

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

In the Matter of)	
)	
Universal Service Contribution Methodology)	CG Docket No. 06-122
)	
A National Broadband Plan for Our Future)	GN Docket No. 09-51
)	
To: The Secretary		

COMMENTS

BBG Communications, Inc. ("BBG"), by its attorneys, hereby submits these Comments in response to the Further Notice of Proposed Rulemaking issued by the Commission in the above-referenced proceeding.¹ In the FNPRM, the Commission asks important questions about funding of the Universal Service Fund ("USF" or the "Fund"), including which service providers should be required to contribute to the Fund and how contributions should be assessed. Rather than address these far-reaching issue, BBG Communications wishes to focus its attention in these Comments on a single, narrow issue: the Commission's treatment of international service providers and revenues for purposes of USF contributions.

Currently, the Commission exempts from USF contribution obligations carriers that provide only international telecommunications services² as well as carriers that offer

¹ See *Universal Service Contribution Methodology et al.*, Further Notice of Proposed Rulemaking, FCC 12-46 (rel. Apr. 30, 2012); 77 Fed. Reg. 33896 (June 7, 2012) ("FNPRM").

² See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9174, ¶ 779 (1997) ("*Universal Service First Report and Order*") (*subsequent history omitted*).

predominantly international services.³ In the FNPRM, the Commission asks whether it should eliminate these exemptions and assess international revenues in the same fashion as interstate revenues for purposes of USF contributions.

BBG Communications submits that, under the language of Section 254(d) of the Communications Act, the "equitable and nondiscriminatory contribution" requirement contained in the Communications Act⁴ and the Fifth Circuit's *TOPUC* decision,⁵ the Commission does not

³ The "limited international revenues exemption" ("LIRE") exempts international revenue from reporting and contribution requirements where a provider's interstate revenue is less than 12 percent of its combined interstate and international revenue. *See* 47 C.F.R. § 54.706(c). The Commission adopted the LIRE in response to *Texas Office of the Public Utility Counsel v. FCC*, 183 F.3d 393, 434-435 (5th Cir. 1995) ("*TOPUC*"), in which the Fifth Circuit struck down the Commission's previous rule requiring providers with limited interstate telecommunications revenue to contribute based on both their interstate and international revenues. The LIRE is designed to ensure that no contributor's USF obligation exceeds its total interstate revenues. *See Federal-State Joint Board on Universal Service; Access Charge Reform*, CC Docket Nos. 96-45, 96-262, Sixteenth Order on Reconsideration and Eighth Report and Order, Sixth Report and Order, 15 FCC Rcd 1679, 1687, ¶ 19 (1999).

⁴ 47 U.S.C. § 254(b)(4) provides as follows:

All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service.

47 U.S.C. § 254(d) provides:

Every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service. The Commission may exempt a carrier or class of carriers from this requirement if the carrier's telecommunications activities are limited to such an extent that the level of such carrier's contribution to the preservation and advancement of universal service would be de minimis. Any other provider of interstate telecommunications may be required to contribute to the preservation and advancement of universal service if the public interest so requires.

⁵ 183 F.3d 393, *supra*.

have authority to require exclusively or predominantly international service providers to contribute to the Fund in the same manner as exclusively or predominantly interstate service providers. Further, BBG Communications contends that even if the Commission had such authority, eliminating the exemptions for international service providers would prove counterproductive, as it would harm many of the very customers that universal service is intended to help. Whether the Commission retains its current revenues-based system or moves to a connections-based, numbers-based, or hybrid system, BBG Communications urges the Commission to continue to maintain a USF contribution exemption or functionally-equivalent safe harbor for exclusively or predominantly international service providers. In support thereof, BBG Communications states as follows.

In the FNPRM, the Commission asks whether "the *TOPUC* decision limits our ability to re-examine the international-only and LIRE exemptions today."⁶ BBG Communications submits that *TOPUC*, together with the language of Section 254 of the Communications Act, prohibits the Commission from eliminating these exemptions or otherwise modifying them in a manner that results in identical USF contribution requirements for interstate service providers and exclusively or predominantly international service providers.

In *TOPUC*, COMSAT, a small interstate carrier specializing in international telephone service, challenged the Commission's decision to include the international revenue of interstate carriers in the USF base, arguing that the Commission's decision violated Section 254(b) and (d)'s requirement that all universal service contributions be "equitable and nondiscriminatory." Under the Commission's then effective USF rules, COMSAT owed more in universal service

⁶ NPRM at ¶ 201.

contributions than it was generating in interstate revenues. The Commission defended this result by claiming that there was nothing "inequitable" about requiring a carrier benefiting from universal service to contribute to it. The Court rejected the Commission's rationale as overbroad:

Under [the Commission's] reading...it is difficult to know what [the Commission] would consider inequitable, because any carrier could conceivably benefit from universal service. Obviously, the language also refers to the fairness in the allocation of contribution duties.⁷

Further, the Court took issue with the Commission's understanding of "nondiscriminatory."

While the FCC acknowledged that some providers of international service would be treated differently from others, it claimed that such discrepant treatment of similarly-situated parties nonetheless passed muster under Section 254(d). The Court disagreed. According to the Court, the Commission's recognition of its discriminatory treatment "hardly saves the agency from the statutory requirement that contributions are collected on a non-discriminatory basis."⁸

Finally, the Court also identified the "prohibitive costs" imposed on COMSAT by the Commission's rule as clear evidence that the Commission's interpretation of "equitable and nondiscriminatory" was "arbitrary and capricious and manifestly contrary to the statute."⁹

According to the Court:

COMSAT and carriers like it will contribute more in universal service payments than they will generate from interstate service. Additionally, the FCC's interpretation is "discriminatory," because the agency concedes that its rule damages some international carriers like COMSAT more than it harms others. The agency has offered no reasonable explanation of how this outcome, which will require companies such as COMSAT to incur a loss to participate in

⁷ *TOPUC* at 435.

