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

In the Matter of)
Federal-State Joint Board on)
Universal Service)
Petition for Forbearance from)
Enforcement of Sections 54.709 and 54.711)
of the Commission's Rules by)
Operator Communications, Inc.)
d/b/a Oncor Communications, Inc.)

CC Docket No. 96-45

MEMORANDUM OPINION AND ORDER

Adopted: February 9, 2001

Released: February 13, 2001

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

I. INTRODUCTION

1. In this Order, we deny the petition of Operator Communications, Inc. d/b/a Oncor Communications, Inc. (Oncor) to forbear, pursuant to section 10 of the Communications Act of 1934, as amended (the Act), from the enforcement of the Commission's rules requiring that contributions to the federal universal service support mechanisms be based on carrier revenue from the prior year. Specifically, we conclude that Oncor's petition for forbearance does not satisfy each of the statutory criteria established in section 10.

II. BACKGROUND

A. The Act

2. Section 10. Section 10 requires the Commission to forbear from applying any regulation or any provision of the Act to telecommunications carriers or telecommunications services, or classes thereof, if the Commission determines that: (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable, and are not unjustly or unreasonably discriminatory; (2)

1 Section 10 is codified at 47 U.S.C. § 160.

2 Operator Communications, Inc. d/b/a Oncor Communications, Inc., Petition for Forbearance in CC Docket No. 96-45, filed Nov. 17, 1999 (Oncor Petition).

enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest.³ With regard to the public interest determination required by section 10(a)(3), section 10(b) states that, “[i]f the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest.”⁴

3. Section 254. In section 254, 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.⁵ Section 254 requires that “[e]very telecommunications carrier that provides interstate telecommunications service 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.”⁶ In implementing the requirements of section 254, the Commission adopted rules setting forth the specific method of computation for universal service contributions.⁷ The Commission determined, *inter alia*, to base contributions on interstate end-user telecommunications revenues.⁸ To collect information from contributors about end-user telecommunications revenues, the

³ 47 U.S.C. § 160(a).

⁴ 47 U.S.C. § 160(b).

⁵ 47 U.S.C. § 254.

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

⁷ *Federal-State Joint Board on Universal Service*, Report and Order, CC Docket No. 96-45, 12 FCC Rcd 8776 (1997), as corrected by *Federal-State Joint Board on Universal Service*, Erratum, CC Docket No. 96-45, FCC 97-157 (rel. June 4, 1997) *aff'd in part, rev'd in part, remanded in part sub nom. Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir, 1999) *cert. denied* 2000 WL 684656 (U.S. Sup. Ct. May 30, 2000) (*First Report & Order*). *See also* *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*, Report and Order and Second Order on Reconsideration, CC Docket No. 96-45, 12 FCC Rcd 18400 (1997) (*Second Order on Reconsideration*). *See also* 47 C.F.R. §§ 54.709, 54.711. Section 54.709(a) provides, in relevant part, that contributions to the universal service support mechanisms shall be based on contributors' end-user interstate and international telecommunications revenues and a contribution factor determined quarterly based on information submitted by the Administrator of the fund, the Universal Service Administrative Company (USAC). 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 mechanism to total end-user telecommunications revenues. Thus, contributions are the product of a contributor's end-user telecommunications revenues multiplied by a contribution factor that is equal to the ratio of total projected quarterly expenses of universal service support to total end-user telecommunications revenues.

⁸ *First Report & Order*, 12 FCC Rcd at 9206, para. 844. The Commission concluded that the end-user telecommunications revenues method is competitively neutral, easy to administer, and eliminates some economic distortions associated with gross telecommunications revenues net of payments to other carriers.

Commission adopted a rule requiring contributors to submit a Universal Service Worksheet at regular intervals.⁹ The Worksheet explains that contributions are based on prior year end-user telecommunications revenues.¹⁰

B. The Oncor Petition for Forbearance and the Commission's *Further Notice*

4. On November 17, 1999, Oncor filed a petition for forbearance from enforcement of sections 54.709 and 54.711 of the Commission's rules. Oncor contends that, under the existing contribution rules, which assess carrier contributions based on prior year revenues, carriers with declining revenues must allocate a greater percentage of their current revenues to universal service contributions than carriers with stable or increasing revenues. Specifically, Oncor requests that the Commission forbear from applying its universal service contribution rules to Oncor's end-user telecommunications revenues for the years 1998, 1999, and 2000.¹¹ If the Commission grants such forbearance, then Oncor proposes that its universal service contributions for the years 1998 and 1999 be based on actual revenues for those years, and that its year 2000 universal service contributions be based on estimated revenues for the year 2000.¹² Finally, Oncor requests that, at the termination of the requested period of forbearance (*i.e.*, the

