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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matters of	)	
	)	
Federal-State Joint Board On Universal Service	)	CC Docket No. 96-45
	)	
	)	
Access Charge Reform	)	CC Docket No. 96-262

To: The Commission

PETITION FOR RECONSIDERATION

INTRODUCTION

Arya International Communications Corporation ("Arya"), by and through its counsel, and pursuant to Section 1.429 of the Commission's Rules, hereby files a Petition for Reconsideration ("Petition") of the Sixteenth Order on Reconsideration in CC Docket No. 96-45; Eighth Report and Order in CC Docket 96-45; Sixth Report and Order in CC Docket 96-262, FCC 99-290, released October 8, 1999 ("Order").[1]

Arya specifically requests reconsideration of Paragraphs 27 through 29 of the Order. By these Paragraphs the Commission created a limited international revenues exception regarding Universal Service Fund ("USF") contributions: Effective November 1, 1999, a telecommunications provider of both interstate and international service whose interstate revenues are less than 8 percent of the combined interstate and international revenues will not be required to contribute to the USF based on its international revenues, but rather, will only be required to contribute based on its interstate revenues.

[1] This Petition is timely filed as the Order was published in the Federal Register on , November 5, 1999. 64 Fed. Reg. 214 (1999).

Arya asserts that the figure governing the cut-off for the limited international revenues exception, 8 percent, was arbitrarily and capriciously chosen as it was selected without any explanation. In any case, Arya requests that this adjustment be made with regard to past USF contributions so as to refund, to qualifying parties, those portions of their USF contributions which, in light of the new rules, were wrongfully collected. Arya asserts that retention of the wrongfully collected fees would amount to an unconstitutional taking of property.

In support of the Petition, Arya states as follows:

BACKGROUND

Under the rules in effect prior to November 1, 1999, a telecommunications provider of both interstate and international service was required to contribute to the USF based on the contributor's combined interstate and international revenues. See, former 47 C.F.R. §§54.706, 54.709.

Numerous parties filed petitions for review of these rules. The petitions were consolidated before the United States Court of Appeals for the Fifth Circuit. On July 30, 1999, the Fifth Circuit reversed and remanded to the Commission, for further consideration, those parts of the rules dealing with the assessment of USF contributions based on combined interstate and international revenues. Texas Office of Public Utility Counsel, et al. v. FCC, 183 F.3d 393 (5th Cir. 1999). The Fifth Circuit remanded based on its finding that some providers were being assessed USF contributions in excess of their interstate revenues, which, in light of the "equitable and nondiscriminatory" language governing the statute authorizing the contributions, rendered the Commission's actions "arbitrary and capricious." Id.

On October 8, 1999, the Commission, in the Order, for the purposes of adopting modifications of its rules consistent with the Fifth Circuit's remand, revised, effective November 1, 1999, its USF contribution rules. Under the revised rules, providers of interstate telecommunications services whose interstate end-user telecommunications revenues account for less than 8 percent of their combined interstate and international end-user telecommunications revenues will no longer be required to contribute on the basis of their international revenues. Order, at ¶29. Such providers will, from November 1, 1999 forward, only be required to contribute based on their interstate end-user telecommunications revenues. Id. In rendering this modification, the Commission stated: "The actions we take are *transitional in view of the limited time and data available* to us in implementing the court's mandate that we change our rules and past practices by a specific date. In view of these constraints, *our actions represent our best effort to take short-term action subject to later refinement* if necessary, in order to assure compliance with the court's mandate." Id. ¶2 (emphasis added).

PETITIONER

Arya is a corporation organized under the laws of the State of New Jersey. Arya is an international resale carrier under the authority of Section 214 of the Communications Act of 1934, as amended. Arya is not a facilities-based carrier but rather resells the telecommunications facilities of other carriers. Through the resale services provided by Arya, telecommunications customers may originate calls for termination in either the United States or in other countries. However, the bulk of the calls handled by Arya involve international termination of communications.

