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November 15, 2004

John A. Rogovin, General Counsel
Office of the General Counsel
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: Letter to the Honorable John E. Ott dated August 20, 2004
Martha Self, et al. v. BellSouth Mobility, Inc., CV 98-JEO-2581-S

Dear Mr. Rogovin:

Cingular Wireless LLC ("Cingular"), the successor-in-interest to BellSouth Mobility Inc ("BMI"), has reviewed your letter sent to the Honorable John E. Ott, United States Magistrate Judge for the United States District Court for the Northern District of Alabama, dated August 20, 2004 (the "OGC Letter"), in response to Judge Ott's inquiry to Chairman Powell regarding the status of Commission action on the Petition for Reconsideration and Clarification of BellSouth Corporation ("BellSouth") filed December 6, 1999 in CC Docket Nos. 96-45 and 96-262 (the "Petition").[1] Cingular appreciates that the OGC Letter addressed the cost recovery issue and indicated that the Commission would resolve the retroactivity issue by year's end.[2]

Because the *Self* litigation is moving forward, however, Cingular requests that the OGC or the Commission in its forthcoming order make the conclusion reached in the OGC Letter crystal clear: specifically, that CMRS providers have always been authorized to recover federal universal service fund ("USF") contributions through interstate as well as intrastate rates, and

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[1] A copy of the Petition is attached. BellSouth filed the Petition on BMI's behalf as a protective measure to ensure that it would be reimbursed by the Commission's Universal Service Administrative Company in the event that the *Self* court (or any other court of competent jurisdiction) ruled that monies collected pursuant to Commission rules must be refunded to customers. BellSouth also filed a protective request for refund with USAC on December 6, 1999, which is currently being held in abeyance. *See* Petition, Attachment (Letter from David G. Frolio, BellSouth, to Cheryl Parrino, USAC, dated Dec. 9, 1999).

[2] The OGC Letter states that the Commission has not yet acted on one of the issues raised in the Petition – whether the Fifth Circuit's mandate in *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) ("*Texas Office*"), "required the FCC to apply those changes retroactively." OGC Letter at 3-4. The OGC Letter states that this issue should be resolved by the end of the year. *Id.*

that the Fifth Circuit's *Texas Office* decision had no effect on this long-held position because it did not involve the issue of CMRS providers' cost recovery.[3]

In its Petition, BellSouth requested that the Commission, in light of the *Self* litigation, "reaffirm its policy that *CMRS* providers are permitted to recover their universal service contributions through charges associated with all of their services, both in the past and the future."[4] The OGC Letter confirms that the Commission expressly "permit[ted] CMRS providers to recover their contributions through rates charged for all their services."[5] The Commission relies on the *Fourth Reconsideration Order*, where it held that "[b]ecause section 332(c)(3) of the Act alters the 'traditional' federal-state relationship with respect to CMRS by prohibiting states from regulating rates for intrastate commercial mobile services, allowing recovery through rates on intrastate as well as interstate CMRS services would not encroach on state prerogatives" and that "CMRS providers [may] recover their contributions through rates charged for *all* their services."[6]

OGC also discussed the 2002 and 2003 Orders in which the Commission amended its rules to limit the extent to which carriers are permitted to recover federal USF contributions via a line-item charge on end-user customers' bills, concluding that those Orders "address and provide an answer to th[is] second issue raised in the [Petition]."[7] Specifically, footnote 131 of the *2002 Order*, cited in the OGC Letter, states that:

> For local exchange carriers, the subscriber line charge represents the interstate portion of the bill. For interexchange carriers, all charges associated with interstate calling are interstate. For CMRS providers, the portion of the total bill that is deemed interstate will depend on whether the carrier reports actual revenues or utilizes the safe harbor. For wireless telecommunications providers that avail themselves of the interim safe harbors, the interstate

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[3] An original and two copies of the instant filing are hereby submitted. A copy of this letter is being filed under separate cover in CC Docket Nos. 96-45 and 96-262 in accordance with Section 1.1206(b) of the Commission's rules, 47 C.F.R. § 1.1206(b).

[4] Petition at 14 (emphasis added). Note that the plaintiff in this litigation filed an amended complaint on November 1, 2004, in which it reiterated its early arguments explicitly relying on the Fifth Circuit's decision. Plaintiff asserts, among other things, that the defendants "wrongfully assess[ed] and collect[ed] money from plaintiff and other class members for reimbursement of contributions made to the [federal universal service fund] based on revenues derived from ... intrastate cellular telephone usage and service which plaintiff ... [was] not required or obligated to pay and that defendants were not entitled to collect." *Martha Self v. BellSouth Mobility, Inc. et al.*, Civil Action No. 98-JEO-2581S, Plaintiff's Amended Complaint, at 3 ¶ 5, and 12 ¶ 26 (N.D. Ala. filed Nov. 1, 2004).

[5] *See* OGC Letter at 2 and Petition at 13-14 (both citing *Federal-State Joint Board on Universal Service*, 13 F.C.C.R. 5317, 5489 ¶ 309 (1997) ("*Fourth Reconsideration Order*")).

[6] *Fourth Reconsideration Order* at 5489, ¶ 309 (emphasis added).

[7] *See* OGC Letter at 2-3.