⁹ *Second Order on Reconsideration*, 12 FCC Rcd at 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. . . .") See *Second Order on Reconsideration*, 12 FCC Rcd at 18424, para. 43, 18442, para. 80, 18501-02, Appendix C. The Commission adopted the Worksheet and attached it as Appendix C to the *Second Order on Reconsideration*. On August 4, 1997, the Commission announced that it had received Office of Management and Budget (OMB) approval, and officially released the Worksheet. *FCC Announces Release of Universal Service Worksheet, FCC Form 457*, CC Docket Nos. 97-21, 96-45, Public Notice, DA 97-1671 (rel. Aug. 4, 1997). Subsequent to its issuance of the *Second Order on Reconsideration*, in an effort to reduce administrative burdens on contributors, the Commission consolidated the reporting requirements for the universal service mechanisms, the Telecommunications Relay Service Fund, the cost recovery mechanism for administration of the North American Numbering Plan, and the cost recovery mechanism for administration of long-term number portability into the FCC Form 499 Telecommunications Reporting Worksheet. *1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Services, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms*, CC Docket No. 98-171, Report and Order, FCC 99-175 (1999) (*TRW Order*). See also *Common Carrier Bureau Announces Release of September Version of Telecommunications Reporting Worksheet (FCC Form 499-S) for Contributions to the Universal Service Support Mechanisms*, CC Docket No. 98-171, Public Notice, DA 99-1520 (OMB 3060-0855) (rel. July 30, 1999), and see *Common Carrier Bureau Announces Release of Telecommunications Reporting Worksheet (FCC Form 499-A) for April 1, 2000 Filing by All Telecommunications Carriers*, CC Docket No. 98-171, Public Notice, DA 00-471 (rel. Mar. 1, 2000).

¹⁰ Data for the period from January 1 through June 30 of each year, filed September 1 of that same year, is used to calculate universal service support contributions for January through June of the following year. Data filed on April 1 for the entire prior calendar year is used to calculate universal service support contributions for July through December of the same year in which the data was filed. USAC bases the July through December contributions on data for the second half of the prior calendar year. USAC calculates second half data as annual data minus the previously filed first half data. See FCC Forms 499-S and 499-A.

¹¹ Oncor Petition at 1.

¹² Oncor Petition at 3-4.

end of the year 2000), the Commission evaluate whether the forbearance period should be continued for an additional period of time.¹³

5. On October 12, 2000, the Commission released a *Further Notice* seeking comment on various proposals to adopt a universal service contribution methodology based on current-year revenues.¹⁴ In addition, the Commission extended by 90 days the deadline for resolving Oncor's petition for forbearance.¹⁵

III. DISCUSSION

6. We conclude that Oncor's petition for forbearance does not satisfy the statutory criteria set forth in section 10. Oncor requests that we forbear from our existing contribution rules and that the Commission craft an alternative methodology to calculate its contributions based on current revenues. As such, Oncor's petition appears to ask for two forms of relief, forbearance from the current contribution rule and a rulemaking to create an alternative contribution rule.¹⁶ We now review Oncor's forbearance request in this context.

7. To the extent that Oncor seeks forbearance relating to its universal service contributions in 1998 and 1999, we note that Oncor entered into a Consent Decree with the Commission on May 15, 2000, which requires payment in full, by December 31, 2001, of Oncor's accumulated delinquency to the universal service fund.¹⁷ In the Consent Decree, Oncor waived its right to challenge or contest the validity of the terms of the Consent Decree.¹⁸ By that action, Oncor effectively withdrew its request for forbearance for the years 1998 and 1999. We find no reason to disturb the terms of that agreement. Even in the absence of the Consent Decree, however, we conclude that the petition for forbearance does not satisfy the statutory criteria set forth in section 10.

8. First, we do not find that enforcement of the Commission's universal service

¹³ Oncor Petition at 4.

¹⁴ *Federal-State Joint Board on Universal Service; Petition for Forbearance from Enforcement of Sections 54.709 and 54.711 of the Commission's Rules by Operator Communications, Inc. d/b/a Oncor Communications, Inc.*, Further Notice of Proposed Rulemaking and Order, CC Docket No. 96-45, FCC 00-359 (rel. Oct. 12, 2000) (*Further Notice*).

¹⁵ *Further Notice* at para. 33.

¹⁶ The Commission has initiated a rulemaking proceeding to address the issues raised in Oncor's petition. See *Further Notice*.

¹⁷ *Operator Communications, Inc. Apparent Liability for Forfeiture*, Order, ENF-98-07, 15 FCC Rcd 9674 (2000) (Consent Decree).

