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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Federal-State Joint Board)
on Universal Service)
)
Access Charge Reform)

CC Docket No. 96-45

CC Docket No. 96-262

AT&T CORP. COMMENTS ON PETITIONS FOR RECONSIDERATION AND CLARIFICATION

Pursuant to Section 1.429 of the Commission's Rules, 47 C.F.R. § 1.429, and its Public Notice (Report No. 2399), published in 65 Fed. Reg. 18334 (April 7, 2000), AT&T Corp. ("AT&T") submits these comments on the Petitions for Reconsideration and Clarification of BellSouth Corporation ("BellSouth") and Arya International Communications Corporation ("Arya"), filed December 6, 1999. BellSouth and Arya seek reconsideration and clarification of the Commission's remand order responding to the decision of the United States Court of Appeals for the Fifth Circuit in *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) ("*Texas OPUC*").¹

BellSouth (at 7) argues that "it is by no means clear" that the Court's holding that Section 254 does not permit intrastate revenues to be included in the assessment base of the universal service funds "has only a prospective effect." BellSouth therefore asks the Commission to reconsider its decision to implement the decision prospectively only, and it asks the Commission to formally recognize BellSouth's legal right to a refund. Arya

¹ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Sixteenth Order on Reconsideration in Docket No. 96-45, Eight Report and Order in Docket No. 96-45, Sixth Report and Order in Docket No. 96-262, FCC 99-290 (rel. Oct. 8, 1999) ("*Remand Order*").

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similarly contends that it should be refunded amounts paid into the universal service fund (“USF”) based on its international revenues before the FCC, on remand. modified its rule regarding the assessment of the international revenues of carriers with comparatively small domestic interstate revenues.

The Commission should reject these petitions because the Fifth Circuit almost certainly did not intend for its decision to be applied retroactively. If the Commission does implement the decision retroactively, however, the Commission should require local exchange carriers (“LECs”) like BellSouth to return the refunded money to interexchange carriers (“IXCs”) (which reimbursed the LECs for those contributions via the ILEC flowback). Moreover, the Commission should recognize that it has no legal authority to retroactively increase the assessment of interstate revenues for prior periods in an attempt to replace the shortfall that would be created by any such refunds.

AT&T supports BellSouth’s separate request for the Commission to recognize that commercial mobile radio services (“CMRS”) carriers’ ability to recover their federal universal service assessments through rates for all services remains unaffected by the Fifth Circuit’s ruling.

1. In its original *Universal Service Order*, the Commission required telecommunications carriers to calculate their payments to the USF for the schools, libraries, and rural health care programs as a percentage of their total telecommunications revenues (interstate, intrastate, and international).² The Fifth Circuit reversed, however, and held that Section 254 did not give the FCC jurisdiction to include intrastate revenues in the assessment

² *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, ¶ 840 (1997) (“*Universal Service Order*”).

base for those program funds. *Texas OPUC*, 183 F.3d at 446-48.³ In response to this ruling, the Commission amended its rules to require telecommunications carriers to pay into these funds based solely on their interstate and international revenues. These new rules adopted on remand became effective with assessments beginning November 1, 1999. *See Remand Order*, ¶ 18.

BellSouth asks the Commission to reconsider its decision to make these rule changes prospective only, and it advances two reasons for doing so. First, BellSouth (at 7 & n.18) states that it has filed a request with the Universal Service Administrative Company (“USAC”) for a refund of all payments to the USF based on the assessment of intrastate revenues from January 1, 1998 through October 1999. It asks (at 7-13) the Commission to find that the Fifth Circuit’s decision was retroactive in effect, in order to clarify BellSouth’s legal right to a refund from USAC. Second, BellSouth also cites a class action filed against its CMRS affiliate in Alabama, in which the plaintiffs are seeking damages for the pass-through of universal service contributions to CMRS customers. It asks the Commission to clarify its right to a refund from USAC in the event that the CMRS affiliate is found liable for refunds in the class action suit. *Id.*

The Commission should deny the request for clarification, because it is highly unlikely that the Fifth Circuit intended its decision to be applied retroactively. Indeed, the petitioner in *Texas OPUC*, Cincinnati Bell, expressly asked the Court to order the FCC to “refund all moneys received from carriers attributable to intrastate revenues” in addition to