> telecommunications portion of the bill would equal the relevant safe harbor percentage *times the total amount of telecommunications charges on the bill.*[8]

The Commission reiterated this holding in the *2003 Order*, confirming that CMRS providers may "recover amounts *from all of their customers* based on" either a safe harbor or company specific percentage of reported interstate revenues.[9]

The highlighted language plainly reaffirms the Commission's determination in the *Fourth Reconsideration Order*. Unlike wireline LECs and IXCs, which distinguish between interstate and intrastate charges, the Commission explained that it is the "total amount of telecommunications charges on the bill" that serves as a basis for determining a CMRS provider's total line item charge for USF cost recovery.[10]

The OGC Letter, however, also cites to other provisions of the 2002 and 2003 Orders that address different issues, as well as the Fifth Circuit's decision.[11] As demonstrated in some detail in the pending Petition, the court did not address cost recovery issues in the CMRS context, but rather left the *Fourth Reconsideration Order* intact.[12] The court's only discussion of limiting carrier cost recovery to interstate rates related to states' authority to regulate wireline carriers under Section 2(b) of the Communications Act. Section 332(c)(3) expressly carves out CMRS providers from Section 2(b).[13] Thus, we believe the OGC Letter's reference to *Texas Office* was cited for background purposes only.

To ensure that there is no uncertainty as to OGC's intended conclusion, OGC or the Commission should expressly and clearly confirm in a subsequent letter or order that CMRS providers have always been authorized to recover federal USF contributions through both interstate and intrastate rates and *Texas Office* did not affect that conclusion. An expeditious response would be appreciated because the *Self* case is now proceeding ahead.

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8 *Federal-State Joint Board on Universal Service*, 17 F.C.C.R. 24952, 24978 ¶ 51 n.131 (2002) (emphasis added) ("*2002 Order*"), *aff'd* 18 F.C.C.R. 1421 (2003) ("*2003 Order*").

9 *2003 Order* at 1423, ¶¶ 7-8 nn. 24 and 26 (emphasis added).

10 Moreover, nowhere in those Orders does it appear that the Commission expressly overturns the policy adopted in the *Fourth Reconsideration Order* permitting CMRS providers to recover federal USF contributions through interstate and intrastate rates.

11 *See* OGC Letter at 2.

12 *See* Petition at 14.

13 *See id.* at 13-15 (discussing in detail the limited scope of the Fifth Circuit's decision).

If there are any questions, please contact undersigned counsel or David G. Richards of Cingular at (404) 236-5543.

Respectfully submitted,

L. Andrew Tollin

cc: Honorable John E. Ott
David G. Richards, Cingular
All parties of record

ATTACHMENT

DOCKET FILE COPY ORIGINAL

ORIGINAL

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

PETITION FOR RECONSIDERATION AND CLARIFICATION OF BELLSOUTH CORPORATION

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

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

To: The Commission

PETITION FOR RECONSIDERATION AND CLARIFICATION OF BELLSOUTH CORPORATION

Pursuant to Section 1.429(d) of the Commission's rules, 47 C.F.R. § 1.429(d), BellSouth Corporation ("BellSouth"), on behalf of its wholly-owned subsidiaries BellSouth Telecommunications ("BST") and BellSouth Cellular Corp. ("BSCC"), and the affiliates through which they provide service, hereby seeks reconsideration and clarification of the Commission's *Remand Order* in CC Docket 96-45 implementing the decision of the United States Court of Appeals for the Fifth Circuit in *Texas Office of Public Utility Counsel v. FCC.*[1]

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[1] *Federal-State Joint Board On Universal Service*, CC Docket No. 96-45, *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 No. 96-262*, FCC 99-290 (rel. Oct. 8, 1999), 64 Fed. Reg. 60,349 (Nov. 5, 1999) ("*Remand Order*"); *see Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) ("*Texas Office of Public Utility Counsel*").

SUMMARY

As explained in the *Remand Order*, "the court found that the Commission had exceeded its jurisdictional authority by assessing contributions for [the schools and libraries and rural health care] programs based, in part, on the intrastate revenues of universal service contributors."[2] The Commission then went on to order only prospective — and not retroactive — implementation of this part of the court's mandate. The court's decision does not speak directly to the issue of whether refunds are due for the period immediately preceding the issuance of the court's mandate, although a class action suit against BSCC's wholly-owned affiliate BellSouth Mobility Inc and a filing by Pan Am Wireless on November 10, 1999 raise this issue.

The Fifth Circuit's jurisdictional ruling raises a serious unresolved question whether the Commission and USAC have authority to retain the funds assessed for USF on intrastate revenues prior to the court's ruling. Supreme Court and Court of Appeals precedent suggests that the court's reversal of the Commission's rules on *ultra vires* grounds relates back to when the Commission first implemented the rules. At the same time, however, the court's decision itself (and the underlying appeal by Cincinnati Bell) never spoke directly to the question. Accordingly, BellSouth asks the Commission to reconsider whether the court's mandate should have been implemented in the *Remand Order* only prospectively.

In addition, BellSouth seeks reaffirmation that the Commission's policy ruling that CMRS carriers may recover the costs of federal universal service contributions through their charges for all services was never contested in the Fifth Circuit case and remains the law of the land. In fact, there are no separate intrastate CMRS services.

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[2] *Remand Order* ¶ 11 (citing *Texas Office of Public Utility Counsel*, 183 F.3d at 448).

BACKGROUND

In the May 8, 1997 *Universal Service Report and Order*, the Commission adopted its original rules governing the assessment and recovery of federal universal service contributions.[3] These rules provided in relevant part that every telecommunications carrier providing interstate telecommunications services must (1) contribute to the federal schools and libraries and rural health care support programs "on the basis of its *interstate, intrastate, and international* end-user telecommunications revenues;" and (2) contribute to the high cost/low income programs "on the basis of its *interstate and international* end-user telecommunications revenues."[4]

The Commission in the *Universal Service Report and Order* separately addressed how carriers may lawfully recover the costs of federal universal service contributions. The Commission decided for the high cost/low income program "to continue [its] historical approach to recovery of universal service support mechanisms, that is, to permit carriers to recover contributions to universal service support mechanisms through rates for interstate services only."[5] For schools and libraries fund contributions, the Commission also "decided to permit recovery of contributions . . . solely via rates for interstate services."[6] On reconsideration, the Commission revised the manner in which CMRS providers could recover their support contributions, explicitly "permit[ting] CMRS providers to recover their contributions through rates charged for all their services."[7] The Commission determined that allowing such recovery "would not encroach on state prerogatives,"given that

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3 *Federal-State Joint Board on Universal Service, Report and Order*, CC Docket No. 96-45, 12 F.C.C.R. 8776, 9189-9205 ¶¶ 806-841 (1997) ("*Universal Service Report and Order*").

