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**Before the  
Federal Communications Commission  
Washington, DC 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  
)  
Petition for Reconsideration and Clarification )  
of the *Fifth Circuit Remand Order* of )  
BellSouth Corporation )

**AT&T INC. OPPOSITION TO PETITION FOR RECONSIDERATION AND  
CLARIFICATION OF MARTHA SELF**

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## SUMMARY

The Commission's April 11, 2008 *Reconsideration Order* addresses BellSouth's petition for reconsideration of the Commission's 1999 Order implementing the Fifth Circuit's decision in *Texas Office of Public Utility Counsel v. FCC* (the "*Remand Order*"). In its original December 1999 petition, BellSouth asked the Commission to: (1) decide whether the court's mandate should have been implemented in the *Remand Order* only prospectively; and (2) reaffirm that the holding of the *Fourth Reconsideration Order* in the universal service fund ("USF") proceeding was untouched by the *TOPUC* decision and that CMRS providers may continue to recover the costs of federal universal service contributions through their charges for all services. Petitioner Martha Self now seeks reconsideration of the *Reconsideration Order* in the wake of an order of Federal District Court for the Northern District of Alabama granting AT&T's motion for partial summary judgment and asserts that Petitioner "has been adversely affected by the Court's reliance on the Commission's Reconsideration Order ...."

Petitioner's request comes eight and one-half years after BellSouth filed its initial petition, and nearly three years after the Bureau first addressed most of BellSouth's petition. Section 405(a) of the Communications Act requires that a person aggrieved or whose interests are adversely affected by a Commission Order must file petition for reconsideration of that decision not later than 30 days after public notice thereof. Section 405(a) requires that the Commission summarily dismiss the Petition in its entirety.

In various ways, Petitioner seeks reconsideration of the Commission's determination in the *Fourth Reconsideration Order*. The *Fourth Reconsideration Order* became final in mid-February of 1998, as no petitions for reconsideration were filed, and no parties sought judicial review of that decision. The latest date by which Petitioner could have timely filed the petition was the December 6, 1999 deadline for filing petitions for reconsideration of the *Remand Order*. Petitioner failed to do so, and the Petition is time-barred. (Even if the Wireline Competition Bureau's *Fifth Circuit Clarification Order* provided a further opportunity for Petitioner to take issue with the *Fourth Reconsideration Order*, which it did not, Petitioner failed to timely seek reconsideration of that decision as well.) In any case, the *Reconsideration Order* does not create an "order, decision, report, or action" with respect to the *Fourth Reconsideration Order* that secures any right to seek reconsideration in the first instance.

Petitioner's request that the *TOPUC* decision be applied retroactively, at minimum to cases pending when the case was decided, is also time-barred under section 405(a). The scope of the Commission's prospective application of the *TOPUC* decision occurred at the time of the *Remand Order*, as evidenced by BellSouth's own timely-filed petition. Petitioner did not file comments supporting or opposing BellSouth's petition (even though BellSouth served a copy on Petitioner), much less file a petition for reconsideration of her own. Thus, the *Remand Order* became final as to Petitioner.

Petitioner's request for "clarification" of the Commission's 2002 and 2003 decisions regarding carriers' USF cost recovery requirements is untimely under section 405(a). The *USF Cost Recovery Orders* were not before the Commission in the *Reconsideration Order*, and in any event petitions for reconsideration of those decisions were due in 2002 and 2003, respectively. Thus, Petitioner effectively seeks "clarification" of the *USF Cost Recovery Orders* as a back-door means of obtaining reconsideration of the *Fourth Reconsideration Order*. To the extent

that Petitioner seeks reconsideration of these Orders, the request is clearly untimely and outside the scope of the instant proceeding.

Even if the jurisdictional limitations of section 405 were not applicable, section 1.429 of the Rules would preclude the Commission from entertaining the Petition as well. Petitioner presents no new or changed facts or circumstances that occurred prior to the *Reconsideration Order*, and there is no conceivable public interest basis for granting the Petition. Petitioner had every opportunity (and notice) to participate in clearly relevant and potentially dispositive Commission proceedings yet chose not to do so. The District Court's adverse decision is not a public interest basis for considering the Petition, and as the *Reconsideration Order* did not modify any of the provisions of the *Remand Order*, the Petition may be summarily dismissed.

