BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	
Federal-State Joint Board on Universal Service	CC Docket No. 96-45
1998 Biennial Regulatory Review—Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms	CC Docket No. 98-171
Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990	CC Docket No. 90-571
Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size	CC Docket No. 92-237 NSD File No. L-00-72
Number Resource Optimization	CC Docket No. 99-200
Telephone Number Portability	CC Docket No. 95-116

COMMENTS OF LORAL SPACE & COMMUNICATIONS LTD.

Broadly, Loral Space & Communications Ltd. ("Loral") supports the Commission's goal of streamlining contributor reporting requirements associated with universal service.[1] At the same time, the Commission must be careful to ensure that the universal service system continues to further the goals outlined in Section 254 of the Telecommunications Act of 1996 ("Act") and that it continues to comply with relevant legal limits.[2] Specifically, the Commission should

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1 See Federal-State Joint Board on Universal Service, *et al.*, CC Dkt. Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, NSD File No. L-00-72, *Notice of Proposed Rulemaking* (rel. May 8, 2001) (FCC 01-145) ("*Universal Service NPRM*" or "the NPRM").

2 See Texas Off. of Pub. Util. Couns. v. FCC, 183 F.3d 393 (5th Cir. 1999) ("*TOPUC*").

increase the threshold percentage of the international (or "eight percent") exception to ensure that universal service contributions continue to conform with the Act's requirements.

I. THE THRESHOLD PERCENTAGE FOR THE INTERNATIONAL EXCEPTION MUST BE INCREASED IN ORDER TO COMPLY WITH THE ACT'S REQUIREMENTS AND THE FIFTH CIRCUIT'S RULING IN *TEXAS OFFICE OF PUBLIC UTILITY COUNSEL*.

Section 254 of the Act authorizes the Commission to require carriers and other providers of interstate telecommunications to "contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established . . . to preserve and advance universal service."[3] Although Section 254 limits universal service *contributors* to those that provide interstate telecommunications, the Commission ruled in 1997 that universal service *contributions* should be assessed on a contributor's interstate and international revenues.[4] As a result, even a minimal amount of interstate revenue generated by a primarily international provider would cause that entity to be assessed on both its interstate and international revenues. The Commission found that this outcome was equitable because international providers benefit from universal service when they terminate or originate telecommunications on the domestic public switched telephone network.[5] The Commission further noted that such a rule would minimize the disparity among international providers because most international revenues are earned by entities that also provide interstate service and because the rule would treat foreign-owned providers of interstate telecommunications the same as U.S.-owned providers.[6]

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[3] 47 U.S.C. § 254(d).

[4] See Federal-State Joint Board on Universal Service, 12 FCC Rcd. 8776, ¶ 779 (1997), *aff'd in part, rev'd in part, remanded in part sub nom.* Texas Off. of Pub. Util. Couns. v. FCC, 183 F.3d 393 (5th Cir. 1999).

[5] Id.

[6] Id.

This aspect of the Commission's decision was challenged by COMSAT in *TOPUC*.[7] COMSAT, a provider of interstate and international telecommunications services, argued that the Commission's inclusion of international revenues was inequitable because it required COMSAT to contribute more to the universal service fund than it was generating in interstate revenues. COMSAT maintained that "this result . . . violates the equitable language of the statute."[8] Also, because it was being treated differently from other providers of international service, COMSAT contended that the Commission had violated Section 254(d)'s nondiscrimination requirement.

The Fifth Circuit agreed, finding that the Commission's "interpretation of 'equitable and nondiscriminatory,' [which] allow[ed] it to impose prohibitive costs on carriers such as COMSAT, is 'arbitrary and capricious and manifestly contrary to the statute.' "[9] The court found that the Commission had failed to offer a reasonable explanation of how requiring COMSAT and other companies to "incur a loss to participate in interstate service" satisfied the "equitable" requirement of the statute.[10] In addition, the court found the Commission's inclusion of international revenues in the assessable contribution base was discriminatory because it "damages some international carriers like COMSAT more than it harms others."[11] The Fifth Circuit thus reversed and remanded that portion of the Commission's order.

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7 183 F.3d 393 (5th Cir. 1999).