4 *See* 47 C.F.R. §§ 54.703(b), (c) (1997), *recodified,* 47 C.F.R. §§ 54.706(b), (c) (1998).

5 *Universal Service Report and Order*, 12 F.C.C.R. at 9198-99 ¶¶ 825, 829 (1997).

6 *Id.* at 9203-04 ¶ 838 (emphasis added).

7 *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *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 F.C.C.R. 5318, 5489 ¶ 309 (1997) ("*Fourth Reconsideration Order*").

"section 332(c)(3) of the [Communications] Act alters the 'traditional' federal-state relationship with respect to CMRS by prohibiting states from regulating rates for intrastate commercial mobile services."[8]

In September 1998, well before the Fifth Circuit issued its decision, BSCC's wholly-owned subsidiary, BellSouth Mobility Inc ("BMI"), was named as a defendant in a class action lawsuit filed in Alabama state court in which plaintiffs contend, among other things, that "[n]o Federal Act or Federal Communications Commission decision has jurisdiction over or purported to authorize reimbursement by [sic] defendants by changing or assessing customers' intrastate service" and that "it was unlawful and illegal for [defendants] to collect *intrastate money* for the 'Federal Universal Service Fund Assessment', *on intrastate service* . . . ."[9] The case was subsequently removed to the United States District Court for the Northern District of Alabama.[10]

In *Texas Office of Public Utility Counsel,* the court reversed the portion of the *Universal Service Report and Order* "that includes intrastate revenues in the calculation of universal service contributions."[11] The court found that "the inclusion of intrastate revenues in the calculation of universal service contributions easily constitutes a 'charge . . . in connection with intrastate communication service'" subject to the jurisdictional limits of Section 2(b) of the Act and the Supreme Court's *Louisiana PSC* decision.[12] The court rejected the Commission's arguments that the agency's "decision to prohibit carriers from recovering through intrastate rates [saves] it from

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8 *Id.*; *see also Federal-State Joint Board on Universal Service, Report to Congress*, 13 F.C.C.R. 11,501, 11,601-02 ¶ 218 (1998).

9 *Martha Self v. BellSouth Mobility, Inc. et al.*, No. CV9805439, Complaint and Petition for Class Action, at 2 ¶ 4 and 4 ¶ 12 (Jefferson Co., Ala. filed Sept. 9, 1998) (emphasis added).

10 *Martha Self v. BellSouth Mobility, Inc. et al.*, No. 98-JEO-2581S (N.D. Ala.).

11 183 F.3d at 447-48.

12 *Id.* at 447-48.

§ 2(b) analysis" and determined that Sections 254(d) and (f) of the Act, dealing with universal service support mechanisms, "do not reflect enough of an unambiguous grant of authority to overcome the presumption [against Commission jurisdiction] established by § 2(b)."[13] The court also addressed the Commission's jurisdiction to regulate carrier cost recovery, reversing the Commission's decision to refer carriers to state commissions for recovery of costs from intrastate rates. The court did not, however, address Cincinnati Bell's argument "challenging the agency's requirement that carriers recover their contributions solely from interstate revenues,"[14] nor did it anywhere address the provisions of the *Fourth Reconsideration Order* relating to CMRS providers' recovery of federal universal service contributions.

In response to this ruling, the Commission issued its October 8 *Remand Order*. In this order, the Commission, among other things, amended the rules on assessing contributions to eliminate any assessment on intrastate revenues starting November 1, 1999, the date the Court's mandate became effective. Nevertheless, the Commission continued to require assessments on intrastate revenues prior to that date. Thus, the Commission implemented the Court's intrastate ruling only prospectively.

On November 10, 1999, Pan Am Wireless, Inc. ("Pan Am") requested a total refund of its intrastate-based universal service contributions for the period prior to the Fifth Circuit's ruling when the FCC's USF rules were in effect (January 1, 1998 through October 31, 1999). Pan Am argued that if the FCC and the Universal Service Administrative Company ("USAC") had no jurisdiction

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13 *Id.*

14 *Id.* at 449 n.104.

to assess USF contributions based on intrastate revenues, then any such monies collected during that period must be returned.[15]

For reasons discussed herein, there is no merit to the plaintiffs' allegations in the class action lawsuit that BellSouth's CMRS subsidiaries had no authority under federal law or Commission order to recover the costs of federal universal service contributions through charges associated with all of their service offerings. Nonetheless, this class action litigation (and potentially other lawsuits not yet filed) subjects BMI to the risk of liability to customers for the portion of its federal universal service contribution resulting from intrastate services or derived from intrastate revenues — not only prospectively, but for the twenty-two-month period preceding the *Remand Order*. The issue raised in Pan Am's filing concerning the effect of the Fifth Circuit ruling needs to be addressed by the Commission to set a unified national policy.

BellSouth Telecommunications also has passed through its sizeable federal universal service contribution costs through rates for interstate service in accordance with the Commission's rules.[16] As BST's revenue base for the schools and libraries program (prior to the court's decision) was overwhelmingly from intrastate services, it too is potentially liable for passing such intrastate-related universal service costs to access and end user customers.

