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

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

To: The Commission

REPLY OF ARYA INTERNATIONAL COMMUNICATIONS CORPORATION TO COMMENTS OPPOSING PETITION FOR RECONSIDERATION

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Date: May 9, 2000

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SUMMARY

Prior to November 1, 1999, Arya International Communications Corporation ("Arya") paid excessive contributions to the Universal Service Fund ("USF") pursuant to regulations that required providers of interstate and international service to pay USF fees based on combined interstate *and* international revenues. The Fifth Circuit determined the regulations were arbitrary and capricious because they produced inequitable consequences for primarily international carriers, who could be forced to pay USF fees in excess of their interstate revenues. *See* Texas Office of Public Utility Counsel v. FCC, 183 F.3d 393, 434-35 (5th Cir. 1999).

On remand, the Commission adopted a limited international revenues exception, which allows providers of interstate and international service to pay USF fees based solely on their interstate revenues, provided such revenues are less than 8 percent of their combined interstate and international revenues. The exception went into effect on November 1, 1999. In this petition for reconsideration, Arya contends the Commission violated the APA by adopting the 8 percent cut-off without explanation, and that Arya is entitled to a refund of the excessive USF fees the Commission had no right to assess under its arbitrary rules. Retaining such unlawfully collected fees would amount to an unconstitutional taking. No commenter disputes that the selection of the 8 percent cut-off violates the APA, and no commenter even responds to Arya's taking argument.

With respect to the refund issue, AT&T and MCI WorldCom assert that Arya is not entitled to a refund because the Fifth Circuit (i) did not conclude the Commission lacked jurisdiction to assess the challenged fees and (ii) did not specifically determine the Commission acted "unlawfully." Neither commenter provides legal support for its assertions, which are entitled to no weight in this proceeding. Under the circumstances, Arya urges the Commission to grant its petition, adopt a non-arbitrary cut-off figure, and issue refunds to Arya and other similarly situated carriers.

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REPLY OF ARYA INTERNATIONAL COMMUNICATIONS CORPORATION TO COMMENTS OPPOSING PETITION FOR RECONSIDERATION

Arya International Communications Corporation ("Arya"), by and through its counsel, hereby files its Reply to the Comments opposing Arya's 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"). The Petition specifically requested reconsideration of Paragraphs 27 through 29 of the Order, which adopted a limited international revenues exception governing contributions to the Universal Service Fund ("USF") by telecommunications providers of both interstate and international service. Effective November 1, 1999, the limited exception allows such providers to contribute to the USF based solely on their interstate revenues, provided such revenues are less than 8 percent of their combined interstate and international revenues.

I. SUMMARY OF ARYA'S REQUESTS FOR RECONSIDERATION

Arya asks the Commission to reconsider two aspects of its Order. First, Arya seeks reconsideration of the 8 percent cut-off that triggers eligibility for the limited international revenues exception. The Commission adopted the cut-off without explanation, which amounts to arbitrary and capricious decision-making in violation of the Administrative Procedure Act ("APA").

Second, Arya seeks reconsideration of the Order's failure to refund USF fees wrongfully collected under the USF contribution system in effect prior to November 1, 1999, which the Fifth Circuit struck down as an arbitrary and capricious misapplication of the Commission's statutory authority. *See* Texas Office of Public Utility Counsel v. FCC, 183 F.3d 393, 434-35 (5th Cir. 1999). Prior to November 1, 1999, the Commission's rules required telecommunications providers of both interstate and international service to contribute to the USF based on the their interstate *and* international revenues, no matter what the respective revenues were. *See* former 47 C.F.R. §§54.706, 54.709. Arya contends that prior to November 1, 1999, it and other primarily international carriers paid excessive USF fees that the Commission lacked authority to impose. It follows that if the fees were wrongfully collected, the Commission must order their refund to the parties that paid them. Retaining them would amount to an unconstitutional taking of property in violation of the Fifth Amendment.

