

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

In the Matter of)	
)	
Federal-State Joint Board on Universal Service)	CC Docket No. 96-45
)	
Access Charge Reform)	CC Docket No. 96-262
)	
Universal Service Contribution Methodology)	WC Docket No. 06-122

**OPPOSITION OF VERIZON¹ TO
PETITION FOR RECONSIDERATION**

To revive her decade-old class action lawsuit against BellSouth Mobility, Martha Self asks the Commission to reconsider its decision not to reach back in time and issue refunds to consumers for universal service fees assessed on intrastate services in the late 1990s.² As the Commission correctly determined, this would be enormously burdensome, ultimately impossible, and would result in a manifest injustice.³ The Commission should deny the *Petition for Reconsideration*.

¹ The Verizon companies participating in this filing (“Verizon”) are the regulated, wholly owned subsidiaries of Verizon Communications Inc.

² Martha Self, *Petition for Reconsideration and Clarification*, CC Docket Nos. 96-45, et al. (filed May 9, 2008) (“*Petition for Reconsideration*”). Many of Petitioners claims against BellSouth were recently dismissed on summary judgment. *Self v. BellSouth Mobility, LLC*, No. 2:98-cv-02581-JEO (N.D. Ala. April 21, 2008) (order granting partial summary judgment).

³ *Petition for Reconsideration and Clarification of the Fifth Circuit Remand Order of BellSouth Corporation; Petition for Reconsideration of the Fifth Circuit Remand Order of Arya Communications International Corporation; Joint Request for Review of Decision of Universal Service Administrator of Cable Plus L.P., and MultiTechnology Services, L.P.; Request for review of Pan Am Wireless, Inc.; Request for Review of USA Global Link, Inc., Order on Reconsideration*, 23 FCC Rcd 6221, ¶ 20 (2008) (“*BellSouth Reconsideration Order*”).

For a brief time in the late 1990s carriers contributed to the Universal Service Fund (“USF” or “the fund”) schools and libraries and rural health care programs based on their intrastate, interstate, and international revenues. *BellSouth Reconsideration Order* ¶ 2. The Fifth Circuit remanded that part of the Commission’s *1997 Universal Service Order* that required contributions on intrastate revenues, and on November 1, 1999 carriers began contributing to the schools and libraries and rural health care programs only on their interstate and international revenues. *BellSouth Reconsideration Order* ¶¶ 3-4 (citing *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776 (1997) (“*1997 Universal Service Order*”), *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*, 530 U.S. 1210 (2000) (“*TOPUC*”). As permitted then and as is still the case today, carriers generally recovered their USF contributions through pass-through charges to customers on their bills. The Commission reasonably concluded in the *BellSouth Reconsideration Order* that it would be impossible and enormously burdensome for the Universal Service Administrative Company (“USAC”) to identify and issue refunds to carriers that made contributions to the fund on their intrastate revenues ten years ago, and then for those carriers in turn to issue refunds to their customers from the late 1990s. *Id.* ¶ 17. The Commission further concluded, correctly, that such refunds would work a “manifest injustice” vis-à-vis today’s consumers, who would be forced to pay for any refunds to customers from the past. *Id.* ¶ 20.

From USAC’s end, not all carriers that contributed to the fund some ten years ago still operate today, and many of those that survived have been subject to myriad mergers and acquisitions and other upheaval as technology and consumer demands continue to reshape the telecommunications market. More problematic is the suggestion that even if USAC could

identify and refund intrastate contributions to the right carriers, that those carriers would have any ability to flow those refunds through to their customers from the late 1990s. Petitioners do not address how carriers could conceivably go about this, and for good reason – this would be an exercise in futility, or, as the Commission said, “a bit like unscrambling eggs.” *BellSouth Reconsideration Order* ¶ 18 (quoting BellSouth Corporation, *Petition for Reconsideration and Clarification*, CC Docket No. 96-45 (filed Dec. 6, 1999)).

First, in many cases carriers simply have no way of knowing which of their current and former customers – collectively many millions strong – purchased intrastate services subject briefly to USF contributions ten years ago. Even carriers with the most robust recordkeeping programs would have enormous difficulty identifying customers for specific services from so long ago. Second, even for those customers that could be identified, contact information will not be current in a great many cases because customers will have moved, often many times over, or changed providers. Finally, even if a consumer of contributing intrastate services from the late 1990s could be identified, located, and is still alive, the net effect of a massive refund program as proposed by Petitioners would very likely at best be a wash to that customer. The customer would see a de minimis refund of USF fees on intrastate services in the late 1990s. But that same consumer is also likely today a customer of a contributing carrier that would be required to pay more into the current USF in order to fund the refunds, which carriers would pass through either directly or indirectly to current customers.