DISCUSSION

BellSouth is reluctant to file this petition for reconsideration of the *Remand Order,* but the class action and Pan Am filings establish the need for clarification (and reconsideration) of the import of the Fifth Circuit's ruling. Moreover, BellSouth cannot risk waiting until suits are resolved

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[15] Pan Am Wireless, Inc., Request for Refund for Intrastate Universal Service Contributions, filed in CC Docket No. 96-45, Nov. 10, 1999, at 2.

[16] *See Universal Service Report and Order*, 12 F.C.C.R. at 9200, ¶ 830; *Access Charge Reform/Price Cap Performance Review,* 12 F.C.C.R. 15982, 16147 ¶ 379 (1997).

or the Pan Am claim is ruled upon. The Commission has in the past invoked Section 405 of the Act to preclude subsequent challenges to its rules in the absence of a timely petition for reconsideration of a rulemaking order.[17] BellSouth is filing now because the *Remand Order* represents the FCC's response to the court's remand. BSCC and BST are committed to passing through any refunds to customers.[18]

I. THE FIFTH CIRCUIT DECISION AND SUPREME COURT CASE LAW SUGGEST THAT THE COURT'S DECISION MAY BE RETROACTIVE, WARRANTING RECONSIDERATION OF THE PROSPECTIVE-ONLY *REMAND ORDER*

The Commission made the new rules in the *Remand Order* apply prospectively only, as demonstrated by the fact that it ruled that contributions for October 1999 (the period preceding the November 1, 1999 effective date of the court's mandate) must include *intrastate* revenues.[19] The Commission's approach is understandably intended to facilitate a swift and smooth implementation of the court's mandate on a going-forward basis and minimize the financial impact on the federal universal service programs and contribution scheme the Commission is required to administer under Section 254 of the Act.[20]

Nevertheless, given the jurisdictional ruling of the Fifth Circuit and judicial precedent, it is by no means clear that the court's decision has only a prospective effect. The court reversed the

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[17] 47 U.S.C. § 405(a); *see, e.g., Community Teleplay, Inc.*, 13 F.C.C.R. 12426, 12427-28 ¶¶ 3-6 (WTB 1998); *but see Graceba Total Communications, Inc. v. FCC*, 115 F.3d 1038, 1040-42 (D.C. Cir. 1997).

[18] BSCC and BST are concurrently submitting with the instant petition a refund request to the Universal Service Administrative Company ("USAC") for contributions assessed on their intrastate revenues prior to November 1, 1999, contingent on the outcome of this filing.

[19] *Remand Order* ¶ 18; Public Notice, *Proposed Fourth Quarter 1999 Universal Service Contribution Factor for November and December 1999*, CC Docket No. 96-45, DA 99-2109 (rel. Oct. 8, 1999).

[20] *See* 47 U.S.C. §§ 254(a), (e); *Remand Order* ¶¶ 15-18.

Commission's assessment of USF contributions on intrastate revenues as beyond the Commission's authority. Specifically, the court held that Section 254 did not authorize the FCC to assess USF contributions on intrastate revenues and that "[w]ithout a finding that § 254 applies, *the FCC has no other basis to assert jurisdiction*."[21] As a result, it reversed the Commission's decision to "include[] intrastate revenues in the calculation of universal service contributions."[22] There is no indication in the court's decision that assessments that carriers have already paid into the fund under rules that have been reversed as beyond the FCC's jurisdiction may nevertheless be retained. The fact is that the ruling simply does not speak to this question. In light of the case law on the subject, however, the import of the court's decision may be to invalidate assessments on intrastate revenues dating back to the implementation of the FCC's rules.

In a series of decisions from 1991 through 1995, the Supreme Court has adopted a strong presumption that appellate judicial decisions in civil cases are to apply retroactively.[23] The Court in these decisions, *James B. Beam Distilling Co. v. Georgia*, *Harper v. Virginia Department of Taxation*, and *Reynoldsville Casket Co. v. Hyde*, has largely rejected the earlier precedent which placed considerable weight on reliance interests and equities in determining whether to apply a

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21 *See* 183 F.3d at 448.

22 *See id.*(emphasis added). The Court found that the broad language of Section 2(b) of the Communications Act "encompasses the FCC's decision to assess intrastate revenues" as "the inclusion of intrastate revenues in the calculation of universal service contributions easily constitutes a 'charge . . . in connection with intrastate communication service,'" and that the language of Section 254(d) was not "'so unambiguous or straightforward as to override'" the limitations on Commission jurisdiction imposed in Section 2(b) of the Act and the Supreme Court's *Louisiana PSC* decision -- limitations recently affirmed by the Supreme Court. 183 F.3d at 447-48 (citing 47 U.S.C. § 152(b)); *see also AT&T Corp. v. Iowa Utilities Bd.*, 119 S.Ct. 721, 731 (1999), and *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 377 (1986)).

23 *See* Pamela J. Stevens, *The New Retroactivity Doctrine: Equality, Reliance and Stare Decisis*, 48 SYRACUSE LAW REV. 1515, 1559 (1998).

judicial decision retroactively.[24] The Fifth Circuit itself expressly adopted this approach in a separate opinion, *Hulin v. Fibreboard Corp.,* that was issued during the pendency of its decision in *Texas Office of Public Utility Counsel.*[25] Likewise, the D.C. Circuit has applied these principles to the implementation of judicial decisions by an administrative agency.[26]

Under this series of decisions, a court's decision is presumptively retroactive, and a lower court or administrative agency can override this presumption only in limited circumstances.[27] The D.C. Circuit has held that the case law permits departure "from the norm of retroactive application" only under "the most compelling circumstances."[28] Moreover, the Fifth Circuit itself has determined that the Court has "le[ft] only an indistinct possibility of the application of pure prospectivity *in an extremely unusual and unforeseeable case.*"[29]

Under this case law, serious questions arise as to whether, in the wake of the Fifth Circuit's ruling that the FCC had no authority to require carriers to pay federal universal service contributions assessed on intrastate revenues, assessments made during the twenty-two-month period preceding the effective date of the *Remand Order* may be retained.