The Commission need not address Plaintiff/Petitioner's legal arguments concerning retroactive application of the *TOPUC* decision. In any case, Petitioner has presented no valid basis for the Commission to reconsider its decision. The Commission explained that there was no selective retroactivity in its implementation of the *TOPUC* decision, as no parties, including those who timely filed petitions for review of the original *Universal Service Order*, were afforded refunds of USF contributions assessed on their reported intrastate revenues as a result of the *TOPUC* decision. The Commission has thus addressed the concerns BellSouth raised in its petition.

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**AT&T INC. OPPOSITION TO PETITION FOR RECONSIDERATION AND  
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Pursuant to section 1.429(f) of the Commission’s Rules, 47 C.F.R. § 1.429(f), AT&T Inc., on behalf of AT&T Mobility LLC and its wholly-owned and controlled wireless affiliates (collectively “AT&T”) opposes the Petition for Reconsideration and Clarification of Martha Self in the above-referenced proceeding.<sup>1</sup> The Petition is untimely and wholly without merit, and the Commission should accordingly dismiss it and not revisit the merits of the April 11, 2008 *Order on Reconsideration*.<sup>2</sup>

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<sup>1</sup> See Petition for Reconsideration and Clarification of Martha Self, CC Docket No. 96-45, CC Docket No. 96-262, and WC Docket No. 06-122, filed May 9, 2008 (the “Petition”).

<sup>2</sup> *In the Matters of Federal-State Joint Board on Universal Service, Access Charge Reform, Universal Service Contribution Methodology, 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 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, CC Docket No. 96-45, CC Docket No. 96-262, WC Docket No. 06-122, FCC 08-101 (rel. Apr. 11, 2008), recon. pending (“Reconsideration Order”).*

## BACKGROUND AND INTRODUCTION

On May 8, 1997, the Commission released its initial *Report and Order* implementing the universal service provisions of section 254 of the Communications Act of 1934, as amended (the “Act”).<sup>3</sup> In that original *Universal Service Order*, the Commission found that telecommunications carriers must contribute to several of the federal universal service support mechanisms based on their intrastate, interstate and international end user telecommunications revenues.<sup>4</sup> In that same order, the Commission also determined that telecommunications carriers must recover their universal service contributions solely through rates for interstate services.<sup>5</sup> On reconsideration the same year, the Commission found that section 332(c)(3) of the Act “alter[ed] the ‘traditional’ federal-state relationship with respect to CMRS by prohibiting states from regulating rates for intrastate commercial mobile services.”<sup>6</sup> The Commission thus “permit[ted] CMRS providers to recover their contributions through rates charged for all their services.”<sup>7</sup>

The following year in 1998, one of AT&T’s predecessors-in-interest, BellSouth Mobility Inc (“BMI”), was named as a defendant in a class action lawsuit filed on behalf of Petitioner Martha Self (“Petitioner”) in Alabama state court. In that original action, Petitioner contended 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’

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<sup>3</sup> *Federal-State Joint Board on Universal Service*, Report and Order, CC Docket No. 96-45, 12 FCC Rcd 8776 (1997) (“*Universal Service Order*”)(subsequent history omitted).

<sup>4</sup> *Id.* at 9174, 9200, 9203-05, ¶¶ 779, 831, 837-41.

<sup>5</sup> *Id.* at 9198-99, 9203-04, ¶¶ 825, 829, 838.

<sup>6</sup> *See Federal-State Joint Board on Universal Service*, Fourth Order on Reconsideration in CC Docket No. 96-45, Report and Order in CC Docket Nos. 96-45, 96-262, 94-1, 92-213, 95-72, 13 FCC Rcd 5318, 5489 ¶ 309 (1997) (“*Fourth Reconsideration Order*”).