II. SUMMARY OF COMMENTS

The Commission published a notice of Arya's Petition in the Federal Register on April 7, 2000.[1] MCI WorldCom, Inc. ("MCI WorldCom") and AT&T Corp. ("AT&T") submitted opposing comments on April 24, 2000. Neither commenter disputes that the Commission violated the APA

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[1] 65 Fed. Reg. 18334 (April 7, 2000).

by adopting the 8 percent cut-off without explanation. With respect to the refund issue, the commenters supply no authority to rebut Arya's contention that the Commission must refund wrongfully collected USF fees in the wake of the Texas Office of Public Utility Counsel decision. Instead, the commenters merely assert that the Commission need not refund such fees because the Fifth Circuit:

> (1) did not specifically find the Commission lacks jurisdiction to assess the challenged fees (*see* MCI WorldCom Comments at 3); and
>
> (2) did not specifically declare that the Commission's assessment of USF fees prior to November 1, 1999 was "unlawful" (*See* AT&T Comments at 7 note 8).

MCI WorldCom and AT&T's assertions lack foundation in law and defy common sense. They also side-step the stubborn fact that Arya and similarly-situated entities paid excessive USF fees based on their international revenues -- fees that the Texas Office of Public Utility Counsel decision found the Commission had no right to impose in the first place. The Commission must return such fees to the persons who paid them.

A third commenter, Teleglobe USA Inc. ("Teleglobe"), submitted Comments in support of Arya's Petition. Teleglobe correctly relies on National Association of Broadcasters v. FCC, 554 F.2d 1118, 1130 (D.C. Cir. 1976) ("NAB"), for the proposition that the Commission has an obligation to refund fees wrongfully collected pursuant to regulations invalidated by a reviewing court. Moreover, Teleglobe rightfully points out that the Commission could hardly have been surprised by the Fifth Circuit's invalidation of the international revenue component of the USF contribution rules. Commissioner Chong's dissent[2] on the subject, which predicted the rules unduly discriminate against

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[2] *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8766, 9279 (1997) (Chong, Comm'r., dissenting).

primarily international carriers like COMSAT, placed the Commission on notice that its rules were vulnerable to challenge long before the Fifth Circuit invalidated them. *See* Teleglobe Comments at 2.

In sum, none of the commenters disputes that the Commission violated the APA by adopting the 8 percent cut-off without explanation. With respect to the refund issue, MCI WorldCom and AT&T supply no legal justification for retaining monies wrongfully collected pursuant to the rules invalidated by the Fifth Circuit. In contrast, Arya and Teleglobe provide sound legal support for the straightforward proposition that the Commission must refund excessive USF contributions that the Commission had no authority to impose in the first place. Arya's Petition is well-supported in law and common sense, and should be granted.

III. REPLY ARGUMENTS

A. There is no dispute that the Commission violated the APA by adopting the 8 percent cut-off without explanation.

In its Petition, Arya applauded the Commission for adopting a limited international revenues exception to its USF contribution rules in response to the Fifth Circuit's order. However, Arya pointed out that the Commission failed to articulate an explanation for its selection of the 8 percent interstate revenue cut-off, which triggers eligibility for the exception. The failure to articulate an explanation for choosing the 8 percent cut-off figure renders the choice arbitrary and capricious under the APA.[3] The D.C. Circuit's recent decision in U.S. Telephone Ass'n v. FCC is on-point in that

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[3] As Arya stressed in its Petition, it is well-settled that 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.

regard. In that case, the Court reversed and remanded the Commission's selection of a 6.0% productivity offset (or "X-factor) used to adjust price caps for certain regulated access charges. U.S. Telephone Ass'n v. FCC, 188 F.3d 521 (D.C. Cir. 1999). The Court explained that remand was warranted because the Commission "failed to state a coherent theory supporting is choice of 6.0%." Id. At 526. It follows that the Commission's failure to state a coherent theory supporting the 8 percent figure renders that figure legally deficient.