In *Harper*, the Court applied its decision in *Davis v. Michigan Dept. of Treasury* — which invalidated a Michigan state income tax provision and required refunds — to a Virginia taxation

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24 *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 752-54 (1995); *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 97 (1993); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 543 (1991). The older approach from which *Hyde, Harper and Beam* depart is described in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971).

25 *See Hulin v. Fibreboard Corp.*, 178 F.3d 316, 329-333 (5th Cir. 1999).

26 *See National Fuel Gas Supply Corp. v. FERC*, 59 F.3d 1281, 1288 (D.C. Cir. 1995).

27 *Hyde*, 514 U.S. at 758-759.

28 *National Fuel Gas Supply Corp.*, 59 F.3d at 1288.

29 *Hulin*, 178 F.3d at 330-331 (emphasis added) (*citing* Jill E. Fisch, *Retroactivity and Legal Change, An Equilibrium Approach*, 110 HARV. L. REV. 1056, 1059 (1997)).

statute.[30] The Court's rationale applies to mandatory fees as well as taxes.[31] Like the situation in *Harper*, universal service contributors have been "place[d] . . . under duress promptly to pay a [contribution] when due and relegate[d] to a postpayment refund action in which" the legality of the contribution obligation is addressed, and contributions to date have been submitted in part "'to avoid financial sanctions'" or other penalties. Like the states in *Davis* and *Harper*, the Commission did not have jurisdiction to impose the assessment at issue.[32]

In *Hyde*, the Court restated the *Harper* example in terms that underscore its particular relevance to the original federal universal service contribution scheme:

> Suppose a State collects taxes under a taxing statute that this Court later holds unconstitutional. Taxpayers then sue for a refund of the unconstitutionally collected taxes. *Retroactive application of the Court's holding would seem to entitle the taxpayers to a refund of taxes.*[33]

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[30] *Harper*, 509 U.S. at 89-91. In *Davis*, the Court had invalidated a Michigan state income tax provision which "violate[d] principles of intergovernmental tax immunity by favoring retired state and local government employees over retired federal employees" and in which the court held that "to the extent appellant has paid taxes pursuant to this invalid tax scheme, he is entitled to a refund." *See Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 817 (1989) (citing *Iowa-Des Moines Bank v. Bennett*, 284 U.S. 239, 247 (1931)).

[31] *See National Cable Television Assn., Inc. v. United States*, 415 U.S. 336, 340 (1974) ("*NCTA*") (holding that Commission failed to use appropriate statutory standard in setting fees), *on remand*, *Petitions for Refund of Cable Television Annual Fees*, 49 F.C.C.2d 1089 (1974) (authorizing refunds of fees); *see also* discussion *infra* of the *National Association of Broadcasters* decision. Accordingly, the Fifth Circuit's determination that a fee is involved here, rather than a tax, *see Texas Office of Public Utility Counsel*, 183 F.3d at 426-27, n.52, is of no decisional significance.

[32] *See Harper*, 509 U.S. at 101 n.10 (citing *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation*, 496 U.S. 18, 38, n.21 (1990)); 47 C.F.R. §§ 54.706(a), 54.713 ("telecommunications carriers providing interstate telecommunications services . . . *must* contribute to the universal service support programs" and failure "to submit the *required* . . . contributions may subject the contributor to the enforcement provisions of the Act and any other applicable law" (emphasis added)); *Operator Communications, Inc.; Apparent Liability for Forfeiture*, 13 F.C.C.R. 16,082 (1998) (imposing sizeable forfeiture for failure to submit required payments); *ConQuest Operator Services Corp.; Apparent Liability for Forfeiture*, 13 F.C.C.R. 16,075 (1998) (same).

[33] *Hyde*, 514 U.S. at 756 (emphasis added).

In *Texas Office of Public Utility Counsel*, the court similarly held that the Commission lacked jurisdiction to collect monies based on carriers' intrastate revenues. While the Supreme Court in *Hyde* noted in its example that an independent rule of law, such as "certain procedural requirements for any refund suit" or a statute of limitations, may act as a bar to recovery to the taxpayers, there is no such obstacle to carriers' obtaining a refund of federal universal service contributions assessed on intrastate revenues.[34]

Moreover, even before the Court's decisions in *Beam, Harper* and *Hyde* more rigorously imposed retroactive application of judicial decisions on lower courts and agencies, the D.C. Circuit addressed how the retroactive application of a judicial determination applies to monies the Commission unlawfully collects from entities it regulates. In *National Association of Broadcasters v. FCC*,[35] the Commission's fee schedule for broadcast and cable operators had been challenged in and upheld by the Fifth Circuit. Cable operators successfully appealed the fees applicable to them to the Supreme Court, but broadcasters did not appeal. The Supreme Court found the Commission implemented to fee program inconsistent with the underlying statute and remanded the case. Thereafter, the Commission suspended the fees for cable and broadcast services, but refunded only cable-related fees.[36]

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[34] There are no rules setting time limits on refund requests or for submitting a grievance with USAC. Indeed, at the July 27, 1999 USAC Board meeting, USAC staff recommended setting a deadline for carriers to submit a revised worksheets, on the basis that "*there is no deadline right now* and it is very costly administratively to continually true up the numbers every time USAC receives a revised form." *See* USAC Board Meeting, draft minutes, at <http://www.universalservice.org>.

