

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
High-Cost Universal Service Support)	WC Docket No. 05-337
)	
)	
Universal Service Contribution Methodology)	WC Docket No. 06-122
)	
)	
Federal-State Joint Board on Universal Service)	CC Docket No. 96-45
)	
)	
Comment Sought on Request for Universal)	
Service Fund Policy Guidance Requested by)	
the Universal Service Administrative Company)	

COMMENTS OF THE NEBRASKA RURAL INDEPENDENT COMPANIES

Dated: October 28, 2009

The Nebraska Rural Independent Companies

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Comments of The Nebraska Rural Independent Companies

I. Introduction

The Nebraska Rural Independent Telephone Companies (“Nebraska Companies”)¹ hereby submit comments in the above-captioned proceeding. The Nebraska Companies appreciate the opportunity to file comments on the Request for Universal Service Fund Policy Guidance requested by the Universal Service Administrative Company. Specifically, the Nebraska Companies submit comments on the following items in which USAC seeks clarification from the Federal Communications Commission (“Commission”):

¹ Companies submitting these collective comments include: Arlington Telephone Company, The Blair Telephone Company, Cambridge Telephone Company, Clarks Telecommunications Co., Consolidated Telco, Inc., Consolidated Telcom, Inc., Consolidated Telephone Company, Curtis Telephone Company, Eastern Nebraska Telephone Company, Great Plains Communications, Inc., Hamilton Telephone Company, Hartington Telecommunications Co., Inc., Hershey Cooperative Telephone Company, Inc., K&M Telephone Company, Inc., Nebraska Central Telephone Company, Northeast Nebraska Telephone Co., Rock County Telephone Company, Stanton Telephone Co., Inc. and Three River Telco.

1. Whether eligible telecommunications carriers (ETCs) are required to separately list each supported service enumerated in 47 C.F.R. §54.101² to comply with the advertising requirement found in Section 54.201;

2. What remedial action, if any, should be initiated against carriers that did not maintain documentation for periods prior to the establishment of high-cost program documentation rules; and

3. Whether income taxes attributable to S-Corporation shareholders, as a result of their ownership of the corporation's equity, are includable in the carrier's revenue requirement, and therefore, recoverable through universal service support.

II. Advertising Supported Services

In order to achieve consistency in the administration of the USAC audit process, USAC management seeks clarification from the Commission as to whether eligible telecommunications carriers (ETCs) are required to separately list each supported service enumerated in 47 C.F.R. §54.101 to comply with the advertising requirement found in Section 54.201. Pursuant to Section 54.201, a common carrier designated as an ETC is eligible to receive support if it offers the services that are supported by federal universal support mechanisms and advertises the availability and charges of such services. While undergoing High Cost Support Mechanism beneficiary audits, several ETCs have argued that only local telephone service and the associated charge must be advertised in view of the fact that supported services are indivisibly bundled into what the public understands to be local telephone service. Following consistent findings from these audits that ETCs are neither listing nor advertising each supported service separately,

² The supported services include:

1. Voice grade access to the public network;
2. Local usage;
3. Dual-tone multi-frequency signaling or its functional equivalent;
4. Single-party service or its functional equivalent;
5. Access to emergency service;
6. Access to operator services;
7. Access to interexchange services;
8. Access to directory assistance; and
9. Toll limitation for qualifying low-income consumers.

USAC requested guidance from the Commission in determining whether ETCs that fail to list and advertise each separate supported service are in violation of Section 54.201(d)(2).

The Nebraska Companies agree with those ETCs that argue that only local telephone service must be advertised, as long as all of the supported services are being provided under the umbrella of local telephone service. The supported services enumerated in Section 54.101 are functionalities of the overall service being offered to the public (*i.e.*, voice grade telecommunications service offered as local telephone service.) The supported services enumerated in Section 54.101 are not separately offered to the public, are not customarily regarded by consumers as separate product offerings, and to avoid consumer confusion, should not be required to be advertised as though the services are separately offered to the public.