¹⁸ Consent Decree, 15 FCC Rcd at 9679 (waiving "any and all rights [Oncor] may have to seek administrative or judicial reconsideration, review, appeal or stay or to otherwise challenge or contest the validity of this Consent Decree and the Order adopting this Consent Decree, provided the Order adopts the Consent Decree without change, addition, or modification").

contribution rules is not necessary to ensure that charges, practices, classifications, or regulations are just and reasonable, and are not unjustly or unreasonably discriminatory, as required by section 10(a)(1). As an initial matter, we believe that to grant Oncor or other similarly situated carriers forbearance from the universal service contribution rules, in the absence of an alternative contribution methodology, would enable such carriers to avoid entirely the obligation to contribute to the universal service mechanisms. By relieving Oncor, and other similarly situated carriers that have declining revenues, of the obligation to contribute to the universal service mechanisms, forbearance in this instance would create a contribution methodology that unreasonably discriminates against those carriers with stable or increasing revenues.

9. Moreover, we conclude that forbearing from requiring carriers with declining revenues to contribute to the universal service fund on the basis of the prior year's revenues would be contrary to section 254(d) and the universal service principles established in section 254(b).¹⁹ Specifically, the statute requires every telecommunications carrier that provides interstate telecommunications services to contribute, on an equitable and nondiscriminatory basis, to the universal service fund. In addition, the Commission established the principle of competitive neutrality to ensure that the universal service support mechanisms and rules neither unfairly favor nor disfavor one provider or technology over another.²⁰ The existing contribution methodology does not discriminate against one class of carrier or favor one market segment over another. We conclude that by exempting Oncor, or other similarly situated carriers with declining revenues, from having to comply with the current contribution rule, while continuing to require carriers with stable or increasing revenues to comply with the rule, would result in a discriminatory and inequitable mechanism. Oncor, and other carriers with declining revenues, would benefit from an unfair competitive advantage because they would not incur the expenses incurred by other carriers still required to contribute to the universal service fund.

10. We disagree with Oncor's assertion that, absent forbearance, application of the Commission's universal service contribution rules could cause customers of Oncor and other similarly situated carriers that serve declining market segments to pay rates that may not be just and reasonable, or that may be unreasonably discriminatory.²¹ Under the current contribution methodology, all telecommunications carriers providing interstate telecommunications services are required to contribute to the universal service fund an equitable, *pro rata* share of the total projected quarterly expenses. This rule applies equally to carriers with both increasing and decreasing revenues from one year to the next. We are not persuaded that Oncor's obligation to

¹⁹ 47 U.S.C. § 254(b), (d).

²⁰ *First Report & Order*, 12 FCC Rcd at 8801, para 47. In addition to the universal service principles specified in the 1996 Act, Congress directed that the Joint Board and the Commission shall be guided by such other principles that they determine to be consistent with the Act, and necessary and appropriate for the protection of the public interest, convenience, and necessity. 47 U.S.C. § 254(b)(7). At the recommendation of the Federal-State Joint Board on Universal Service, the Commission adopted competitive neutrality as an additional principle for universal service. *First Report & Order*, 12 FCC Rcd at 8801-03.

²¹ Oncor Petition at 5-6 (contending that under the current mechanism, Oncor will have to significantly increase rates to its customers to cover its universal service contributions, while carriers with stable revenues would not require similar increases).

contribute to the universal service fund on the basis of its prior year's revenues will necessarily result in unjust or unreasonable rates. Carriers are not precluded from anticipating the possible effects of declining revenues in the following year and reserving a portion of their current revenues to meet the contribution obligations that arise from those current revenues in the following year.

11. Second, we cannot conclude that enforcement of the Commission's contribution rules is not necessary for the protection of consumers, as required by section 10(a)(2) of the Act. We agree with Oncor's assertion that forbearance from the existing contribution rules will not interfere with the amount of funding available for universal service programs, because the cost of the universal service mechanism would simply be borne by those carriers to which forbearance would not apply (*i.e.*, those with stable or increasing interstate, end-user telecommunications revenues).²² We conclude, however, that such a redistribution of the contribution obligation to only those carriers with stable or increasing revenues would result in increased charges to such carriers' customers to recover the increased universal service obligation.²³

