

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

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In the Matters of:
Federal-State Joint Board on
Universal Service
Division Announces Release of Revised
Universal Service Worksheet. FCC Form 457
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. 96-45

CC Docket Nos. 96-45, 97-21
DA No. 98-1519

CC Docket No. 98-171

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FCC MAIL SECTION

TWENTY-FIRST ORDER ON RECONSIDERATION IN CC DOCKET NO. 96-45, AND
MEMORANDUM OPINION & ORDER IN CC DOCKET NOS. 96-45, 97-21, AND 98-171

Adopted: March 29, 2000

Released: April 11, 2000

By the Commission: Commissioner Furchtgott-Roth dissenting and issuing a statement.

I. INTRODUCTION

1. Several parties have challenged the Commission's decision to include in the universal
service contribution base those charges identified by carriers on end-user bills as recovering state
or federal universal service contributions. As described below, these challenges are pending
before the Commission at various procedural stages. Because all of the challenges concern the
same issue, we address them together in this order. For the reasons that follow, we deny the
parties' challenges.

II. BACKGROUND

2. In section 254 of the Communications Act of 1934 (Act), as added by the

1 A list of the items concerning the inclusion of carrier-imposed universal service charges in the contribution base,
and the parties' responses thereto, is attached as Appendix A.

2 See 47 C.F.R. § 1.1 (Commission shall follow procedures that best serve the purposes of the proceedings before
it).

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.³ 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."⁴ The support mechanisms established by the Commission also should be competitively neutral, i.e., they should neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another.⁵

A. Universal Service Contribution Rules

3. In the universal service *First Report and Order*, the Commission decided, *inter alia*, to base contributions to the universal service support mechanisms on carriers' end-user telecommunications revenues.⁶ The Commission concluded that the end-user telecommunications revenues method is competitively neutral, easy to administer, and eliminates some economic distortions associated with alternative contribution bases.⁷ In addition, the Commission found that, in a dynamic telecommunications marketplace where pricing flexibility is an important competitive tool, carriers will need the ability to decide how they should recover

³ 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).

⁴ 47 U.S.C. § 254(d). In addition to interstate telecommunications providers, "[a]ny other provider of interstate telecommunications may be required to contribute to the preservation and advancement of universal service if the public interest so requires." *Id.* See also 47 C.F.R. § 254 (b)(4), (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).

⁵ Besides the universal service principles specified in the 1996 Act, Congress directed that the Federal-State Joint Board on Universal Service (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. *First Report and Order*, 12 FCC Rcd at 8801-03, paras. 46-51.

⁶ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9206, para. 844 (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, and remanded in part sub nom Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir., July 30, 1999), *petitions for cert. filed*, 68 U.S.L.W. 3433 (U.S. Dec. 23, 1999) (No. 99-1072), 68 U.S.L.W. 3496 (U.S. Jan. 26, 2000) (Nos. 99-1244, 99-1249) (*First Report and Order*). In *Texas Office of Public Utility Counsel*, the Fifth Circuit reversed certain Commission decisions regarding the revenues on which universal service contributions are based. The present matter, however, concerns a specific aspect of the Commission's underlying contribution methodology, and the Fifth Circuit's decision regarding the contribution base does not affect our decision here.

⁷ *First Report and Order*, 12 FCC Rcd at 9206-09, paras. 844-50.

Administrator, the Universal Service Administrative Company (USAC).¹⁴ The rule further provides that the quarterly universal service contribution factor shall be based on the ratio of total projected quarterly expenses of the universal service support programs to total interstate and international end-user telecommunications revenues.¹⁵ Thus, contributions are the product of a contributor's individual interstate and international end-user telecommunications revenues and a contribution factor that is equal to the ratio of total projected quarterly expenses of the universal service support mechanisms to the total interstate and international end-user telecommunications revenues of all contributors.¹⁶

5. To collect information about end-user telecommunications revenues from contributors, the Commission adopted a rule in the *Second Order on Reconsideration* requiring contributors to submit a Universal Service Worksheet, FCC Form 457 (1997 Worksheet), at regular intervals.¹⁷ The 1997 Worksheet asks carriers to report their revenues from various categories of their operations, e.g., fixed local service, mobile service, toll service, non-telecommunications services, etc. The Commission delegated authority to the Common Carrier Bureau (Bureau) to "require any additional contributor reporting requirements necessary to the sound and efficient administration of the universal service programs."¹⁸