[35] *See National Ass'n of Broadcasters v. FCC*, 554 F.2d 1118, 1122-23 (D.C. Cir. 1976) (discussing *Clay Broadcasting Corp. of Texas v. United States*, 464 F.2d 1313 (5th Cir. 1972), *rev'd sub nom. National Cable Television Association v. United States*, 415 U.S. 336 (1974)).

[36] *Id.* at 1123.

Broadcasters, who were denied refunds, appealed to the D.C. Circuit, where the Commission "argue[d] that the effect given to the [Supreme Court's] decision should be limited to that of a prospective change in the law" such that parties would be denied refunds of regulatory fee payments for the period prior to the Court's decision.[37] The D.C. Circuit, noting that"[t]he general rule of long standing is that judicial precedents normally have retroactive as well as prospective effect,"[38] ruled:

> Since *NCTA* was a case of first impression, and since the FCC had notice almost from the time it adopted the schedule that it would be subject to a challenge in court, there could be no justifiable reliance here; and indeed, the record demonstrates that there was none. For the same reason, and because of the immediate protests and refund requests made by many of the petitioners, we reject any idea that the Commission would be unfairly surprised by our action today as well as the notion that petitioners' "transactions" had become final and should not be disturbed. *As for the purpose of the rule announced in NCTA, it was to prevent the Commission from collecting money for activities for which it had no statutory right to charge. The same idea would prevent the agency from retaining money illegally exacted.*[39]

As a result, the court required refund of the past fees paid by broadcasters, based on the Supreme Court's jurisdictional ruling in *NCTA*. Similarly here, the *Texas Office of Public Utility Counsel* decision was a case of first impression, and the Commission may have difficulty claiming justifiable reliance on rules that it knew were non-final and might be set aside.[40] Moreover, under the stringent standard for retroactivity established in *Beam*, *Harper* and *Hyde*, the rationale for mandating refunds

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37 *Id.* at 1131.

38 *Id.* at 1131-32 (citing *Linkletter v. Walker*, 381 U.S. 618, 627-29 (1965)).

39 *Id.* at 1132 (citations omitted, emphasis added).

40 *See, e.g., Federal-State Joint Board on Universal Service,* CC Docket No. 96-45, *Twelfth Order on Reconsideration*, FCC 99-121 (1999) (statement of Commissioner Michael K. Powell); *Federal-State Joint Board on Universal Service,* CC Docket No. 96-45, *Second Recommended Decision,* CC Docket No. 96-45, 13 FCC Rcd 24,744, 24,783 (Joint Bd. 1998) (separate Statement of Commissioner Tristani, dissenting in part); *id.* at 24804, 24815 (dissenting Statement of Commissioners Kenneth McClure and Laska Schoenfelder).

— collecting money for activities for which it had no statutory right to charge — is even more compelling here.

Given the nature of the reversal by the Fifth Circuit and principles established by the case law, it would appear that the rule changes adopted on remand should have eliminated any unlawful effect relating back to their adoption. BellSouth recognizes that undoing these past assessments, which have already been paid, is a bit like unscrambling eggs. The Commission will have to ensure that reasonable procedures are followed for refunding unlawfully assessed payments to carriers, taking into account the carriers' varied circumstances, while at the same time not disrupting the schools and libraries and rural health care programs established by Section 254. This will be a complex task to accomplish, and may require further proceedings. If the rules need to be amended retroactively, there should be no further delay.

II. THE FCC SHOULD REAFFIRM THAT ITS POLICY PERMITTING CMRS CARRIERS TO RECOVER USF CONTRIBUTIONS THROUGH CHARGES ASSOCIATED WITH ALL SERVICES WAS NEVER CHALLENGED AND THUS IS CONTROLLING

In reconsidering its *Universal Service Report and Order*, the Commission recognized that Section 332 subjects CMRS providers to a different regulatory regime than landline carriers, in that CMRS carriers are exempt from state regulation of rates and entry. Accordingly, the Commission exempted them from the original requirement that carriers recover their universal service contributions solely through rates for interstate services.[41] In its *Fourth Reconsideration Order,* it said it would, instead, "permit CMRS providers to recover their contributions through rates charged

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[41] 12 F.C.C.R. at 9198-99, 9203-04, ¶¶ 825, 829, 838.

for all their services."[42] This determination was not challenged in the Fifth Circuit review proceedings,[43] was not directly called into question by the court even in *dicta,* and has not been challenged on reconsideration. Accordingly, the Commission should make clear that this policy remains undisturbed by the court's decision and has been the national policy that carriers properly followed from the announcement of the USF program.

In light of the *Self* litigation, however, BellSouth also asks that the Commission reaffirm its policy that CMRS providers are permitted to recover their universal service contributions through charges associated with all of their services, both in the past and the future. Nothing in the Fifth Circuit decision warrants any change in this policy. The only address by the court of carrier cost recovery issues was in the wireline context, where state regulators retain exclusive jurisdiction over intrastate rates, pursuant to Section 2(b) of the Communications Act.[44] Thus, the Court's discussion

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[42] *Fourth Reconsideration Order,* 13 F.C.C.R. at 5489 ¶ 309. The Commission determined that in the case of CMRS, unlike wireline service, allowing such recovery "would not encroach on state prerogatives" given the fact that "section 332(c)(3) of the [Communications] Act alters the 'traditional' federal-state relationship with respect to CMRS by prohibiting states from regulating rates for intrastate commercial mobile services." *Id.* (emphasis added); *see also Federal-State Joint Board on Universal Service, Report to Congress*, 13 F.C.C.R. at 11601-02 ¶ 218.

[43] Cincinnati Bell, which challenged both the inclusion of intrastate revenues in the contribution base for the schools and libraries program and the Commission's interstate cost recovery limitation, expressly stated that the original *Universal Service Report and Order* was the only Commission decision on review before the court. *See* Brief of Petitioner Cincinnati Bell Tel. Co., *Texas Office of Public Utility Counsel v. FCC*, No. 97-60421 (filed Feb. 23, 1998), at 2 (stating that the *Universal Service Order* was "the Order on review in this proceeding").