³ AT&T and MCI WorldCom Network Services, Inc. have filed a petition for *certiorari* challenging the Fifth Circuit’s jurisdictional holding concerning the assessment base. *AT&T Corp., et al. v. Cincinnati Bell Telephone Company*, No. 99-1249 (January 26, 2000). That petition is currently pending before the Supreme Court.

revising the rules going forward. See *Texas OPUC v. FCC*, Brief of Cincinnati Bell Tel. Co., p. 38 (February 28, 1998). The Court declined to do so, however; it merely “reverse[d] that portion of the Order that includes intrastate revenues in the calculation of universal service contributions.” *Texas OPUC*, 183 F.3d at 448. Given that the Court declined to order refunds even though the issue was expressly brought to its attention by the petitioner, it is reasonable to conclude that the Court intended the decision to be applied prospectively only.

Moreover, the Supreme Court has indicated that the general principle of retroactivity of judicial decisions need not be followed if it would result in “grave disruption or inequity” to the parties. *Ryder v. United States*, 515 U.S. 177, 184-85 (1995); see also *Crawford v. Falcon Drilling Co., Inc.*, 131 F.3d 1120, 1124 (5th Cir. 1997) (acknowledging that *Ryder* recognized exceptions to the rule of retroactivity). Here, according to AT&T’s estimate, from January 1, 1998 to November 1, 1999, USAC collected more than \$1.6 billion in contributions that were derived from the assessment of intrastate revenues, which was then disbursed to literally thousands of schools, libraries, and rural health care providers all across the nation. Retroactive application of the Fifth Circuit’s decision, however, would require USAC to refund that full amount – already disbursed to program beneficiaries – to the contributing carriers. Such massive refunds would result in truly “grave disruption” to the operations of USAC and the universal service program as a whole.⁴ The Fifth Circuit could not have intended to deal such a crippling blow to the universal service mechanisms mandated by Congress, especially without even addressing the issue in its opinion.

⁴ As even BellSouth (at 13) admits, “undoing these past assessments” would be a “complex task” that would be “a bit like unscrambling eggs.”

Therefore, the Commission was fully justified in declining to apply the decision retroactively. *Ryder*, 515 U.S. at 184-85.⁵

Nonetheless, if BellSouth is correct that the Fifth Circuit's decision is retroactive, the Commission should recognize that two important consequences follow. First, as BellSouth (at 6) itself recognizes, "[BellSouth] also has passed through its sizeable federal universal service contribution costs through rates for interstate services in accordance with the Commission's rules" – *i.e.*, it passed those costs through to IXCs by means of the ILEC flowback. Thus, as BellSouth recognizes, it is "potentially liable for passing such intrastate-related universal service costs to access and end user customers." *Id.* Indeed, if the Commission had no jurisdiction to include intrastate revenues in the assessment base for the schools and libraries fund, it necessarily follows that it had no jurisdiction to order ILECs to recover such unlawful contributions from IXCs in interstate access charges.⁶

Because BellSouth has already received full reimbursement for its intrastate-related contributions through the ILEC flowback, a refund from USAC would constitute double recovery, unless BellSouth were also required to return immediately the refunded money to its customers, the IXCs. The Commission could not lawfully "undo[] these past assessments" without also undoing the recovery of those contributions through the ILEC flowback. Recognizing this fact, BellSouth (at 7) states that it is "committed to

⁵ Even if the Fifth Circuit's decision is retroactive, it does not necessarily follow that the Commission must order refunds. Courts have recognized that the agency may weigh the equities when considering whether a refund is appropriate. *See, e.g., AT&T v. FCC*, 836 F.2d 1386, 1392 (D.C. Cir. 1988); *MCI Telecommunications Corp. v. FCC*, 59 F.3d 1407, 1414 (D.C. Cir. 1995); *Koch Gateway Pipeline v. FERC*, 136 F.3d 810 (D.C. Cir. 1998).

⁶ As AT&T has explained elsewhere, the ILEC flowback is unlawful in all events, because it violates Section 254(e). *See Texas OPUC*, 183 F.3d at 424-25; *Alenco Communications Inc. v. FCC*, 201 F.3d 608, 616 (5th Cir. 2000); *AT&T Corp. v. FCC*, No. 00-60044, Brief of Petitioner AT&T Corp., filed March 13, 2000 (5th Cir.) (appeal pending).

passing through any refunds to customers.” If the Commission orders such refunds, it must also ensure that ILECs pass such refunds through to IXCs, to avoid an unlawful double recovery.