8 Id. at 434.

9 Id. at 435–36 (citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984)).

10 Id. at 435.

11 Id.

On remand, the Commission modified its regulations to adopt the eight percent rule.[12] Under that rule, a telecommunications provider would not have to contribute based on its international end-user telecommunications revenues unless its interstate end-user telecommunications revenues exceeded eight percent of its combined international and interstate telecommunications revenues.[13] This rule was designed to ensure that a provider's international revenues would be excluded from its assessable contribution base where inclusion of those revenues would result in that provider's universal service contribution exceeding the amount of its interstate telecommunications revenues.[14] The Commission found that the eight percent rule would alleviate the equitable and nondiscriminatory concerns raised by the Fifth Circuit.[15] In addition, because providers would know as soon as they prepared their universal service worksheets whether they fit under the eight percent exception, the Commission held that this "bright-line rule" met the Act's requirement that the contribution mechanism be specific and predictable.[16] The Commission found this approach to be superior to comparing the provider's actual contribution to its interstate revenues to determine whether its international revenues would be exempt from assessment because the provider's eligibility would depend on the level of the contribution factor, which fluctuated from quarter to quarter.[17]

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12 See Federal-State Joint Board on Universal Service; Access Charge Reform, 15 FCC Rcd. 1679, ¶ 19 (1999) ("*16th Order on Reconsideration*").

13 See id.

14 Id.

15 Id. ¶¶ 19-23.

16 Id. ¶ 24.

17 Id. ¶ 25.

When the universal service fund was first established, the proposed contribution factor for first quarter 1998 was 1.7% for interstate and international revenues.[18] At the time that the Commission adopted the eight percent rule, the factor had increased to 5.9%.[19] The Commission indicated at that time that it did not anticipate that the contribution factor would exceed eight percent "in the near future."[20] The upward trend has nonetheless continued unabated. Today, at almost seven percent,[21] the factor is fast approaching the amount of the current exception and may reach or exceed that threshold percentage within the next few quarters. In light of this trend, the Commission sought comment in the NPRM on whether to increase the percentage threshold for providers to qualify for the international revenue exception.[22]

To the extent that the Commission continues to believe that it is appropriate to include a provider's international revenues in its assessable contribution base, Loral submits that the percentage threshold for those revenues must be increased. Because the exception is intended to address the concerns raised by the court in *TOPUC*, failure to increase the threshold would resurrect the same issues underlying COMSAT's initial challenge of the Commission's treatment of international revenues. Specifically, to the extent that the contribution factor overtakes the eight percent rule, the Commission's rule will result in companies incurring a loss to participate in the interstate services market, an inequitable and discriminatory outcome under the Fifth

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18 *Proposed First Quarter Universal Service Contribution Factors*, CC Dkt. No. 96-45, Public Notice at 3 (rel. Nov. 13, 1997) (DA 97-2392) (also setting a separate contribution factor of 0.45% when intrastate revenues were included in addition to interstate and international).

19 *Universal Service NPRM* ¶ 32.

20 Id.

21 Two weeks ago, bureau staff proposed a universal service contribution factor of 6.9% for the third quarter of 2001. *Proposed Third Quarter 2001 Universal Service Contribution Factor*, CC Dkt. No. 96-45, Public Notice at 3 (rel. June 8, 2001) (DA 01-1384).

22 *Universal Service NPRM* ¶ 32.

Circuit's ruling. Indeed, even under the current rule, a number of companies with interstate revenues greater than eight percent of total revenues will no doubt incur an economic loss to provide interstate services. Moreover, as the contribution factor approaches the eight percent threshold, providers will not "know with certainty" whether they will owe more in universal service contributions than they will earn in interstate revenues until the actual contribution factor is adopted. The failure to set a higher threshold will raise, at a minimum, the same issues regarding specificity and predictability that caused the Commission to decide on the eight percent rule in the first place.

In order to ensure that the eight percent rule does not violate the Fifth Circuit's mandate, the Commission must increase the threshold percentage for the international exception to a level sufficient to "provide[] a margin of safety to account for usual fluctuations in the contribution factor from quarter to quarter" and to ensure that contributors will be able to "know with certainty whether they qualify for the limited international exception."[23] When it selected the eight percent limit, the Commission recognized that significant increases in the contribution factor, such as have occurred over the past two years, would likely result in the eight percent rule being adjusted "to a more appropriate level."[24] Unless the Commission acts to increase the percentage threshold at which international revenues are included in a provider's contribution base, its rules will again run afoul of the Fifth Circuit's mandate. The Commission should act expeditiously to ensure that this does not occur.

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23 *16th Order on Reconsideration* ¶ 19 n.56. As noted, the Commission has previously held that "[a] rule using the contribution factor to determine eligibility for the limited international exception . . . would not be as specific and predictable as the 8 percent rule because of the usual quarterly fluctuations in the contribution factor." Id.

24 Id.

II. CONCLUSION

With each quarter, the universal service contribution factor comes closer to the eight percent limit established in response to *TOPUC,* making it more likely that telecommunications providers may be required to contribute an amount greater than their interstate revenues. For the foregoing reasons, Loral respectfully requests that the Commission adopt rules to guard against contributors to the universal service fund being forced to pay more in contributions than they earn in interstate revenues and to ensure that the Commission's universal service mechanism remains specific and predictable.

Respectfully submitted,

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