconsideration, 12 FCC Rcd 18400 (1997) (*Universal Service Second Order on Reconsideration*). See also 47 C.F.R. §§ 54.709.

<sup>18</sup> 47 C.F.R. § 54.709(a). In the *Universal Service Order*, the Commission decided to assess contributions to the high-cost and low-income support mechanisms on contributors' interstate and international end-user telecommunications revenues, and contributions to the schools and libraries, and rural health care support mechanisms on contributors' intrastate, interstate, and international end-user telecommunications revenues. *Universal Service Order*, 12 FCC Rcd at 9189-9205, paras. 806-41. Thus, in the *Universal Service Second Order on Reconsideration*, the Commission adopted a rule employing two separate contribution factors, one for the high-cost and low-income support mechanisms, and one for the schools and libraries, and rural health care support mechanisms. *Universal Service Second Order on Reconsideration*, 12 FCC Rcd 18400; 47 C.F.R. §

3. On March 8, 1996, the Commission began the process of implementing the Congressional goals set out in section 254 of the Act by establishing a Federal-State Joint Board on Universal Service (Joint Board) and issuing the *Universal Service NPRM*.<sup>5</sup> In relevant part, the Commission sought comment on the methods it should use to assess contributions to the universal service support mechanisms.<sup>6</sup> Commenters were asked to address the relative merits of basing contributions on gross revenues, revenues net of payments to other carriers, per-line or per minute-units, and/or any alternative methodologies that commenters were willing to suggest.<sup>7</sup> The *Universal Service NPRM* identified the Telecommunications Relay Services program (TRS) as one possible model on which to pattern universal service contribution methods and sought comment on the practicality of the TRS approach.<sup>8</sup>

4. In response to the *Universal Service NPRM*, the Joint Board released a *Recommended Decision* on November 8, 1996.<sup>9</sup> Among other things, the Joint Board noted that some commenters had suggested that basing contributions on gross telecommunications revenues would be equitable and easily administered because the industry is already familiar with the TRS fund, which is based on gross interstate revenues.<sup>10</sup> Ultimately, the Joint Board decided to recommend a slightly different revenue-based contribution method, gross telecommunications revenues net of payments to other carriers, because it avoided the "double payment" problem associated with gross telecommunications revenues, it more closely approximated a value-added contribution, and it was administratively easy to implement.<sup>11</sup>

5. After considering the Joint Board's *Recommended Decision* and the comments

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<sup>5</sup> *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Notice of Proposed Rulemaking and Order Establishing Joint Board, 11 FCC Rcd 18092 (1996) (*Universal Service NPRM*).

<sup>6</sup> *Id.* at 18147-49, paras. 121-26.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* (citing *Telecommunications Relay Services, and the Americans with Disabilities Act of 1990*, CC Docket No. 90-571, Third Report and Order, 8 FCC Rcd 5300 (1993) (*TRS Third Report and Order*)). TRS is a telephone transmission service that allows people with hearing or speech impairments to communicate by telephone in a manner functionally equivalent to persons without such impairments. See 47 U.S.C. § 225(a)(3). Contributions to TRS are based on a carrier's prior year gross interstate revenues multiplied by a contribution factor equal to the ratio of the expected costs of TRS to total interstate revenues. See 47 C.F.R. § 64.604; see also *Telecommunications Relay Services, and the Americans with Disabilities Act of 1990*, CC Docket No. 90-571, Order, DA 98-2481 (Com. Car. Bur. 1998).

<sup>9</sup> *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Recommended Decision, 12 FCC Rcd 87 (1996) (*Recommended Decision*).

<sup>10</sup> *Id.* at 492, para. 804.

<sup>11</sup> *Id.* at 495, para. 807.