ARGUMENT

I THE COMMISSION FAILED TO ARTICULATE A SATISFACTORY EXPLANATION

In altering the arbitrary and capricious portions of its USF contribution rules, the Commission set the limited international revenues exception at 8 percent, i.e., a telecommunications provider of both interstate and international service whose interstate revenues are less than 8 percent of the combined interstate and international revenues will only be required to contribute to the USF based on its interstate revenues. However, the Commission failed to articulate an explanation for this 8 percent cut-off. This failure to articulate a satisfactory explanation for the 8 percent cut-off renders the Commission's action arbitrary and capricious.

Agency actions which fail to articulate a satisfactory explanation, including "a 'rational connection between the facts found and the choice made,'" have been found to be arbitrary and capricious. Motor Vehicle Manufacturers Association v. State Farm, supra, 463 U.S. at 43, (finding arbitrary and capricious a National Highway Traffic Safety Administration order), quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156 (1962). See also, Florida Cellular Mobil Communications Corp. v. Federal Communications Commission, 28 F.3d 191 (D.C. Cir. 1994), cert. denied, 514 U.S. 1016 (1995) (stating "our duty is to ensure that the Commission has examined the relevant data and articulated a satisfactory explanation for its action based on the materials that were before the Commission at the time its decision was made").

Arya applauds the Commission for altering its USF contribution rules in response to the Court's order. However, in making the alteration, the Commission chose a cut-off for receiving the benefit of the limited international revenues exception without any explanation whatsoever. This failure to articulate a satisfactory explanation for the 8 percent cut-off figure renders the choice of that cut-off figure arbitrary and capricious.

II THE COMMISSION FAILED TO RETROACTIVELY REMEDY THE WRONGFUL COLLECTION OF FEES

By its actions in the Order, the Commission altered, on a prospective basis, the arbitrary and capricious portions of its USF contribution rules. However, the Commission failed to remedy its past wrongful collection of USF fees. The Commission should now fulfill its promise to "refine" the actions taken in response to the Fifth Circuit's ruling, and refund all USF fees wrongfully collected before November 1, 1999.

Simple common sense dictates such a result. If a fee is wrongfully collected, when the determination is made that the collection was wrongful, the fee collected should be returned. There is no basis for denying this simple, common sense proposition.

Correction of the Commission's wrongful collection of USF contributions is authorized by analogous case law. In Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission, 988 F.2d 146 (D.C. Cir. 1993), the Court remanded to the agency reconsideration of the apportionment of nuclear waste disposal fees due to the arbitrary nature of the prior apportionment scheme. This factual situation is analogous to the one at hand. The Allied-Signal Court, while refusing to abandon the rule prohibiting retrospective application of agency rules, stated that certain parties

would be entitled to a refund as a result of the reconsideration of the apportionment of the fee at hand. Id. at 152-153. In making this decision, the Court stated:

> [F]irms whose burden is lower under a new, non-arbitrary, rule should be entitled to refunds of the difference . . . [i]f . . . licensees enjoy only refunds for the difference between liability under the old rule and liability under the new . . . it might be argued that such result allows the new rule to have 'retroactive effect', in violation of *Georgetown University Hospital* . . . [t]here is plainly some retroactive effect. **The effect, however, is only to define that aspect of the old rule that must be *cut away* as legally excessive. We do not read *Georgetown* as barring so limited a retroactive impact.**

Id. at 153 (emphasis added, italics in original). Clearly, under Allied-Signal, the Commission is authorized to, and must, refund the USF contribution fees wrongfully collected.[2]

Such a result is proper in the matter at hand. Up until November 1, 1999, the Commission collected USF contributions based, in part, on international revenues, from those interstate carriers who derived less than 8 percent of their revenues from interstate activity. The Commission, on remand from the Fifth Circuit, has now corrected this inequitable, and hence, arbitrary practice, and will no longer collect USF contributions based on international revenues from those whose interstate revenues account for less than 8 percent of their revenues.