As an example, the capability to dial 911 and access emergency services is not a service separately sold to the public, and for that reason, there is not a price developed and associated with it. Access to emergency services is, instead, one of the functionalities that is a part of providing local exchange telephone service. Perhaps an even more graphic example of a service that is not separately sold is the availability of dual-tone multi-frequency signaling or its functional equivalent. The Nebraska Companies submit that most telephone service consumers do not even know, nor do they need to know, what dual-tone multi-frequency signaling or its functional equivalent is, and certainly consumers do not purchase this service separate or apart from local exchange telephone service. Therefore, requiring an ETC to advertise each supported service separately with a charge assessed to each service does not benefit the general public or the consumer when supported services cannot be purchased a la carte.

The Nebraska Companies recommend that the Commission continue to require that ETCs provide all of the supported services as functionalities or inputs into the service offered to the

public as local exchange telephone service or its functional equivalent. The Nebraska Companies believe that advertising local exchange telephone service is sufficient for compliance with 47 C.F.R. §54.201(d)(2) and recommend that no retroactive remedial action be taken against ETCs who have offered all of the supported services, but advertised to the public all of the supported services under the umbrella local telephone service or its functional equivalent. Further, the Nebraska Companies request that the Commission would provide clarification that separate advertising of the supported services is not required on a prospective basis.

III. High Cost Program: Document Retention Requirements Prior to Rule Change

In addition, USAC requests guidelines for remedial actions, if any, that should be initiated against carriers that did not maintain documentation for periods prior to the establishment of high-cost program documentation retention rules (“Document Retention Rule”).³ The Document Retention Rule should not be applied retroactively. As part of their request for guidance, USAC seeks input from the Commission regarding remedial actions, if any, that should be imposed upon carriers that did not maintain documents the period of time prior to the enactment of the Document Retention Rule.

The rule, which USAC states became effective on March 1, 2008, is codified at 47 CFR §54.202(e) and requires that eligible telecommunications carriers retain records relating to support received from the universal service high-cost program for five years. There was no rule regarding document retention before this regulation became effective.

USAC states in its request that “[w]hen the Commission established this rule, it did not address what, if any, remedial actions should be initiated against carriers that did not maintain documentation for periods being audited prior to the establishment of the High Cost Program

³ 47 CFR 54.202(e) and referred to in this document as “Document Retention Rule.”

documentation rules.”⁴ Nevertheless, it should be noted that the Commission also did not address whether the Document Retention Rule should be applied retroactively, and the rule itself does not state that it applies retroactively. Accordingly, the document retention rule should be categorized as a new rule that does not require retroactive application. Additionally, the rule’s adoption was not based upon any statutory authority that allows a retroactive application.

The Administrative Procedures Act (“APA”) generally prohibits the retroactive application of a rule. This basic concept is found in the APA definitions, where the APA defines the term “rule” in part, as meaning “the whole or a part of an agency statement of general or particular applicability and future effect designed to . . .”⁵ Consequently, a “rule” is to apply in the future, from the effective date and not retroactively.

This general prohibition on retroactive application is also supported by case law. The Supreme Court addressed this issue in *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988), where the Court stated:

Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result. (citations omitted) By the same principle, a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms. (citations omitted) Even where some substantial justification for retroactive rulemaking is presented, courts *209 should be reluctant to find such authority absent an express statutory grant.

Bowen at 208-209 (1988).

This general prohibition on retroactive application has also been addressed in the Circuit Court of Appeals for the District of Columbia in *Chadmoore Communications Inc. v. FCC*, 113 F.3d 235 (D.C. Cir. 1997). The *Chadmoore* court stated as follows:

⁴ USAC letter to FCC (“USAC Letter”), dated August 19, 2009, at p. 3.

⁵ 5 U.S.C. 551(4) (emphasis added).

As we pointed out in *Georgetown Univ. Hosp. v. Bowen*, 821 F.2d 750, 757 (D.C.Cir.1987), *aff'd* on other grounds, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988), the APA requires that legislative rules [i.e., rules adopted pursuant to the notice and comment procedures of the APA, 5 U.S.C. § 553] be given future effect only. [Therefore], equitable considerations are irrelevant to the determination of whether the [agency's] rule may be applied retroactively; such retroactive application is foreclosed by the express terms of the APA.