[44] *See Texas Office of Public Utility Counsel,* 183 F.3d at 448. Applying Section 2(b) of the Act and *Louisiana PSC,* the court held that "[t]he FCC has failed to point to any statutory authority that explicitly demonstrates how § 254 applies to intrastate universal service." *Id.* at 449. The court thus reversed the Commission's determination "that it can refer these carriers [with intrastate revenues] to the states for recovery of those contributions." *Id.* The court *did not*, however, even in the landline context, reach Cincinnati Bell's arguments challenging the Commission's requirement "that carriers recover their contributions solely from interstate revenues." *Id.* at 449 n.104.

of ILECs' authority to recover universal service contributions via access charges plainly is relevant only to landline carriers.[45]

The statutory provisions underlying the court's decision apply very differently to CMRS carriers' cost recovery, and the court's decision is perfectly consistent with the *Fourth Reconsideration Order*. Section 332 exempts CMRS carriers from state rate regulation, and the Commission has preempted state regulation of intrastate CMRS rates.[46] Thus, the jurisdictional limitations of Section 2(b) applicable to landline carriers' cost recovery simply do not apply to CMRS.[47]

Given this straightforward analysis, there should not be *any* uncertainty regarding the continued vitality of the CMRS recovery policy set forth in the *Fourth Reconsideration Order*. The Commission's universal service proceeding, however, has been enormously complicated. Since the Fifth Circuit's decision, the Commission has already addressed carrier cost recovery (in the wireline context) in at least two separate decisions.[48] Given other aspects of the court's decision involving state jurisdiction[49] — such as its holding affirming states' authority to require CMRS carriers to contribute to state universal service programs — there is certainly the possibility that the court's

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45 *See Texas Office of Public Utility Counsel*, 183 F.3d at 424-25; *Remand Order* ¶¶ 30-33.

46 *See Regulatory Treatment of Mobile Services, Second Report and Order*, 9 F.C.C.R. 1411, 1504 ¶ 250 (1994). The Commission subsequently denied all state petitions seeking CMRS rate regulation authority. *See, e.g., Petition of the People of the State of California and the Public Utilities Commission of the State of California To Regulatory Authority over Intrastate Cellular Service Rates, Order on Reconsideration*, 11 F.C.C.R. 796 (1995); *Petition of the State of Ohio for Authority to Continue to Regulate Commercial Mobile Radio Service, Order on Reconsideration*, 10 F.C.C.R. 12,427 (1995).

47 Indeed, while the court did not address the merits of the *Fourth Reconsideration Order*, it expressly acknowledged the continued relevance of Section 332(c)(3)(A) and its preemption of state regulation of CMRS rates. *See* 183 F.3d at 430-32, n.64.

48 *See Remand Order* ¶¶ 30-33; *Federal-State Joint Board on Universal Service,* CC Docket No. 96-45, *Ninth Report and Order,* FCC 99-306, ¶ 111 (rel. Nov. 2, 1999).

49 *See Texas Office of Public Utility Counsel*, 183 F.3d at 430-33.

mandate will be misinterpreted. Finally, there is every likelihood that litigation such as the class action lawsuit filed against BMI will be spurred by the Fifth Circuit's decision, citing that decision improperly for the proposition that CMRS carriers were without legal authority to recover federal universal service costs from intrastate services. Such arguments have no merit with respect to past or future universal service cost recovery.

CMRS carriers were explicitly authorized by the *Fourth Reconsideration Order* to recover their USF costs through charges associated with all of their services, not only interstate services, for good reason. In fact, this is the only reasonable policy, since CMRS carriers offer *no* purely intrastate services. All customers are provided with the ability to make and receive interstate calls and have the ability to use their phones while roaming interstate. CMRS networks are designed to facilitate customer's phone usage — interstate as well as intrastate — while at home or roaming. CMRS carriers have no way to tell in advance how or where a given customer will use its service, given the customer's mobility. Accordingly, while it may be possible to allocate a carrier's revenues among the interstate and intrastate jurisdictions for purposes of assessing the USF contribution, it is not possible to classify any CMRS customers or services as being purely "intrastate."

Accordingly, the Commission should reaffirm its policy of permitting CMRS carriers to recover their USF contributions through charges imposed on all of their services, since this aspect of the *Fourth Reconsideration Order* was never challenged and the ruling makes good sense.

CONCLUSION

For the foregoing reasons, the Commission should (1) clarify (and reconsider) its *Sixteenth Order on Reconsideration* to determine whether the Fifth Circuit's mandate required adjustments to its rules for the period January 1, 1998 through October 31, 1999 (and, if necessary, establish procedures for refunding intrastate-based contributions); and (2) confirm that the Fifth Circuit

decision did not disturb the policy that CMRS providers may recover the costs of federal universal service contributions through charges associated with all of their services, and reaffirm this existing policy.

Respectfully submitted,

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December 6, 1999

Attachment

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December 6, 1999

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Re: Contingent Request for Refund of Federal Universal Service Contributions Assessed on Intrastate Revenues for the Period January 1, 1998 through October 31, 1999

Dear Ms. Parrino:

BellSouth Corporation, on behalf of affiliates of its subsidiary BellSouth Cellular Corp. and on behalf of BellSouth Telecommunications, Inc. (collectively, "BellSouth"), hereby submits a request for refund of certain Universal Service contributions submitted to the Universal Service Administrative Company ("USAC"), and its predecessor in interest the National Exchange Carrier Association.[1] This request is contingent on the response to a BellSouth petition for reconsideration being filed today with the FCC (a copy of which is enclosed as Attachment B) concerning the *Sixteenth Order on Reconsideration* in CC Docket No. 96-45.[2] Accordingly, *BellSouth asks that this refund request be held in abeyance pending FCC and judicial action in response to that petition for reconsideration.*

BellSouth's contingent request for a refund pertains to contributions assessed on BellSouth's intrastate revenues for the 22-month period January 1, 1998 through October 31,

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1 The names and file ID numbers of the specific entities through which BellSouth made contributions that are subject to this refund request are listed in Attachment A.