The Commission stated in the Order that its actions were transitional in view of the limited time available to it, and that it would refine its actions regarding USF contributions in the future. Equity and the Fifth Circuit required the Commission to make its prospective changes

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[2] Other cases authorize this result: In Alvarado Parkway Institute, Inc. v. Mendez, 789 F. Supp 1190 (D.D.C. 1992), the court dealt with corrections to a reimbursement rate. In correcting the challenged reimbursement rate, the court ruled that the rate was an interpretive rule (as opposed to a substantive one), and as such, refunds should be made of fees wrongfully withheld under the former reimbursement rate. Id. at 1197.

In light of Allied-Signal, there is no need to characterize the USF contribution rate as substantive or interpretive; Allied-Signal authorizes refunds due to corrected agency rules without regard to such a distinction. What is important is that both Allied-Signal and Alvarado clearly show that the Commission should refund fees wrongfully collected under the former USF contribution rules.

regarding USF contributions. Propriety and common sense now require the Commission to correct its past actions and refund wrongfully collected USF contributions. Case law explicitly permits this result.[3]

III RETENTION OF THE WRONGFULLY COLLECTED FEES WOULD AMOUNT TO AN UNCONSTITUTIONAL TAKING OF PROPERTY

Retention of the wrongfully collected fees would amount to an unconstitutional taking of property. The Commission should not permit the USF to benefit by virtue of an act which has now been determined to be inequitable, and hence, arbitrary. If the USF is not entitled to the funds, it should not retain them.

Arya and other similarly situated entities have paid their USF fees, a large portion of which was based on its international end-user revenues. The imposition of this portion of the fees has now been determined to be arbitrary and in violation of the law, and the Commission has removed prospective collection of this portion of the fees. However, the Commission and/or the USF fund retains that portion of the previously collected fees which has now been determined to have been arbitrarily and unlawfully collected.

The Fifth Amendment to the Constitution states ". . . nor shall property be taken for public use, without just compensation." U.S. CONST. Amend V. "Property" without a doubt encompasses monies and fees collected from an individual or entity by virtue of the laws and implementing regulations.

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[3] The mechanics of a refund are clearly not beyond the Commission's contemplation. In Paragraph 29 of the Order, for the purposes of future application of the new rules, the Commission requires qualifying parties to submit amendments to their March and September, 1999 worksheets so as to identify the amounts and percentages of the contributor's interstate and international revenues. In order to effectuate a refund of fees wrongfully collected in the past, the Commission can simply utilize a similar procedure, but one that reaches further into the past.

Regulations affecting property may amount to a taking. Courts consider, among other factors, the *character of the governmental action* in determining whether a governmental regulation amounts to a taking. Connolly v. Pension Benefit Guaranty Corporation, 475 U.S. 211 (1986).

In the matter at hand, the character of the governmental action, involving the former rules regulating the collection of the USF fees, has been clearly determined by the Fifth Circuit to be inequitable and, hence, arbitrary. As such, in light of the Fifth Circuit's decision and the Commission's statements and actions in the Order, retention of the wrongfully collected USF fees would amount to a taking without compensation in violation of the law. Connolly, 475 U.S. at 225. Consequently, the fees collected should be refunded to the parties from when they were improperly collected.

CONCLUSION

The 8 percent cut-off for receiving the benefit of the limited international revenues exception was arbitrarily and capriciously chosen. In any case, the Commission must correct its prior wrongful collection of USF contributions and refund the difference between what was wrongfully collected, and, in light of under the new rules annunciated in the Order, what should have been collected. Such a result is proper, permissible, and is well within the Commission's power. Retention of the wrongfully collected fees would amount to an unconstitutional taking and cannot be permitted.

Respectfully submitted,

ARYA INTERNATIONAL COMMUNICATIONS CORPORATION

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