<sup>7</sup> *Id.*

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 ....”<sup>8</sup> The case was subsequently removed to the United States District Court for the Northern District of Alabama.<sup>9</sup>

In *Texas Office of Public Utility Counsel*, the U.S. Court of Appeals for the Fifth Circuit reversed those provisions of the *Universal Service Order* “that include[] intrastate revenues in the calculation of universal service contributions.”<sup>10</sup> The court did not address the *Fourth Reconsideration Order*, and only addressed cost recovery to a very limited degree in the wireline context.<sup>11</sup> On remand, the Commission in an October 8, 1999 Order amended its universal service contribution rules to eliminate any universal service contribution assessment on intrastate revenues starting November 1, 1999, the date the court’s mandate became effective.<sup>12</sup>

In light of the pending litigation, BellSouth Corporation timely filed a protective petition for reconsideration and clarification of the *Remand Order* specifically raising the *Self* case and requesting a refund for revenues in the event the Commission found that *TOPUC* applied retroactively. Specifically, BellSouth asked the Commission to: (1) decide on reconsideration whether the court’s mandate should have been implemented in the *Remand Order* only prospectively; and (2) reaffirm that the holding of the *Fourth Reconsideration Order* was

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<sup>8</sup> See *Martha Self v. BellSouth Mobility, Inc. et al.*, No. V9805439, Complaint and Petition for Class Action, at 2 ¶ 4 and 4 ¶ 12 (Jefferson Co., Ala. Filed Sept. 9, 1998).

<sup>9</sup> *Martha Self v. BellSouth Mobility, Inc. et al.*, No. 98-JEO-2581S (N.D.Ala.).

<sup>10</sup> *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 447-48 (5<sup>th</sup> Cir. 1999), cert. denied sub nom. *GTE Serv. Corp. v. FCC*, 531 U.S. 975 (2000) (“*TOPUC*”).

<sup>11</sup> *Id.* at 424-25; see *Federal-State Joint Board on Universal Service*, Sixteenth Order on Reconsideration in CC Docket No. 96-45, Eighth Report and Order in CC Docket No. 96-45, Sixth Report and Order in CC Docket No. 96-262, 15 FCC Rcd 1679, ¶¶ 30-33 (1999) (“*Remand Order*”) (subsequent history omitted).

<sup>12</sup> *Remand Order* at 1687 ¶ 18.

untouched by the *TOPUC* decision and that CMRS providers may continue to recover the costs of federal universal service contributions through their charges for all services. A copy of BellSouth's petition was served on Petitioner, and it appeared on Public Notice in the Federal Register on April 7, 2000.<sup>13</sup> Self declined to participate.

On March 6, 2000, the Federal District Court granted BellSouth's motion, on primary jurisdiction grounds, to hold the case in abeyance pending the Commission's resolution of BellSouth's petition, a decision of which Petitioner was certainly aware.<sup>14</sup> On August 22, 2005, the Wireline Competition Bureau ("Bureau") released an order reaffirming that CMRS providers "may recover their universal service contributions through rates charged for all of their services" and holding that the Commission in the *Remand Order* applied the *TOPUC* decision prospectively beginning November 1, 1999.<sup>15</sup> (The Bureau did not address the issue of whether the Fifth Circuit's decision was appropriately applied prospectively-only in the first instance, but deferred that issue to the Commission.) Petitioner did not seek reconsideration or otherwise seek Commission review of that Bureau Order, and it became final in accordance with Commission rules.

In the *Reconsideration Order* at issue here, the Commission addressed the remaining provisions of BellSouth's original Petition. The Commission agreed with the Bureau's earlier

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<sup>13</sup> 65 Fed. Reg. 18334 (Apr. 7, 2000).

<sup>14</sup> *Martha Self v. BellSouth Mobility, Inc.*, 111 F.Supp.2d 1169, 1173 (N.D.Ala. 2000).

<sup>15</sup> See *Federal-State Joint Board on Universal Service, Access Charge Reform, Petition for Reconsideration and Clarification of the Fifth Circuit Remand Order of BellSouth Corporation*, Order, 20 FCC Rcd 13779 (WCB 2005) ("*Fifth Circuit Clarification Order*").

findings in their entirety,<sup>16</sup> and separately held that the *Remand Order* appropriately applied the *TOPUC* decision prospectively only.<sup>17</sup>

Petitioner now seeks reconsideration because the Federal District Court has granted AT&T's motion for partial summary judgment and Petitioner "has been adversely affected by the Court's reliance on the Commission's Reconsideration Order ...."<sup>18</sup> Only now — over eight and one-half years after BellSouth filed its initial petition for reconsideration and clarification of the *Remand Order*, and nearly three years after the Bureau first addressed the merits of BellSouth's petition — does Petitioner seek to have the Commission consider the merits of Petitioner's arguments. The untimely Petition must be summarily dismissed.