B. 1998 Worksheet

6. Pursuant to the authority delegated by the Commission in the *Second Order on Reconsideration*, the Bureau, through its Accounting Policy Division (APD),¹⁹ released a revised

¹⁴ An explanation of the Commission's contribution factor is contained in section 54.709(a) of the Commission's rules, which was recently amended to comply with the Fifth Circuit's decision. 47 C.F.R. § 54.709(a). See note 6. *supra*.

¹⁵ 47 C.F.R. § 54.709(a).

¹⁶ *Id.*

¹⁷ *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. . . ."). The Commission adopted the 1997 Worksheet and attached it as Appendix C to the *Second Order on Reconsideration*. The 1997 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 *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 1997 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).

¹⁸ *Second Order on Reconsideration*, 12 FCC Rcd at 18442, para. 81. See also 47 C.F.R. § 54.711(c) (the Bureau may "require additional reporting requirements that the Bureau deems necessary to the sound and efficient administration of the universal service support mechanisms.").

¹⁹ See 47 C.F.R. § 0.204(a), (b) (authority delegated to any official to issue action documents may be delegated to appropriate subordinate officials).

their contributions to the federal universal service support mechanisms.⁸ The Commission decided to permit, but not require, carriers to recover their contributions to the universal service support mechanisms from their customers.⁹ Rather than mandating that carriers recover their contributions from their customers through a federally imposed end-user surcharge, the Commission allowed carriers to decide for themselves whether, how, and how much to recover from their customers.¹⁰ The Commission required only that carriers not shift more than an equitable share of their contributions to any customer or group of customers, and that carriers provide accurate, truthful, and complete information regarding the nature of the charge.¹¹ In response to the *First Report and Order*, the Personal Communications Industry Association (PCIA) filed a petition seeking, *inter alia*, clarification of whether universal service charges that carriers recover from their customers would be included in carriers' end-user telecommunications revenues for purposes of determining carriers' contribution bases.¹²

4. In the universal service *Second Order on Reconsideration*, the Commission adopted a rule setting forth the method of computation for universal service contributions.¹³ Specifically, section 54.709(a) of the Commission's rules 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

⁸ *Id.* at 9210-11, para. 853.

⁹ *Id.* at 9199, para. 829. For price cap local exchange carriers that elect to recover their contributions, however, the Commission determined that such carriers may treat their contributions as exogenous changes to their price cap indices. *Id.* at 9200, para. 830. For all other incumbent local exchange carriers, the Commission decided to permit recovery of contributions by applying a factor to increase their carrier common line charge revenue requirement. *Id.* In *Texas Office of Public Utility Counsel v. FCC*, the Fifth Circuit found that the Commission required incumbent local exchange carriers to recover their contributions through access charges. *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d at 425. The court held that this requirement maintained an implicit subsidy in violation of section 254(e) of the Act, and reversed the Commission's decision to impose the requirement. *Id.* In the *Universal Service Remand Order*, the Commission revised its rules to allow incumbent local exchange carriers to recover their contributions through access charges or through end-user charges. *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. 30-33 (rel. Oct. 8, 1999) (*Universal Service Remand Order*).

¹⁰ *First Report and Order*, 12 FCC Rcd at 9210-11, para. 853.

¹¹ *Id.* at 9199, para. 829, 9211, para. 855.

¹² PCIA 1997 Petition. PCIA's 1997 Petition also sought reconsideration of the Commission's decision to require paging carriers to contribute to the universal service support mechanisms. *Id.* at 4-8. The Commission addressed that aspect of PCIA's 1997 Petition in the universal service *Fourth Order on Reconsideration*. *Federal-State Joint Board on Universal Service*, Fourth Order on Reconsideration in CC Docket No. 96-45, Report and Order in CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, 13 FCC Rcd 5318 (1997) (*Fourth Order on Reconsideration*).

¹³ *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) (*Second Order on Reconsideration*).