Chadmoore at 240.

The standard applicable to the Document Retention Rule is clear. There should be no retroactive application of the Document Retention Rule. The Commission should clearly state that the Document Retention Rule is only applicable to time periods after the effective date of the Rule.

IV. High Cost Program: Income Tax for S-Corporations

USAC requests clarification as to whether income taxes attributable to S-Corporation shareholders, as a result of their ownership of the corporation's equity, are includable in the carrier's revenue requirement, and therefore are recoverable through universal service support. As noted in the Public Notice, current industry practice allows carriers with an S-Corporation election to impute income taxes paid by the shareholders for purposes of determining the corporation's reportable interstate revenue. This practice makes S-Corporation and C-Corporation treatment consistent by recognizing the taxes on income of a regulated carrier as recoverable regardless of designation.

USAC states that this S-Corporation historical practice "has been a finding in over 20 High Cost Program beneficiary audits because auditors do not agree with the industry practice"⁶ and asks the Commission for policy guidance. The Nebraska Companies urge the Commission to rule consistently with the industry's historical practice.

⁶ USAC Letter at p. 4

The Nebraska Companies agree with the National Exchange Carrier Association's ("NECA") rationale for allowing an S-Corporation to receive income tax reimbursement from NECA pools. As NECA explains, an S-Corporation passes the corporate income through the company to their shareholders, who then pay taxes in lieu of the corporation. The earned income is, in fact, taxable. Therefore, Subchapter S status is not equivalent to tax-exempt status (*i.e.*, OIG auditor treatment would be as though Subchapter S corporations are tax-exempt). Taxes on income are not avoided and are paid by shareholders instead of directly by the corporation. NECA is correct to continue to follow the industry practice that derives the income tax portion of revenue requirement based on the taxable income associated with regulated telephone company operations. NECA, therefore, includes the interstate portion of income taxes of an S-Corporation in the interstate revenue requirement and supports a tax reimbursement from the NECA pools equivalent to a C-Corporation.⁷

The Nebraska Companies also question USAC's statement regarding the impact on the Universal Service Fund. Specifically, USAC states that recovery of High Cost Program support would be significant if the S-Corporation carriers are not permitted to impute shareholder income tax in determining the company's interstate revenue requirement.⁸ The most likely outcome to occur as a result of disallowing S-Corporations to recover taxes on operating income would be for such S-Corporations to switch to C-Corporation status. Therefore, the likely impact on the High Cost Program would be much less than anticipated by the OIG.

⁷ NECA requires companies to provide documentation that supports the calculation of the composite shareholders tax rates. Companies unable or unwilling to provide documentation to support the composite effective tax rate will be required to use as a default the lowest individual federal and state tax rate in the individual federal and state tax tables.

⁸ USAC Letter at p. 5.

IV. Conclusion

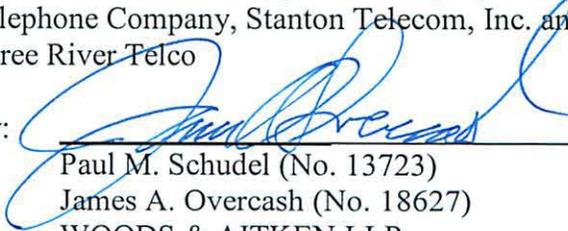
The Nebraska Companies request that the Commission would provide the following guidance to the Universal Service Administrative Company:

1. Advertising local exchange telephone service is sufficient for compliance with 47 C.F.R. § 54.201(d)(2) and no retroactive remedial action shall be taken against ETCs who have offered all of the supported services, but advertised to the public only local exchange telephone service;
2. There should be no remedial action initiated against carriers that did not maintain documentation for periods prior to the establishment of high-cost program documentation rules; and
3. Consistent with current industry practice, corporations electing S-Corporation status may impute taxes on income taxes paid by the shareholders for purposes of determining the corporation's reportable interstate revenue.

Dated: October 28, 2009.

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