## DISCUSSION

### I. THE PETITION IS UNTIMELY UNDER SECTION 405 IN ALL RESPECTS AND MUST BE DISMISSED

Section 405(a) of the Act provides in relevant part that "[a]fter an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission ... , any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority, making or taking the order, decision, report, or action ...."<sup>19</sup> Further, such "[a] petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of."<sup>20</sup> The Commission has no authority to

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<sup>16</sup> *Reconsideration Order* at ¶¶ 8-9, 13-22.

<sup>17</sup> *Id.* at ¶¶ 13-21.

<sup>18</sup> Petition at 9; *Martha Self v. BellSouth Mobility, LLC*, No. 2:98-cv-02581-JEO, Memorandum Opinion (N.D.Ala. Apr. 21, 2008).

<sup>19</sup> 47 U.S.C. § 405(a).

<sup>20</sup> *Id.*

waive this statutory deadline except under extraordinary circumstances not remotely present here.<sup>21</sup> Petitioner failed to meet these requirements and the Commission must therefore summarily dismiss the Petition in all respects.

**A. Petitioner Was Required to Seek Reconsideration of Either the *Fourth Reconsideration Order*, the *Remand Order* or the *Fifth Circuit Clarification Order***

Petitioner requests that the Commission “reconsider its determination that CMRS providers could recover USF contributions through rates for all of its services during the period from January 1, 1998 through October 31, 1999,” on the basis that BMI “could not recover more than the amount that was properly assessed” or, alternatively, “reconsider the [*Fourth Reconsideration Order*] in light of the TOPUC decision.”<sup>22</sup> Citing again to the TOPUC decision, Petitioner alternatively requests that the Commission “clarify that permitting CMRS to recover USF contributions through rates for all of its services does not allow CMRS providers to recover USF contributions that were calculated on assessments based on intrastate revenue.”<sup>23</sup> Section 405(a) of the Act, however, prohibits the Commission from considering all these requests.

Petitioner’s contentions are all erroneously premised on the assumption that the TOPUC decision somehow restricted the scope of the *Fourth Reconsideration Order*. In fact, that decision was never challenged in TOPUC. The *Fourth Reconsideration Order* became final in

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<sup>21</sup> *Reuters, Ltd. v. FCC*, 781 F.2d 946, 951-52 (D.C. Cir. 1986); *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order, 18 FCC Rcd 7615, 7615-16 ¶ 2 (2003) (denying petition filed two weeks after statutory deadline); *Ole Brook Broadcasting, Inc.*, 15 FCC Rcd 20644 (2000); *Sunjet Car Service, Inc.*, 15 FCC Rcd 25451 (EB 2000); see also *Virgin Islands Telephone Corp. v. FCC*, 989 F.2d 1231, 1237 (D.C. Cir. 1993) (holding that “miscommunications within [the petitioner’s law] firm” that cause a filing to be one day late did not constitute “extenuating circumstances” and thus “the Commission’s refusal to entertain Vitelco’s petition for reconsideration was justified.”).

<sup>22</sup> Petition at 14-15.

<sup>23</sup> *Id.* at 14 (emphasis in original).