8. The Commission released a draft copy of the proposed Telecommunications Reporting Worksheet, FCC Form 499, as an appendix to the *Telecommunications Reporting Worksheet NPRM*.²⁷ Consistent with the Commission's decision not to revisit the substantive requirements of the various programs, the draft Telecommunications Reporting Worksheet contains a line-item (Line 215) which is substantively identical to Line 48 on the 1998 Worksheet and requires a carrier to report the amount of revenues derived from charges assessed on end-users to recover the carrier's contributions to state or federal universal service support mechanisms. The Commission explained that this reporting requirement is designed to: (1) "ensure that these revenues are properly reported and included in carriers' contribution bases", and (2) "make it easier for the Commission to verify that contributors are not over-recovering from subscribers."²⁸ In response to the *Telecommunications Reporting Worksheet NPRM*, PCIA filed comments, and Blooston, Mordkofsky, Jackson & Dickens (Blooston) and GTE Service Corporation (GTE) filed reply comments, all claiming that Line 215 increases contributions by artificially inflating carriers' contribution bases.²⁹ On July 14, 1999, the Commission adopted the Telecommunications Reporting Worksheet, and deferred consideration of the pending challenges to the inclusion of carrier-imposed universal service charges in the contribution base.³⁰ We now address those challenges.

III. DISCUSSION

A. Alleged Procedural Violations

9. The Commission's rules provide that contributions to the universal service support mechanisms shall be based on "revenues derived from domestic end users for telecommunications or telecommunications services."³¹ The parties claim that charges assessed

²⁷ *Id.* at 19339, Appendix B.

²⁸ *Id.* at 19307, para. 22.

²⁹ PCIA TRW comments; Blooston TRW Reply comments; GTE TRW reply comments. Sprint Corporation (Sprint) also filed comments in response to the *Telecommunications Reporting Worksheet NPRM*. Sprint claims that Line 215 will not allow the Commission to verify that contributors are not over-recovering from subscribers because "[t]here is no way for the Commission to know whether a particular carrier . . . intends its line item to recover only its explicit payments to USAC or its total Universal Service Fund obligation (including the implicit contribution made through access charges)." Sprint TRW comments at 6. We believe that this argument raises issues beyond the scope of this Order and would be more appropriately addressed in the Commission's ongoing truth-in-billing proceeding. See *Truth-in-Billing and Billing Format*, CC Docket No. 98-170, First Report and Order and Further Notice of Proposed Rulemaking, FCC 99-72 (1999).

³⁰ *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, paras. 1, 26 (1999). 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).

³¹ 47 C.F.R. § 54.709(a)(1).

Universal Service Worksheet (1998 Worksheet) on July 31, 1998.²⁰ The 1998 Worksheet contains a new Line 48, which requires a carrier to report, as a separate line-item, the amount of revenues derived from charges assessed on end-users to recover the carrier's contributions to state or federal universal service support mechanisms.²¹ In response to the 1998 Worksheet, PCIA and Metrocall, Inc. (Metrocall) filed petitions for reconsideration challenging Line 48.²² PCIA and Metrocall claim that Line 48 constitutes a new substantive rule that: (1) exceeds the Bureau's delegated authority; (2) was promulgated in violation of the Administrative Procedure Act; and (3) increases contributions by artificially inflating a carrier's contribution base.²³

C. Telecommunications Reporting Worksheet

7. On September 25, 1998, the Commission released the *Telecommunications Reporting Worksheet NPRM*, which proposed simplifying carrier reporting requirements for various Commission support and cost recovery mechanisms so that a single worksheet would replace the multiple forms then required by those mechanisms.²⁴ Specifically, the *Telecommunications Reporting Worksheet NPRM* proposed consolidating the reporting requirements of the universal service support mechanisms, the Telecommunications Relay Services 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.²⁵ The Commission noted, however, that it did not seek to revisit the substantive requirements of the four support and cost recovery mechanisms, the class of contributors to each mechanism, or the services whose revenues are included in the contribution bases.²⁶

²⁰ *Division Announces Release of Revised Universal Service Worksheet, FCC Form 457*, CC Docket Nos. 97-21, 96-45, Public Notice, DA 98-1519 (APD, rel. July 31, 1998).

²¹ 1998 Worksheet at 2, 16.