12. Finally, we cannot conclude that granting Oncor's forbearance request is consistent with the public interest, as required by section 10(a)(3).²⁴ Section 254(d) requires that the Commission establish a universal service contribution mechanism that is "specific, predictable and sufficient" to preserve and advance universal service.²⁵ As discussed above, in implementing section 254, the Commission adopted rules setting forth the specific method of computation for universal service contributions. To grant forbearance from the contribution rules to carriers whose revenues decline from one year to the next creates the potential for uncertainty and confusion in the administration of the fund. The Act directs the Commission to ensure that the mechanisms are specific and predictable, and that all telecommunications providers of interstate telecommunications service contribute on an "equitable and nondiscriminatory" basis. This mandate is essential to the preservation and advancement of universal service to ensure that consumers who rely upon universal service funding, including low-income consumers and those residing in rural and high-cost areas, may continue to receive telecommunications service at affordable rates.²⁶

13. Moreover, we disagree with Oncor's argument that forbearance from enforcement of sections 54.709 and 54.711 of the Commission's rules will promote competition in the

²² Section 54.709 provides that the quarterly universal service contribution factor shall be based on the ratio of total projected quarterly expenses of the universal service support mechanism to total end-user telecommunications revenues. 47 C.F.R. § 54.709.

²³ Although the Commission does not mandate the manner in which carriers may recover their universal service contributions, most carriers elect to recover their contribution amounts through line-items on the consumer's bill. *See First Report & Order*, 12 FCC Rcd at 9210-11, para. 853.

²⁴ 47 U.S.C. § 160(a)(3).

²⁵ 47 U.S.C. § 254(d). *See also* 47 U.S.C. § 254(b)(5).

²⁶ 47 U.S.C. §§ 254(b)(1),(d).

telecommunications market by alleviating the effects of the current contribution methodology on carriers serving declining market segments.²⁷ The assessment of contribution obligations based on carriers' revenues from the prior year applies equally to all telecommunications carriers, regardless of whether those carriers are experiencing revenue increases or decreases. As the telecommunications market becomes increasingly competitive, all carriers face the possibility of such revenue fluctuations from year to year. We are not, therefore, convinced that forbearing from the obligation to contribute on the prior year's revenues for only Oncor and other similarly situated carriers would promote competition.

14. We acknowledge, however, that significant recent developments in the interstate telecommunications marketplace, such as the entry of the Regional Bell Operating Companies (RBOCs) into the interexchange services market under section 271 of the Act, warrant further examination of the contribution methodology for the industry as a whole, not just those carriers with declining revenues. The Commission initiated a rulemaking proceeding last fall to seek comment from industry, state commissions, consumer groups, and other interested parties, on ways to ensure that, in an increasingly competitive marketplace, the assessment of contributions to the federal universal service support mechanisms remains competitively neutral, equitable, and nondiscriminatory.²⁸ As noted above, Oncor's petition requests two forms of relief: first, that we forbear from our existing contribution rules; and second, that the Commission craft an alternative methodology based on current revenues to calculate its contributions. In this Order, we address Oncor's request for forbearance. Oncor's request that the Commission consider an alternative contribution rule is among the proposals contained in the Commission's rulemaking proceeding to address these issues on an industry-wide basis. We believe that this pending rulemaking presents the appropriate opportunity for the Commission to consider and implement changes to the universal service contribution methodology for all telecommunications carriers in a competitively neutral, non-discriminatory, and equitable manner, while preserving and advancing universal service. We intend to issue a decision in that proceeding in the near future.²⁹

²⁷ Oncor Petition at 8-10 (alleging that under the current contribution mechanism, carriers serving the diminishing "0+ payphone market" segment must allocate a greater percentage of their current revenues to universal service contributions than such carriers would allocate if contributions were based on current revenues).

²⁸ See *Further Notice*.

²⁹ Oncor's petition will be added to the Commission's rulemaking docket in this proceeding and considered in conjunction with the comments filed therein.

IV. ORDERING CLAUSE

15. Accordingly, IT IS ORDERED, pursuant to sections 10 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 160 and 254, that the Petition for Forbearance filed November 17, 1999 by Operator Communications, Inc. d/b/a Oncor Communications, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas
Secretary

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

Re: Federal-State Joint Board on Universal Service, Petition for Forbearance from Enforcement of Sections 54.709 and 54.711 of the Commission's Rules by Operator Communications, Inc. d/b/a Oncor Communications, Inc., Memorandum Opinion and Order, CC Docket No. 96-45.

I agree with the Commission's denial of Oncor's forbearance petition. I write separately to emphasize that I believe the problem identified in Oncor's petition is a serious one. Because carriers contribute to the universal service fund based on the prior year's revenues, those carriers whose revenues have declined find themselves paying a higher percentage of their current revenues to universal service contributions than do carriers with stable or increasing revenues. In my view, end-user surcharges offer a promising solution to this problem, and I hope that the Commission addresses this issue in the very near future.