mid-February of 1998, as no petitions for reconsideration were filed, and no parties sought judicial review of that decision. Accordingly, any petition for reconsideration of that decision *per se* is untimely under section 405(a). Further, the *Fourth Reconsideration Order* has remained the law in effect throughout the life of Petitioner’s litigation.<sup>24</sup> To the extent Petitioner was aggrieved by a later Commission decision it was the *Remand Order*, and the absolute latest deadline for seeking modification of the *Fourth Reconsideration Order* “in light of the TOPUC decision” was through a petition for reconsideration of the *Remand Order*, as evidenced by BellSouth’s own timely filed petition. To the extent that Petitioner ignored (1) the obvious implications of the *Fourth Reconsideration Order* on the legal merits of its litigation prior to October 31, 1999, and (2) the impact (or lack thereof) of the *TOPUC* decision on the *Fourth Reconsideration Order* – whether as a matter of litigation strategy or otherwise – Petitioner did so at its own peril. Petitioner may not rely on the District Court’s adverse decision partially granting BMI’s summary judgment motion as a legal or jurisdictional basis for seeking yet another proverbial bite at the apple.<sup>25</sup>

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<sup>24</sup> See 63 Fed. Reg. 2093 (Jan. 13, 1998).

<sup>25</sup> Even if the *Fifth Circuit Clarification Order* provided a further opportunity for Petitioner to take issue with the *Fourth Reconsideration Order*, which it did not, Petitioner failed to timely seek reconsideration of the Bureau’s decision there as well. In that decision, the Bureau concluded that “[t]he manner in which carriers may recover their universal service contributions through assessments on customers was not before the court” and “that the *TOPUC* decision did not affect the Commission’s finding in the *Fourth Reconsideration Order* ....” *Fifth Circuit Clarification Order*, 20 FCC Rcd at 13781 ¶ 6. Accordingly, the deadline for Petitioner to raise its arguments on reconsideration was 30 days after the item’s release on August 22, 2005, which has obviously long since passed. 47 U.S.C. § 405(a); 47 C.F.R. § 1.429. The deadline for filing an application for review of the *Fifth Circuit Clarification Order* was also 30 days after Public Notice thereof. 47 C.F.R. § 1.115(d).

Further, while the Commission confirmed the Bureau’s reasoning in the *Reconsideration Order*,<sup>26</sup> that more recent item does not create an “order, decision, report, or action” with respect to the *Fourth Reconsideration Order* that secures any right to seek reconsideration in the first instance.<sup>27</sup> The Bureau’s decision addressed the clarification provisions of BellSouth’s original petition, including those relating to the *Fourth Reconsideration Order*; BellSouth’s request for reconsideration relating to the issue of retroactivity was deferred to the full Commission.<sup>28</sup> The Bureau’s decision became final, unreviewable, and tantamount to Commission action in the fall of 2005.<sup>29</sup> As the Commission stated, citing the Bureau’s action, “we clarified previously that the *TOPUC* decision did not undermine the validity of the” *Fourth Reconsideration Order*.<sup>30</sup> For this reason as well, section 405(a) precludes the Commission from considering this aspect of the Petition.

**B. Petitions for Reconsideration of the Commission’s Prospective-Only Application of the *TOPUC* Decision Were Due December 6, 1999.**

Petitioner requests that the Commission “[r]econsider its decision to apply *TOPUC* prospectively or, in the alternative, clarify that” the relevant provision of the *Reconsideration Order* “does not apply prospectively to claims made by customers of CMRS providers to recover

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<sup>26</sup> *Reconsideration Order* at ¶¶ 1, 8-9.

<sup>27</sup> See 47 U.S.C. § 405(a).

<sup>28</sup> See *Fifth Circuit Clarification Order*, 20 FCC Rcd at 13781 ¶ 5 n.16.

<sup>29</sup> See 47 U.S.C. 155(c)(3) (Unless an application for review is acted on, “[a]ny order, decision, report, or action made or taken pursuant to [delegated authority] ... shall have the same force and effect, and shall be made, evidenced, and enforced in the same manner, as orders, decisions, reports, or other actions of the Commission.”); 47 C.F.R. §§ 1.103(b), 1.117(a).

<sup>30</sup> *Reconsideration Order* at ¶ 8 (emphasis added). The Ordering Clauses in the *Reconsideration Order*, which only purport to *deny* the underlying petitions for reconsideration, confirm this conclusion – as the Bureau obviously *granted* the provision of BellSouth’s petition relating to the *Fourth Reconsideration Order*. See *id.* at ¶ 24; *Fifth Circuit Clarification Order* at 13783 ¶ 12.

amount [sic] CMRS providers collected for USF contributions calculated on intrastate revenues pending when TOPUC was decided ....”<sup>31</sup> The purported “alternative” suggestion that TOPUC has retroactive application only to cases pending when the case was decided is a distinction without a difference. In any case, the Commission’s prospective application of the *TOPUC* decision occurred at the time of the *Remand Order*, a fact BellSouth made clear in its own timely-filed petition.<sup>32</sup> Petitioner was required to raise these concerns on reconsideration of the *Remand Order*, which it failed to do, and its claim is time-barred under section 405(a).