²² PCIA 1998 Petition; Metrocall Petition. APD issued a public notice seeking comment on each of the petitions. *Petitions for Reconsideration and Clarification of Action in Rulemaking Proceedings*, Public Notice, Report No. 2298 (APD, rel. Sept. 22, 1998). A list of the comments and reply comments filed in response to the public notice is included in Appendix A.

²³ PCIA 1998 Petition at 1-4; Metrocall Petition at 2-11. MCI WorldCom, Inc. (MCI WorldCom), among others, filed comments in support of the petitions by PCIA and Metrocall. In addition to echoing the concerns of PCIA and Metrocall, MCI WorldCom claims that the Commission has unfairly allowed local exchange carriers "to recover their federal universal service assessments by increasing interstate access charges instead of imposing a charge on end-users." MCI WorldCom Comments at 2. Those issues were addressed by the Fifth Circuit in *Texas Office of Public Utility Counsel v. FCC*, and are not relevant to this proceeding. See note 9, *supra*.

²⁴ *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, Notice of Proposed Rulemaking and Notice of Inquiry, 13 FCC Rcd 19295 (1998) (*Telecommunications Reporting Worksheet NPRM*).

²⁵ *Id.* at 19303-06, paras. 16-20.

²⁶ *Id.* at 19298, para. 4.

on end users to recover a carrier's contributions to state or federal universal service support mechanisms do not qualify as revenues derived from telecommunications or telecommunications services.³² Thus, the parties assert that Line 48 on the 1998 Worksheet, which treats universal service charges as telecommunications revenues, constitutes a new substantive rule.³³ Based on the assertion that Line 48 is a new substantive rule, the parties further allege that APD committed two procedural violations in adding Line 48 to the 1998 Worksheet. First, the parties claim that APD exceeded the authority delegated to the Bureau by adopting a new substantive rule, which is a task reserved to the Commission in Part 1, Subpart C, of the Commission's rules.³⁴ Second, the parties allege that APD violated section 553 of the Administrative Procedure Act (APA) by adopting a new substantive rule without an opportunity for notice and comment.³⁵ We disagree.

10. The parties have erred in their underlying assertion that Line 48 constitutes a new substantive rule. In the *First Report and Order*, released on May 8, 1997, the Commission decided to assess contributions to the universal service support mechanisms on telecommunications revenues that carriers derive from end users.³⁶ The Commission permitted carriers to recover their universal service contributions from their customers and "to specify that fact on customers' bills," e.g., through a line-item charge.³⁷ The Commission codified the contribution requirement at section 54.709(a)(1) of its rules, which states that contributions to the universal service support mechanisms shall be based on "revenues derived from domestic end users for telecommunications or telecommunications services."³⁸ The 1996 Act defines telecommunications as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information sent and received."³⁹ The 1996 Act also defines telecommunications services as "the offering of

³² Metrocall Petition at 2-4; USTA comments at 2; Arch reply comments at 2; RSL reply comments at 4-6.

³³ Metrocall Petition at 2-4; Arch reply comments at 2; RSL reply comments at 4-6.

³⁴ Metrocall Petition at 5-6. See 47 C.F.R. § 1.411 ("Rulemaking proceedings are commenced by the Commission, either on its own motion or on the basis of a petition for rulemaking."); 47 C.F.R. § 1.425 ("The Commission will consider all-relevant comments and material of record before taking final action in a rule-making proceeding and will issue a decision incorporating its finding and a brief statement of the reasons therefor."). See also 47 C.F.R. § 0.291 ("The Chief, Common Carrier Bureau, shall not have authority to issue notices of proposed rulemaking, notices of inquiry, or reports and orders . . .").

³⁵ Metrocall Petition at 4-5. See 5 U.S.C. § 553(b) (a notice of the proposed rulemaking shall be published in the Federal Register, and shall include: (1) a statement of the time, place, and nature of the public rulemaking proceedings; (2) a reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved).

³⁶ *First Report and Order*, 12 FCC Rcd at 9206, para. 844.

³⁷ *Id.* at 9211-12, para. 855.

³⁸ 47 C.F.R. § 54.709(a)(1).