None of the commenters disputes that the Commission violated the APA by failing to explain its rationale for adopting the 8 percent cut-off. Under the circumstances, the Commission should examine the relevant factors and determine whether the 8 percent cut-off or an alternative figure is suitable to avoid the inequity and undue discrimination that led to the Texas Office of Public Utility Counsel remand order. In that regard, it is incumbent on the Commission to publish a reasoned analysis of its decision to enable the regulated community and the courts to understand the grounds for its selection of a cut-off figure.

B. Common sense and well-established principles of administrative law dictate that the Commission should refund excessive USF fees paid by Arya and similarly-situated carriers.

In its Petition, Arya advanced the straightforward proposition that if a fee is collected and is later found to have been wrongfully collected, the fee should be returned to the parties that paid it. Arya pointed out that the common sense approach to refunds is reflected in Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission, 988 F.2d 146 (D.C. Cir. 1993). In that case, the Court held that certain regulations governing the apportionment of nuclear waste disposal fees were arbitrary and

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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").

capricious, and remanded them to the Nuclear Regulatory Commission. In discussing the effect of its remand order, the Court explained that "those firms whose [fee] burden is lower under a new, non-arbitrary, rule should be entitled to refunds of the difference." Id. At 153. It follows that when the Commission adopts new non-arbitrary rules for collecting USF fees based on international revenues, those firms with lower fee burdens under the new rules should be entitled to refunds of the difference.

As Teleglobe pointed out in its comments, the D.C. Circuit faced a similar set of facts in NAB, *supra,* 554 F.2d at 1118, and overturned certain Commission orders denying refunds to broadcasters who paid excessive fees pursuant to a fee schedule invalidated by the Supreme Court in National Cable Television Association v. United States, 415 U.S. 336 (1974) ("NCTA"). Like the Fifth Circuit in Texas Office of Public Utility Counsel, the Supreme Court in NCTA held that certain of the Commission's fee requirements were unlawful, but did not order refunds or otherwise specifically call for the retroactive application of its holding.[4] Under the circumstances, the NAB Court properly applied the NCTA decision retroactively because the Supreme Court did not express any contrary intent, and because the Commission had no basis to retain fees that it lacked authority to impose in the first place. *See* NAB, 554 F.2d at 1122 (holding that "the fees in question were illegally assessed, and thus the refunds of those fees were improperly denied").

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[4] In NCTA, the Supreme Court simply held that a fee schedule that required licensees to pay for the entire cost of regulating community antenna television systems ("CATVs") violated the Independent Offices Appropriations Act ("IOAA"), which authorized agencies to charge fees for government services taking into account the "value [of such services] to the recipient." *See* NCTA, 415 U.S. at 342-43. The Court reasoned that because the public received benefits from CATV regulation, the Commission lacked statutory authority to recoup all the costs of such regulation from licensees. Id. at 343-44. The Court did not order refunds, but rather remanded the matter to the Commission for "further proceedings consistent with this opinion." Id. at 344.

With respect to the issue of retroactivity, the NAB Court's decision falls squarely in line with the controlling law of the Fifth Circuit, which provides that in the absence of "grave disruption or inequity," decisions of Federal Courts are to be given full retroactive effect.[5] Crawford v. Falcon Drilling Co., Inc., 131 F.3d 1120, 1124 (5th Cir. 1997). In Crawford, the Fifth Circuit adopted the following rule on retroactivity articulated by the Supreme Court in Harper v. Virginia Dep't of Taxation:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.

Crawford, 131 F.3d at 1124 (*quoting* Harper v. Virginia Dep't of Taxation, 509 U.S. 86, 97 (1993)).