As evidenced by BellSouth’s petition and the District Court’s primary jurisdiction referral, the issue of whether the *TOPUC* decision was to be applied retroactively was potentially a linchpin of Petitioner’s case against BMI, yet Petitioner failed to take issue with the Commission’s implementation of that decision.<sup>33</sup> By failing to do so, the *Remand Order* became final as to Petitioner and is now beyond challenge.<sup>34</sup> Section 405(a) clearly forecloses Petitioner from trying to re-state these arguments at this late date. Petitioner cannot extend the deadline for challenging the *Remand Order* “by piggy-backing on to a petition for reconsideration filed by another party.”<sup>35</sup>

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<sup>31</sup> Petition at 17.

<sup>32</sup> See BellSouth Petition at 5, 7.

<sup>33</sup> See *Martha Self v. BellSouth Mobility*, 111 F.Supp.2d at 1173.

<sup>34</sup> The courts have held that “finality with respect to agency action is a party-based concept.” *United Transportation Union v. ICC*, 871 F.2d 1114, 1117-18 (D.C. Cir. 1989). Thus, the *Remand Order* became final as to all parties other than those, like BellSouth, who timely filed petitions for reconsideration. See *BellSouth Corporation v. FCC*, 17 F.3d 1487, 1489 (D.C. Cir. 1994) (“once a party petitions the agency for reconsideration of an order or any part thereof, the entire order is rendered nonfinal *as to that party*.”) (emphasis added). Thus, the *Remand Order* is final as to Petitioner.

<sup>35</sup> *Public Citizen Inc. v. Mineta*, 343 F.3d 1159, 1170 (9th Cir. 2003)

**C. Reconsideration of the 2002 and 2003 Orders on Universal Service Cost Recovery Is Untimely and the Requested “Clarification” Effectively Seeks Untimely Reconsideration of the *Fourth Reconsideration Order*.**

Petitioner requests that the Commission “clarify that, prior to” the Commission’s 2002 and 2003 decisions modifying telecommunications carriers’ universal service cost recovery practices,<sup>36</sup> such practices “were governed by the Commission rule that carriers could not shift more than an equitable share of their contributions to any customer or group [of] customers [sic] and that the 2002 and 2003 recovery rules do not apply ret[ro]actively [sic].”<sup>37</sup> The *USF Cost Recovery Orders* were not before the Commission in the *Reconsideration Order*, and in any event petitions for reconsideration of those decisions were due in 2002 and 2003, respectively. To the extent that Petitioner seeks reconsideration of those Orders, the request is clearly untimely and outside the scope of the instant proceeding.<sup>38</sup>

Petitioner’s “clarification” request asserts that before the *USF Cost Recovery Orders*, “USF contribution policies were governed by the Commission’s mandate [from the *Universal Service Order*] that carriers not shift more than an equitable share of contributions to any customer or group of customers.”<sup>39</sup> The Commission, however, modified that very provision of the *Universal Service Order* in the *Fourth Reconsideration Order* with respect to CMRS

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<sup>36</sup> See *Federal-State Joint Board on Universal Service*, Further Notice of Proposed Rulemaking and Report and Order, 17 FCC Rcd 3752, 3806-07 ¶¶ 125-28 (2002), modified on recon. 18 FCC Rcd 1421, 1426 ¶ 8 (2003) (the “*USF Cost Recovery Orders*”).

<sup>37</sup> See Petition at 17.

<sup>38</sup> See 47 U.S.C. § 405(a); 47 C.F.R. § 1.429(c) (petition must “state with particularity the respects in which the *action taken* should be changed.” (emphasis added)); *Illinois Bell Tel. Co. v. FCC*, 911 F.2d 776, 783 (D.C. Cir. 1990); *Implementation of Section 302 of the Telecommunications Act of 1996 Open Video Systems*, 13 FCC Rcd 14553, 14558-59 (2003).