³⁹ 47 U.S.C. § 153(43).

telecommunications *for a fee* directly to the public"⁴⁰ The charge assessed on an end-user to recover a carrier's contributions to state or federal universal service support mechanisms is simply one part of the carrier's fee for the provision of telecommunications to that end-user. Although a carrier may choose to assess a particular cost of providing telecommunications or telecommunications services separately from other such costs, the carrier's choice does not change the nature of the revenues received from the end-user. Thus, carrier-imposed universal service charges are, and always have been, revenues derived from the provision of telecommunications. As such, carrier-imposed universal service charges are part of the universal service contribution base.⁴¹

11. Moreover, we believe that the parties misapprehend the nature of carrier-imposed universal service charges. Instead of forcing carriers to recover their universal service contributions through a mandatory surcharge on their customers, the Commission gave carriers the flexibility to decide whether, how, and how much to recover from their customers.⁴² For example, carriers may recover their universal service contributions by raising their rates or by adding a separate line-item universal service charge to their customers' bills. In either event, the carrier is recovering its contribution from its end-users. Merely because the Commission allowed carriers to identify a portion of their fees as recovering the carriers' universal service contributions, the monies so collected are not somehow rendered non-telecommunications revenues. Indeed, but for the provision of telecommunications to its customers, a carrier would not have telecommunications revenues, would not be required to contribute to the universal service support mechanisms,⁴³ and would not have any lawful basis to assess a universal service charge on its customers.⁴⁴

12. Because carrier-imposed universal service charges are end-user telecommunications revenues, the addition of Line 48 on the 1998 Worksheet does not constitute a new substantive rule. Rather, Line 48 is merely the Bureau's implementation and clarification of the existing Commission rule requiring that contributions be based on end-user telecommunications

⁴⁰ 47 U.S.C. § 153(46) (emphasis added).

⁴¹ See 47 C.F.R. § 54.709(a)(1). In support of its argument against including carrier-imposed universal service charges in the contribution base, PCIA points out that the Commission decided not to include support payments *from* the universal service support mechanisms in the contribution base. PCIA 1997 Petition at 10. We find no merit in this analogy. Unlike carrier-imposed universal service charges, support payments are not end-user telecommunications revenues because support payments are derived from the universal service support mechanisms, not end-users. See *First Report and Order*, 12 FCC Rcd at 9212, para. 857.

⁴² *Universal Service Order*, 12 FCC Rcd at 9210-12, paras. 853, 855.

⁴³ See 1997 Worksheet at 17 ("Contributors may have revenues on their books that are not derived from telecommunications or telecommunications-related functions that should not be included in the universal service contribution base.").

⁴⁴ We believe that it would be a clear violation of section 201(b) of the Act for a carrier to assess a universal service charge on its customers where the carrier does not have an obligation to contribute to the universal service support mechanisms. See 47 U.S.C. § 201(b) (all charges for communications services shall be just and reasonable).

revenues.⁴⁵ Because Line 48 is not a new substantive rule, the Bureau neither exceeded its delegated authority nor violated the notice and comment requirements of the APA.⁴⁶ Accordingly, we reject the parties' procedural claims.

B. Substantive Arguments Regarding the Inclusion of Carrier-Imposed Universal Service Charges in the Contribution Base

13. The parties argue that including carrier-imposed universal service charges in the contribution base creates a circular formula that drives up the contribution base, causing increased contributions, which result in higher carrier-imposed universal service charges that further drive up the contribution base.⁴⁷ Thus, the parties claim that the inclusion of carrier-imposed universal service charges in the contribution base disserves the public interest because it results in an upwardly spiraling "vicious cycle" of perpetual increases in carrier contributions to the universal service support mechanisms.⁴⁸ For example, PCIA supplies the following description of this alleged effect:⁴⁹

[I]f a carrier receives \$100 in revenues for flat-rated services from an end-user over a given period, and assuming a 10 percent contribution rate, the carrier's contribution would be \$10. If the carrier passes the \$10 through to the customer, the revenues received from the customer (in the next comparable period) would increase to \$110. If the \$10 pass through is considered "end user telecommunications revenues," the contribution would increase to \$11, as an assessment would be included on the recovery of contributions from the customer.