With respect to the refund issue, the NAB Court explained that the Commission's authority to refund unlawfully collected fees is clear-cut, and is implicit in its power to assess fees in the first place:

> We reject the argument of counsel for AT&T that the FCC has no power to order refunds. . . . Absent some statutory complication or administrative barrier, the power to refund fees that are unlawfully collected is implicit in the power to assess fees. Here, the [statute] has empowered the FCC to prescribe a 'fair and equitable' fee for each of the services its performs . . . a command which would have little meaning if the agency were unable to refund that portion of an already collected fee that had been determined to be unfair and inequitable.

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[5] Neither AT&T nor MCI WorldCom contend that any "grave disruption or inequity" would result from applying Texas Office of Public Utility Counsel retroactively to refund excessive fees paid by primarily international carriers like Arya or Teleglobe. To the extent they raise any such equitable defenses, they do so only as part of their arguments against refunding fees derived from *intrastate* revenues. *See* AT&T Comments at 4 (asserting that $1.6 billion in USF fees derived from *intrastate* revenues would have to be refunded). With respect to excessive fees derived from *international* revenues, the Commission has absolutely no basis to depart from the general rule of retroactivity, which calls for the refund of such fees.

NAB, 554 F.2d at 1122.

Neither MCI WorldCom nor AT&T provide any authority to rebut the common sense reasoning embodied in the foregoing decisions. MCI WorldCom advances the specious position that the Commission is not required to grant refunds because the Fifth Circuit held that the challenged rule was "arbitrary and capricious, not beyond the Commission's jurisdiction." *See* MCI WorldCom Comments at 3. Apparently, MCI WorldCom would have the Commission believe that an agency's obligation to refund fees arises only if a court determines the agency lacks jurisdiction to assess the fees in question. Nothing could be further from the truth. MCI WorldCom supplies no authority in support of its position because none exists. Indeed, the Allied-Signal, Inc. decision provides a concrete example of a case where a Court invalidated a fee apportionment rule on arbitrary and capricious grounds (as opposed to jurisdictional grounds), and explained that refunds would be warranted to compensate firms that paid too much under the invalidated rule. *See* Allied-Signal, Inc., 988 F.2d at 153. Allied-Signal, Inc. thus rebuts MCI WorldCom's argument against refunding fees wrongfully collected from Arya and similarly-situated entities.

AT&T's argument against refunds is equally specious. AT&T asserts that Arya is not entitled to a refund because the Fifth Circuit did not hold that the Commission's rule governing the assessment of international revenues was "unlawful," but rather held that "the Commission had not given an adequate explanation for the rule." *See* AT&T Comments at 7, note 8 (*citing* Texas Office of Public Utility Counsel, 183 F.3d at 435). AT&T misrepresents the Fifth Circuit's holding, which most certainly found the Commission's rule to be unlawful. In discussing the rationale for its remand order, the Court observed that assessing USF fees based on combined interstate and international revenues produced inequitable and discriminatory consequences for primarily international carriers like COMSAT and Arya, who ended up paying USF fees that exceeded their interstate revenues. *See*

Texas Office of Public Utility Counsel, 183 F.3d at 434-35. Under the circumstances, the Court specifically held that the Commission's rule violated its statutory obligation to assess USF fees in an "equitable and non-discriminatory manner." Id. At 435. The Court explained that

> the agency's interpretation of 'equitable and nondiscriminatory,' allowing it to impose prohibitive costs on carriers such as COMSAT, is 'arbitrary and capricious and manifestly contrary to the statute.' . . . COMSAT and carriers like it will contribute more in universal service payments than they will generate from interstate service. Additionally, the FCC's interpretation is 'discriminatory' because the agency concedes that its rule damages some international carriers more than it harms others.

Id. (citations omitted).

The plain wording of the Fifth Circuit's opinion clearly demonstrates that the Court determined that the Commission's USF contribution rules were unlawful as applied to carriers who derive the lion's share of their revenues from international, as opposed to interstate service. AT&T's assertions to the contrary lack support and are entitled to no weight in this proceeding.