<sup>39</sup> Petitioner’s citation is to the *Fourth Reconsideration Order*, but the pinpoint cite appears to relate to the original *Universal Service Order* at 12 FCC Rcd at 9199 ¶ 829.

providers.<sup>40</sup> The Bureau comprehensively addressed how the *Fourth Reconsideration Order* was unaffected by the *TOPUC* decision, as well as the continued relevance of that decision in light of the *USF Cost Recovery Orders*.<sup>41</sup> Thus, Petitioner effectively seeks “clarification” of the *USF Cost Recovery Orders* as a back-door means of obtaining reconsideration of the *Fourth Reconsideration Order*. For the reasons described *supra*, Petitioner’s request is untimely for this reason as well.

## **II. THERE IS NO PUBLIC INTEREST BASIS FOR CONSIDERATION OF THE PETITION.**

Even if Petitioner could somehow navigate around the jurisdictional limitations of section 405 the Act, the Commission’s rules preclude the Commission from entertaining the Petition as well and further underscore the mischief which would result from consideration of the Petition.

Section 1.429(b) of the Rules provides that:

A petition for reconsideration which relies on facts which have not previously been presented to the Commission will be granted only under the following circumstances: (1) The facts relied on relate to events which have occurred or circumstances which have changed since the last opportunity to present them to the Commission; (2) The facts relied on were unknown to petitioner until after his last opportunity to present them to the Commission, and he could not through the exercise of ordinary diligence have learned of the facts in question prior to such opportunity; or (3) The Commission determines that consideration of the facts relied on is required in the public interest.

As the Commission has explained, under this standard it “will entertain a petition for reconsideration if it is based on new evidence, changed circumstances or if reconsideration is in

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<sup>40</sup> See *Fourth Reconsideration Order*, 13 FCC Rcd at 5487-89, ¶¶ 306-309 (citing *Universal Service Order*, 12 FCC Rcd at 9188-99).

<sup>41</sup> See *Fifth Circuit Clarification Order*, 20 FCC Rcd at 13781-82 ¶¶ 6-10.

the public interest.”<sup>42</sup> Petitioners also must demonstrate that new evidence could not have been raised earlier in the proceeding.<sup>43</sup> None of these standards are even remotely satisfied here.

Petitioner presents no new or changed facts or circumstances that occurred prior to the *Reconsideration Order*, and there is no conceivable public interest basis for granting the Petition here. By Petitioner’s own admission, reconsideration is being sought because Petitioner received an unfavorable ruling in Federal District Court, not new facts. The Commission has warned in another context in applying section 1.429(b) that “[o]ur [broadcast] allotment process cannot operate efficiently if we allow a party to sit back and hope for a decision in its favor and, then, when an adverse decision is rendered, proffer additional submissions or options.”<sup>44</sup> The Commission’s admonishment is certainly relevant here, where Petitioner had every opportunity (and notice) to participate in clearly relevant and potentially dispositive Commission proceedings and chose not to do so. Petitioner declined to file a petition or even comment on the petitions for reconsideration of the *Remand Order*. Accordingly, “unless the public interest would be served by reconsideration, section 1.429(i) of [the] rules limits subsequent reconsideration to modifications made to the original order on reconsideration.”<sup>45</sup>

Petitioner’s only purported basis for filing the petition is the District Court’s adverse decision. As discussed above, this is no public interest basis for considering the Petition. As the

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<sup>42</sup> See *Numbering Resource Optimization*, Fourth Order on Reconsideration, 22 FCC Rcd 8047, 8050 ¶ 5 (2007).

<sup>43</sup> See *FM TABLE OF ALLOTMENTS, Banks, Redmond, Sunriver, Corvallis, and The Dalles, Oregon*, Memorandum Opinion and Order, 19 FCC Rcd 10068, 10075 ¶ 20 (2004) (citing *Colorado Radio v. FCC*, 118 F. 2d 24 (D.C. Cir. 1941)).