Metrocall and Blooston provide similar examples.⁵⁰ Upon closer examination, however, the inclusion of carrier-imposed universal service charges in the contribution base does not have the effect claimed by the parties.

⁴⁵ See 47 C.F.R. § 54.709(a)(1). See also 47 C.F.R. § 54.711(c) (the Bureau may "require additional reporting requirements that the Bureau deems necessary to the sound and efficient administration of the universal service support mechanisms.").

⁴⁶ See 47 C.F.R. § 0.291(g); 5 U.S.C. § 553(b).

⁴⁷ GTE comments at 3. See also PCIA 1997 Petition at 9-11; PCIA 1997 reply comments at 7; PCIA 1998 Petition at 3; Metrocall Petition at 9; USTA comments at 2; MCI WorldCom comments at 1-2; Arch reply comments at 2; RSL reply comments at 6-7; PCIA TRW comments at 4-7; GTE TRW comments at 2-3; Blooston TRW reply comments at 3; GTE TRW reply comments at 6.

⁴⁸ Metrocall Petition at 9. See also PCIA 1997 Petition at 9-11; PCIA 1997 reply comments at 7; PCIA 1998 Petition at 3; GTE comments at 3; USTA comments at 2; MCI WorldCom comments at 1-2; Arch reply comments at 2; RSL reply comments at 6-7; PCIA TRW comments at 4-7; GTE TRW comments at 2-3; Blooston TRW reply comments at 3; GTE TRW reply comments at 6.

⁴⁹ PCIA 1997 Petition at 10.

⁵⁰ Metrocall Petition at Exhibit 1; Blooston reply comments at Attachment B.

14. In each of their examples, the parties assume that, all other things being equal, the contribution factor remains constant as the contribution base increases.⁵¹ This assumption, however, is mathematically impossible. The contribution factor is the ratio of total universal service program costs to the contribution base.⁵² Stated as a mathematical equation, the contribution factor can be described as follows:⁵³

$$\text{Contribution Factor} = \frac{\text{Total Program Costs}}{\text{Contribution Base}}$$

The total program costs and the contribution base are independent variables in this equation. The contribution factor, on the other hand, is the dependent variable, i.e., the contribution factor is dependent on the amount of the total program costs and the contribution base. Because the contribution base is the denominator in this equation, the contribution factor is inversely proportional to the contribution base. In other words, as the contribution base increases, all other things being equal, the contribution factor must decrease.

15. As demonstrated by the exhibit in Appendix B hereto, all other things being equal, when carrier-imposed universal service charges are included in the contribution base, the contribution base increases, the contribution factor decreases in proportion to the increase in the contribution base, and the amount of each carrier's contribution remains constant. Therefore, the parties' "vicious cycle" argument is unfounded.⁵⁴ Moreover, if carrier-imposed universal service charges were *not* included in the contribution base, there would be a competitive imbalance in the Commission's contribution methodology. All other things being equal, a carrier that chose to recover its contributions by increasing its rates would have an increased individual contribution base and an increased contribution. A carrier that chose to recover its contributions by imposing a line-item charge would not have an increased individual contribution base or an increased contribution. Such a result would put carriers choosing to raise their rates at a disadvantage compared to carriers choosing to impose a line-item charge, would render illusory the "choice" of recovery methods, and would violate the universal service principle of competitive neutrality.⁵⁵

⁵¹ PCIA 1997 Petition at 10 (assuming a constant 10 percent contribution factor); Metrocall Petition at Exhibit 1 (assuming a constant 3.93 percent contribution factor); Blooston reply comments at Attachment B ("[W]e will assume that there is only one contribution factor, and that it remains constant . . .").

⁵² 47 C.F.R. § 54.709(a)(2).

⁵³ See *Proposed Third Quarter 1999 Universal Service Contribution Factors*, CC Docket No. 96-45, Public Notice, DA 99-1091 at 7 (Com. Car. Bur., rel. June 4, 1999).

⁵⁴ Metrocall Petition at 9. See also PCIA 1997 Petition at 9-11; PCIA 1997 reply comments at 7; PCIA 1998 Petition at 3; GTE comments at 3; USTA comments at 2; MCI WorldCom comments at 1-2; Arch reply comments at 2; RSL reply comments at 6-7; PCIA TRW comments at 4-7; GTE TRW comments at 2-3; Blooston TRW reply comments at 3; GTE TRW reply comments at 6.