2 *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 96-45, Sixth Report and Order in CC Docket No. 96-262*, FCC 99-290 (rel. Oct. 8, 1999), 64 Fed. Reg. 60349 (Nov. 5, 1999).

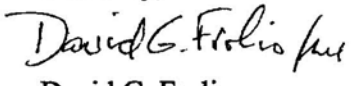
1999, on the basis of the FCC Worksheets submitted under the captioned file numbers. The FCC rules under which these assessments were calculated[3] have subsequently been found unlawful and beyond the FCC's jurisdiction by the United States Court of Appeals for the Fifth Circuit. *See Texas Office of Public Utility Counsel v. FCC*, 183 F.2d 393, 448 (5th Cir. 1999).

As mentioned above, BellSouth is separately petitioning the FCC to reconsider its decision to apply the Fifth Circuit's decision prospectively only.[4] Accordingly, BellSouth is submitting this refund request now only as a protective measure, to ensure that BellSouth's claim is timely filed, in the event the FCC or the courts determine that refunds are payable. Given that there has not yet been such a determination by the FCC or the courts, and there has not been any special mechanism or procedure established for such refunds, this refund request should be held in abeyance, pending resolution by the FCC and/or the courts of these issues. Accordingly, there is no need to act on this request at this time.

This filing is prompted in part by the fact that a wholly-owned BellSouth subsidiary, BellSouth Mobility Inc ("BMI"), is the subject of a class action lawsuit in Alabama in which plaintiffs allege that BMI did not have legal authority to recover federal universal service contributions through rates for intrastate service. Obviously, a determination by USAC and the Commission as to whether the assessments paid by BellSouth based on intrastate revenues are subject to refund will have a significant bearing on this litigation. In the event there is a refund to BellSouth, BellSouth will ensure that the refund is passed through to its subscribers.

Please contact the undersigned should you have questions or need any additional information.

Sincerely,



David G. Frolio

Attachments

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[3] The FCC's rules formerly required telecommunications carriers to contribute for schools, libraries, and rural health care based on interstate, intrastate, and international end-user revenues. *See* 47 C.F.R. § 54.709(a)(1) (1998).

[4] A copy of the petition for reconsideration is enclosed. BellSouth demonstrates therein that Supreme Court and Court of Appeals case law strongly suggests that the Fifth Circuit's decision must be implemented both prospectively and retroactively. *See Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 752-54 (1995); *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 97 (1993); *Hulin v. Fibreboard Corp.*, 178 F.3d 316, 329-333 (5th Cir. 1999); *National Fuel Gas Supply Corp. v. FERC*, 59 F.3d 1281, 1288 (D.C. Cir. 1995).

Attachment A

Filer ID #	Entity Name
804330	Acadiana Cellular General Partnership
804258	Alabama Cellular Service, Inc.
804286	American Cellular Communications Corporation
811426	Anniston-Westel Company, Inc.
804285	Atlanta-Athens MSA Limited Partnership
804372	Bakersfield Cellular Telephone Company
804309	Baton Rouge MSA Limited Partnership
818584	BCTC of Texas, Inc.
815048	BellSouth Carolinas PCS, L.P.
804261	BellSouth Mobility Inc
815046	BellSouth Personal Communications, Inc.
804354	Bloomington Cellular Telephone Company
804306	Chattanooga MSA Limited Partnership
804312	Decatur RSA Limited Partnership
804264	Florida Cellular Service, Inc.
804315	Florida RSA No. 2B (Indiana River) Limited Partnership
809423	Galveston Cellular Telephone Company
804318	Georgia RSA No. 1 Limited Partnership
804321	Georgia RSA No. 2 Limited Partnership
804324	Georgia RSA No. 3 Limited Partnership
804378	Green Bay CellTelCo
804369	Gulf Coast Cellular Telephone Company
804387	Honolulu Cellular Telephone Company
808224	Houston Cellular Telephone Company
804279	Huntsville MSA Limited Partnership
804287	Indiana Cellular Corporation
804297	Jacksonville MSA Limited Partnership
804381	Janesville Cellular Telephone Company, Inc.
804270	Kentucky CGSA, Inc.
804288	Lafayette MSA Limited Partnership
804273	Louisiana CGSA, Inc.
804333	Louisiana RSA No. 7 Cellular General Partnership
817420	Louisiana RSA No. 8 Limited Partnership
804375	Madison Cellular Telephone Company
804344	MCTA
804294	Memphis SMSA Limited Partnership
804343	M-T Cellular, Inc.
804351	Muncie Cellular Telephone Company, Inc.
804303	Nashville/Clarksville MSA Limited Partnership
804384	National Cellular Communications
804259	Northeast Mississippi Cellular, Inc.
804327	Northeastern Georgia RSA Limited Partnership
818256	Orlando CGSA, Inc.
804300	Orlando SMSA Limited Partnership
804363	Racine Cellular Telephone Company
804357	RCTC Wholesale Corporation
804366	Sheboygan Cellular Telephone Company, Inc.
804340	Tennessee RSA Limited Partnership
804348	Terre Haute Cellular Telephone Company, Inc.
804345	Westel-Indianapolis Company
804360	Westel-Milwaukee Company, Inc.
802971	BellSouth Telecommunications, Inc.