If USAC were to attempt to issue refunds to carriers that contributed to the fund on intrastate services in the late 1990s the most likely result would be that only a fraction of the refunds will actually be returned to those carriers, and then only a fraction of that amount will

actually be returned to carrier customers from ten years ago. The only winners in such a situation would be those who profit off of arbitrage opportunities.

Today's consumers would also come out on the losing end of the long-stale refunds that Petitioners propose. Refunds to customers from the late 1990s would likely surpass \$1 billion, and could be \$1.6 billion or more by one estimate. *BellSouth Reconsideration Order* ¶ 16 (citing Comments of AT&T at 4). This amount is equal to approximately 20 percent of all annual contributions to the entire USF. Demands on the fund would not change as a result of any refund mandate, meaning USAC would have to raise this amount in addition to funding the USF's existing obligations. This would cause a huge spike in the USF and result in a corresponding increase in the contribution factor at a time when the fund is already struggling to satisfy existing demands. The current contribution factor is near an all-time high at 11.3 percent and could jump to more than 13.5 percent solely as a result of the refunds that Petitioners propose.⁴ A rise in the contribution factor would cause USF fees on consumers' bills to increase in lock-step, and, as discussed above, with no corresponding benefit to anyone other than those who would profit from the process itself.

For these reasons the Commission correctly determined that “the equities of significantly increasing collection from current USF contributors *and their customers* in order to attempt to flow refunds to millions of customers of an earlier decade” in the end “militate strongly against” the refunds Petitioners propose, which would “cause manifest injustice for today's consumers.” *BellSouth Reconsideration Order* ¶¶ 15, 20.

Moreover, to the extent Petitioners suggest that the Commission could order carriers to refund USF fees to consumers from the late 1990s without a corresponding refund of

⁴ See Public Notice, Office of Managing Director, *Proposed Second Quarter 2008 Universal Service Contribution Factor*, 23 FCC Rcd 4087 (2008).

contributions from the fund, they are wrong. *Petition for Reconsideration* at 12-13. This would violate the prohibition against retroactive rulemaking. *Catholic Soc. Serv. v. Shalala*, 12 F.3d 1123, 1124 (D.C. Cir. 1994) (citing *Georgetown Univ. Hosp. v. Bowen*, 821 F.2d 750, 758 (D.C. Cir. 1987), *aff'd*, 488 U.S. 204 (1988)).

Prior to the Fifth Circuit's *TOPUC* decision, the Commission's rules unambiguously required contributions to the schools and libraries and rural health care programs on intrastate revenues and permitted carriers to recover those contributions from their customers. *BellSouth Reconsideration Order* ¶ 8 (citing *Federal State Joint Board on Universal Service*, Report and Order and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 24952 (2002)). These rules were in effect until the Commission's orders resulting from the *TOPUC* decision eliminated contributions on intrastate revenues on a prospective basis only.⁵

The Commission could not now reach back in time and direct carriers operating in the late 1990s not to recover contributions to the fund on intrastate revenues from their customers. This would impermissibly “impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.” *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994); *see also Celtronix Telemetry, Inc. v. FCC*, 272 F.3d 585, 588 (D.C. Cir. 2001) (“a retroactive rule forbidden by the [Administrative Procedure Act] is one which ‘alters the *past* legal consequences of past actions.’”) (quoting *Bowen*, 488 U.S. at 219 (Scalia, J., concurring)); *and id.* (citing *Bergerco Canada v. U.S.*

⁵ *See Federal-State Joint Board on Universal Service*, Sixteenth Order on Reconsideration, Eighth Report and Order, Sixth Report and Order, 15 FCC Rcd 1679, ¶ 1 (1999) (determining to apply *TOPUC* and changes to USF contributions on prospective basis only); *Federal State Joint Board on Universal Service*, Order, 20 FCC Rcd 13779, ¶ 11 (2005) (confirming same); *see also BellSouth Reconsideration Order* ¶ 21 (reaffirming same and observing that “[t]he Fifth Circuit did not specifically mandate that its decision be applied to the litigants before it.”)

Treasury Department, 129 F.3d 189, 192-93 (D.C. Cir. 1997) (treating Justice Scalia's concurring opinion as "substantially authoritative").

CONCLUSION

For the foregoing reasons, the *Petition for Reconsideration* must be denied.

Respectfully submitted,

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