⁵⁵ See *First Report and Order*, 12 FCC Rcd at 8801-03, paras. 46-51.

Accordingly, for all of the foregoing reasons, we reject the parties' claims that carrier-imposed universal service charges should be excluded from the contribution base.

IV. ORDERING CLAUSES

16. 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, and section 1.429 of the Commission's rules, 47 C.F.R. § 1.429, the TWENTY-FIRST ORDER ON RECONSIDERATION in CC docket No. 96-45 and the MEMORANDUM OPINION and ORDER in CC Docket Nos. 96-45, 97-21, and 98-171 ARE ADOPTED.

17. 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 Petition for Partial Reconsideration and Clarification filed by the Personal Communications Industry Association on July 17, 1997 IS DENIED to the extent stated herein.

18. 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 1.106 of the Commission's rules, 47 C.F.R. § 1.106, the Petition for Reconsideration filed by the Personal Communications Industry Association on August 31, 1998 IS DENIED.

19. 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 1.106 of the Commission's rules, 47 C.F.R. § 1.106, the Petition for Reconsideration filed by Metrocall, Inc. on August 31, 1998 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas
Secretary

Appendix A**Commission Items and Relevant Responses from Parties**

1. *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45. Report and Order, 12 FCC Rcd 8776 (1997)
 - Petition for Reconsideration
Personal Communications Industry Association (filed July 17, 1997)
(PCIA 1997 Petition)
 - Reply Comments in Response to Comments on Petitions for Reconsideration
Personal Communications Industry Association (filed Sept. 3, 1997)
(PCIA 1997 Reply Comments)

2. *Division Announces Release of Revised Universal Service Worksheet. FCC Form 457*. CC Docket Nos. 97-21, 96-45. Public Notice. DA 98-1519 (APD, rel. July 31, 1998)
 - Petitions for Reconsideration
Personal Communications Industry Association (filed Aug. 31, 1998)
(PCIA 1998 Petition)
Metrocall, Inc. (filed Aug. 31, 1998)
(Metrocall Petition)
 - Public Notice Seeking Comment on Petitions for Reconsideration
Petitions for Reconsideration and Clarification of Action in Rulemaking Proceedings. Public Notice. Report No. 2298 (APD, rel. Sept. 22, 1998)
 - Comments
GTE Service Corporation (filed Sept. 10, 1998)
(GTE Comments)
MCI WorldCom, Inc. (filed Oct. 13, 1998)
(MCI WorldCom Comments)
United States Telephone Association (filed Oct. 19, 1998)⁵⁶
(USTA Comments)
 - Reply Comments
Arch Communications Group, Inc. (filed Oct. 23, 1998)
(Arch Reply Comments)

⁵⁶ Comments in response to the petitions by PCIA and Metrocall were due on October 13, 1998. See 63 Fed. Reg. 51576 (1998). Although USTA's comments were filed on October 19, 1998, we will deem them informal requests for Commission action and consider them in this proceeding. See 47 C.F.R. § 1.41; *Pacific Telesis Group*, 12 FCC Rcd 2624, 2630, para. 10 (1997) (late-filed comments may be treated as an informal request for Commission action pursuant to section 1.41 of the Commission's rules).

RSL Com USA, Inc. (filed Oct. 23, 1998)
(RSL Reply Comments)

3. *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.* Notice of Proposed Rulemaking and Notice of Inquiry, 13 FCC Rcd 19295 (1998).

Comments

Personal Communications Industry Association (filed Oct. 30, 1998)
(PCIA TRW Comments)

Sprint Corporation (filed Oct. 30, 1998)
(Sprint Comments)

GTE Service Corporation (filed Oct. 30, 1998)
(GTE TRW Comments)

Reply Comments

Blooston, Mordkofsky, Jackson & Dickens (filed Nov. 16, 1998)
(Blooston TRW Reply Comments)

GTE Service Corporation (filed Nov. 17, 1998)
(GTE TRW Reply Comments)

- * *See also* Notice of *Ex Parte* Meeting - Metrocall, Inc.: Personal Communications Industry Association; and Blooston Mordkofsky, Jackson & Dickens (filed Feb. 23, 1999).