<sup>44</sup> *Id.*.

<sup>45</sup> *Amendment of Part 95 of the Commission’s Rules to Provide Regulatory Flexibility in the 218-219 MHz Service*, 17 FCC Rcd 8520, 8527 ¶ 20 (2002) (citing 47 C.F.R. § 1.429(i)).

*Reconsideration Order* did not modify any of the provisions of the *Remand Order*, the Petition may be summarily dismissed.

### **III. THE COMMISSION FULLY ADDRESSED THE CONCERNS RAISED IN BELL SOUTH'S 1999 PETITION AND THERE IS NO REASON TO REOPEN THE MATTER**

The Commission need not address Petitioner's legal arguments concerning retroactive application of the *TOPUC* decision, as Petitioner was required to present them as a petition for reconsideration of the *Remand Order*. In any case, Petitioner has presented no valid basis for the Commission to reconsider its decision. As courts have made increasingly clear since BellSouth's petition, what the Supreme Court prohibits as a result of its *Harper*, *Beam*, and *Hyde* decisions<sup>46</sup> is "selective retroactivity," where some parties are afforded retroactive treatment whereas others are not. Pure prospectivity, in which a decision is applied neither to the parties in the immediate case or to any other pending cases, is permitted.<sup>47</sup>

The Commission explained that "[a]s the Fifth Circuit did not apply the new rule to the litigants before it, there is no selective retroactivity here."<sup>48</sup> No parties, including those who timely filed petitions for review of the original *Universal Service Order*, were afforded refunds

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<sup>46</sup> *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995); *Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991).

<sup>47</sup> See *Glazner v. Glazner*, 347 F.3d 1212, 1216-17 (11<sup>th</sup> Cir. 2003) ("whether to apply a newly announced rule prospectively in the first instance" is distinguishable from the principle that a decision apply to all parties before it and all pending cases); *Crowe v. Bolduc*, 365 F.3d 36, 93 (1<sup>st</sup> Cir. 2004) (embracing *Glazner* view and applying new rule adopted for the first time in that case prospectively only); see also *National Fuel Gas Supply Corp. v. FERC*, 59 F.3d 1281, 1286-87 (D.C. Cir. 1995) (noting that *Beam* decision addressed selective retroactivity).

<sup>48</sup> *Reconsideration Order* at ¶ 21. In its brief before the Fifth Circuit, Cincinnati Bell stated that "[t]he FCC should be ordered to refund all moneys received from carriers attributable to intrastate revenues ...." Brief of Petitioner Cincinnati Bell Tel. Co., No. 07-60421, at 38 (5<sup>th</sup> Cir. filed Feb. 23, 1998). The court, however, did not address this argument, and ultimately granted the Commission's Motion for Stay of the court's mandate until November 1, 1999, thus effectively ratifying the Commission's determination to apply the mandate prospectively. See *Remand Order*, 15 FCC Rcd at 1685 ¶ 14.

of universal service fund contributions assessed on their reported intrastate revenues as a result of the *TOPUC* decision.<sup>49</sup> Petitioner’s categorical assertions that “TOPUC must be given retroactive effect as to Self’s claims” and “without consideration of any equitable issues” are thus incorrect.<sup>50</sup> Selective prospectivity was not at issue in the Commission’s implementation of the *TOPUC* decision in the *Remand Order*, and the Commission has addressed the concerns BellSouth raised in its petition. Petitioner’s untimely attempt to bootstrap on to BellSouth’s timely filed petition should be rejected for this reason as well.<sup>51</sup>

### CONCLUSION

For the reasons discussed above, the Petition is untimely in its entirety and section 405(a) of the Act requires the Commission to dismiss it.

Respectfully submitted,

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June 11, 2008

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<sup>49</sup> See *Reconsideration Order* at ¶ 21.

<sup>50</sup> See Petition at 13.

<sup>51</sup> See *supra* note 35 and associated text.

**CERTIFICATE OF SERVICE**

I, Paula Lewis, hereby certify that copies of the foregoing “AT&T Inc. Opposition to Petition for Reconsideration and Clarification of Martha Self” have been served this 11th day of June, 2008, by first class U.S. Mail upon the following persons:

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