C. The commenters do not dispute that retaining wrongfully collected USF fees would amount to an unconstitutional taking of property.

In its Petition, Arya argued that retaining wrongfully collected fees would amount to an unconstitutional taking of property in violation of the Fifth Amendment to the Constitution, which states ". . . nor shall property be taken for public use, without just compensation." U.S. CONST. Amend V. In support of its position, Arya explained that it and other similarly-situated entities have paid excessive USF fees based on international end-user revenues. The imposition of such excessive fees has now been determined to be arbitrary and in violation of the law, yet the Commission and/or the USF fund continues to retain them. Under the circumstances, common sense and a plain reading of the Fifth Amendment dictate that refunds are necessary to avoid an unconstitutional taking.

The commenters have failed to even address Arya's Fifth Amendment argument, much less provide authority supporting a contrary position. As a result, the Commission has no basis to depart from the common sense rule that the Constitution requires federal agencies to return unlawfully acquired funds. In that vein, Arya urges the Commission to follow the reasoning embodied in Horizon Coal Corp. v. United States, 876 F.Supp. 1521 (N.D. Ohio 1993). In that case, the Court held that the Fifth Amendment required the federal government to refund mining reclamation fees wrongfully assessed against Horizon Coal. The Court provided the following analysis in support of its holding:

> The Court finds that it is unnecessary to determine which, if any, statute, provides authority for requiring the government to pay interest on the wrongfully assessed reclamation fees at issue in this case. This case comes under the fifth amendment 'takings' clause which prohibits the taking of private property for public use without just compensation. The constitution itself requires the government to make Horizon Coal completely whole in this instance where the government improperly coerced Horizon Coal, under the threat of the loss of its mining permit, to pay reclamation fees that Horizon coal did not owe. On September 20, 1991, Horizon Coal paid the fees under protest and thereafter unsuccessfully pursued administrative remedies for a refund.
>
> * * * * *
>
> The government took Horizon Coal's property, in the amount of $97,324.23 on September 20, 1991 and has kept the money since then, putting it to public use. This Court has determined that Horizon Coal did not owe any reclamation fees. Therefore, the government was not entitled to assess any such fees in the first place. The fees must be refunded.

Horizon Coal Corp. v. U.S., 876 F.Supp. 1521, 1522 (N.D. Ohio 1993), *aff'd in part, rev'd in part,* 43 F.3d 234 (6th Cir. 1994), *on remand*, 876 F.Supp. 1527 (N.D. Ohio 1994).[6]

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[6] The Sixth Circuit affirmed the District Court's award insofar as it ordered the refund of the principal amount of Horizon Coal's wrongfully assessed reclamation fees, but

Arya urges the Commission to adopt the common sense approach to refunds advanced in Arya's Petition and applied in the Horizon Coal Corp. decision. The Commission collected fees from Arya and similarly-situated entities that it was not authorized to impose in the first place. The Commission should return those fees to the persons who paid them.

IV. CONCLUSION

There is no dispute that 8 percent cut-off for receiving the benefit of the limited international revenues exception was arbitrarily adopted in violation of the APA. With respect to the issue of refunds, common sense and judicial precedent dictate that the Commission must correct its prior wrongful collection of USF contributions and refund the difference between what was wrongfully collected and what should have been collected. MCI WorldCom and AT&T have provided no justification for a contrary result. Such a result is proper, permissible, and is well within the Commission's power. Moreover, retaining wrongfully collected fees would amount to an unconstitutional taking that cannot be permitted.

Respectfully submitted,

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reversed the award insofar as it ordered the payment of interest. *See* Horizon Coal Corp. v. U.S., 876 F.Supp. 1527, 1528 (N.D. Ohio 1994).

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply of Arya International Communications Corporation to Comments Opposing Petition For Reconsideration was served by first-class mail postage prepaid this 9th day of May 2000, on the following:

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