Appendix BEffect of Including Carrier-Imposed Universal Service Charges in Contribution Base⁵⁷**Period 1**

Number of Carriers: 10

Revenue per Carrier: \$100

Contribution Base: $(10 \times \$100) = \1000

Total Program Costs: \$100

Contribution Factor: $\$100 / \$1000 = .10$

Contribution per Carrier: $(.10 \text{ Contribution Factor} \times \$100 \text{ Revenue per Carrier}) = \10

Period 2

Number of Carriers: 10

Revenue per Carrier: $(\$100 \text{ Service Revenue} + \$10 \text{ Universal Service Charge}) = \110

Contribution Base: $(10 \times \$110) = \1100

Total Program Costs: \$100

Contribution Factor: $\$100 / \$1100 = .0909$

Contribution per Carrier: $(.0909 \text{ Contribution Factor} \times \$110 \text{ Revenue per Carrier}) = \10

Period 3

Number of Carriers: 10

⁵⁷ For the purpose of simplicity, this exhibit assumes an industry composed of ten carriers and constant total universal service program costs of \$100. We recognize that total program costs normally will vary from period to period. Because total program costs are an independent variable, however, we can properly assume constant total program costs in order to demonstrate the effect of including carrier-imposed universal service charges in the contribution base.

Revenue per Carrier: ($\$100$ Service Revenue + $\$10$ Universal Service Charge) = $\$110$

Contribution Base: $(10 \times \$110) = \1100

Total Program Costs: $\$100$

Contribution Factor: $\$100 / \$1100 = .0909$

Contribution per Carrier: $(.0909 \text{ Contribution Factor} \times \$110 \text{ Revenue per Carrier}) = \10

**DISSENTING STATEMENT
OF COMMISSIONER HAROLD FURCHTGOTT-ROTH**

Re: Federal-State Joint Board on Universal Service, Division Announces Release of Revised Universal Service Worksheet, FCC Form 457, 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, Twenty-First Order on Reconsideration in CC Docket No. 96-45, and Memorandum Opinion and Order in CC Docket Nos. 96-45, 97-21, and 98-171.

I do not agree with the Commission's decision to require carriers to include in their universal service contribution base the charges that carriers assess on end users in order to recover their universal service expenses. The order concludes, with no explanation whatsoever, that the charges "are simply one part of the carrier's fee for the provision of telecommunications to [an] end-user," see Order ¶ 10, and therefore must be included in the universal service contribution base.

But by this reasoning, *any* tax or fee collected from an end-user by the carrier, and paid by the carrier to the taxing authority, constitutes a "fee for the provision of telecommunications." Why should the federal excise tax that is assessed on consumers not also be included in a carrier's "revenues"?

In my view, since the universal service fees at issue are essentially gross receipts fees - in that they are a percentage of a carrier's gross revenues - the rational approach would be to exclude these amounts from the universal service contribution base. Drawing an analogy to the retail industry, the end user's universal service charge parallels the gross receipt sales tax that consumers pay in retail stores. For a given retail purchase, taxes that are due are calculated as a percentage of the customer's purchase cost, placed on a separate line, and added to the customer's bill. Thus, if a state has five percent sales tax, and a customer purchases \$Y worth of goods, he receives a bill for $\$Y = 1.05*\Y . He does *not* receive a bill for $1.05*(\$Y + 0.05*\$Y)$. Indeed, this is how carriers pay the federal excise tax assessed on telecommunications services.

The Commission's approach makes sense only for those fees or taxes that are based on *net* receipts or profits, rather than *gross* receipts. Since net receipts taxes vary with a carrier's profits, it is not possible to calculate at the time of purchase the contribution that the purchase makes to the tax liability of the seller. Again drawing a parallel to retail stores, the same department store that places a line item for sales taxes does not have a separate line item for the corporate tax or real estate tax liability of the department store owner. This is because in

neither case can the tax be directly allocated to a consumer at the time of purchase. Consequently, the tax payments are implicitly raised in the corporate overhead. Universal service contributions, however, are precise receipts tax, and there is no reason to bury them in corporate overhead.