Second, the Commission should also recognize that it has no authority under the Communications Act to adopt rules that retroactively increase the assessment of interstate revenues for periods prior to November 1, 1999 to fund the shortfall that would be created by refunds to contributing carriers. It is well-established that "a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208-09 (1988). Section 254 does not contain any such express terms, and therefore the Commission has no authority to promulgate universal service rules with retroactive effect. Thus, if USAC were required to refund money collected from carriers based on an assessment of intrastate revenues, the Commission does not have any lawful means at its disposal to require carriers to contribute retroactively to make up for those lost funds. *Id.*; see also *Allied-Signal, Inc. v. NRC*, 988 F.2d 146, 151 (D.C. Cir. 1993) (vacating rule requires refund of fees collected, and “in addition [the agency] evidently would be unable to recover those fees under a later-enacted rule,” citing *Bowen*).⁷

⁷ Such rules would unquestionably be retroactive, because they would increase parties’ liability for past actions, or impose new duties on completed transactions. See, e.g., *DirectTV, Inc. v. FCC*, 110 F.3d 816, 825-26 (D.C. Cir. 1997); *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994).

The Commission should act promptly to respond to BellSouth's Petition, because this issue is unlikely to go away. As BellSouth notes, Pan Am Wireless, Inc. has also already asked USAC for a refund, and other requests may follow. The prosecution of such claims could prove quite disruptive to the operation of the universal service program, and the administration of such claims could be complex and costly. The Commission should therefore act expeditiously to clarify carriers' rights and obligations with respect to the Fifth Circuit's decision and past assessments.⁸

2. The Commission should also reaffirm that CMRS carriers are permitted to recover their USF contributions through rates charged for all of their services,⁹ and that the Fifth Circuit's decision in *Texas OPUC* did not call that rule into question. BellSouth at 13-16. As BellSouth correctly notes, no party challenged that rule in the Fifth Circuit, and the Court did not address any issue relating to the recovery of wireless carriers' federal universal service assessments. *Id.* at 13-14; *cf. Texas OPUC*, 183 F.3d at 430-33 (addressing ability of states to require wireless carriers to contribute to state universal service funds). Moreover, as BellSouth shows, Section 332 expressly exempts CMRS carriers from state rate and entry regulation, and the Commission has preempted state

⁸ Regardless of whether BellSouth and other carriers are entitled to refunds from USAC as a result of the Fifth Circuit's jurisdictional ruling on the assessment base, Arya and other similarly situated carriers would have no conceivable claim to refunds based on the Commission's modification of the rules governing assessment of international revenues. The Court did *not* hold that the Commission's rule relating to assessment of international revenues of carriers with comparatively small domestic interstate revenues was necessarily unlawful, but merely that the Commission had not given an adequate explanation for the rule. *Texas OPUC*, 183 F.3d at 435. Therefore, even if the Fifth Circuit's decision were retroactive, USAC's collection of contributions based on the previous rule concerning international revenues are not legally deficient.

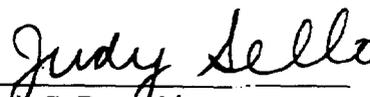
⁹ *Federal-State Joint Board on Universal Service*, Fourth Reconsideration Order, 13 FCC Rcd 5318, 5489, ¶ 309 (1997).

regulation of rates for CMRS services.¹⁰ Accordingly, the jurisdictional limitations of Section 2(b) have no application to CMRS carriers' cost recovery of their federal universal service assessments. BellSouth at 15. For these reasons, AT&T fully supports BellSouth's request for clarification as to CMRS carriers' ability to recover their federal universal service assessments through rates charged for all services.

CONCLUSION

For these reasons, BellSouth's petition for reconsideration and clarification should be denied with respect to the issue of retroactivity and granted with respect to the issue of CMRS carriers' obligations. Arya's petition for reconsideration should be denied.

Respectfully submitted,

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¹⁰ *Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd 1411, 1502, ¶ 250 (1994).

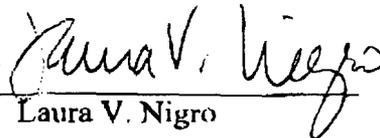
CERTIFICATE OF SERVICE

I, Laura V. Nigro, do hereby certify that on this 24th day of April, 2000, a copy of the foregoing "AT&T Corp. Comments on Petitions for Reconsideration and Clarification" was served by U.S. first class mail, postage prepaid, on the parties named below.

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