⁸ *Id.* at 434.

⁹ *Id.* at 434-435 (quoting *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984)).

interstate service, satisfies the statute's "equitable and nondiscriminatory" language.¹⁰

As the above makes plain, the Commission's proposal to eliminate the LIRE altogether cannot be squared with the Fifth Circuit's holding in *TOPUC*. If the Commission believes that the existing LIRE is the source of unacceptable market distortions, it must address those market distortions through modifications to LIRE or through a functionally-equivalent exemption or safe harbor.

Importantly, the *TOPUC* Court's rejection of the Commission's effort to treat similarly-situated parties differently does not empower the Commission to treat differently-situated parties in the same fashion. While the Commission recognizes in the *FNPRM* that the *TOPUC* Court faulted the Commission's widely disparate treatment of similarly-situated parties, i.e., imposing serious harm on limited-interstate-revenue providers while granting disproportionate relief to no-interstate revenue providers, the Commission suggests that perhaps it can satisfy Sections 254(b)(4) and 254(d) by simply treating all carriers the same, lumping together no-interstate, limited-interstate and all-interstate carriers for purposes of USF contributions: "The [*TOPUC* Court] did not...make any findings or opine about the Commission's jurisdiction to assess international revenues...Thus the Commission should have significant discretion to revise its rules regarding contributions on international revenues..."¹¹

The Commission's reasoning here ignores a key holding in *TOPUC*. Contrary to the Commission's suggestion in the *FNPRM*, the *TOPUC* Court explicitly rejected the notion that universal service contributions may be established in a sweeping, catch-all category, such that any carrier that "conceivably" benefits from universal service is potentially subject to a

¹⁰ *Id.* at 435.

¹¹ *FNPRM* at ¶ 201.

maximum, undifferentiated USF contribution obligation.¹² Instead, the Court determined that the "equitable" language of Sections 254(b)(4) and 254(d) requires "fairness in the allocation of contribution duties." Applying this fairness principle to COMSAT, the Fifth Circuit held that the Commission's USF contribution rules must not indiscriminately harm certain carriers, namely carriers that do not earn commensurate benefits through interstate revenues.

At its core, the fairness principle articulated in *TOPUC* requires commensurability, i.e., the USF contribution requirements the Commission imposes on certain carriers must be commensurate with the benefits those carriers derive from USF.¹³ The Commission's proposal to assess USF contributions on international revenues the same as it assesses USF contributions on interstate revenues fails to satisfy the fairness standard set by *TOPUC*. The Commission cannot base its USF contribution rules on the fiction that all carriers benefit the same from universal service without indiscriminately imposing harm on exclusively and predominantly international service providers, and thereby violating Sections 254(b)(4) and 254(d) of the Communications Act.

¹² In the *FNPRM*, the Commission asks whether § 254(b)(4)'s principle of "equitable and nondiscriminatory contributions" could be used to require international-only and LIRE-qualifying providers to contribute because such providers benefit from being able to originate or terminate traffic in the United States. See *NPRM* at ¶ 200. As *TOPUC* makes plain, § 254(b)(4) does not brook such an overbroad construal of benefit from the PSTN or USF.

¹³ Earlier in the *TOPUC* decision, the Court upheld the Commission's authority to require universal service contributions from a broad array of telecommunications service providers, noting that § 254(b)(4)'s "equitable and nondiscriminatory" language was immediately preceded by the directive to apply this contribution requirement to "all providers of telecommunications services..." See *TOPUC* at 429 (upholding the Commission's decision to include paging carriers in the universal service contribution system). Thus, the fairness principle articulated by the Court here properly applies to the nature and extent of the contribution required, and not simply to the provider identity or type.

Per *TOPUC*, then, in its efforts to reform its USF contribution methodology, the Commission must not ignore fundamental differences between predominantly interstate carriers and exclusively or predominantly international carriers. Carriers that exclusively or predominantly provide international service do not utilize the Public Switched Telephone Network ("PSTN") as extensively as carriers focusing on interstate service. International service providers therefore do not benefit from universal service to the same extent as domestic service providers, and should not be required to meet the same contribution levels.

Both the distinction between interstate and international service providers and the need to tie USF contributions to carrier benefits have firm foundations in the Communications Act and Commission policy. For example, the Communications Act explicitly distinguishes "foreign communication" from both interstate and intrastate communication,¹⁴ and the Commission has long adhered to this distinction in interpreting Section 254.¹⁵ Moreover, from the beginning, the USF contribution system has been built in part on the simple, fair, commonsense principle that service providers benefitting from universal service should contribute to USF. In *TUPOC*, the Fifth Circuit summarized congressional intent underpinning the USF contribution system as follows: "Congress designed the universal service scheme to exact payments from those companies benefitting from the provision of universal service."¹⁶ Similarly, in promulgating universal service rules, the Commission noted that "those who benefit from access to the public switched telephone network (PSTN), which is supported by the universal service fund, should

¹⁴ See FNPRM at ¶ 200, n. 341 (citing 47 U.S.C. §§ 151-153).

¹⁵ See *Universal Service First Report and Order*, 12 FCC Rcd at 9174-75, ¶ 779.

¹⁶ 183 F.3d 393, 428 (5th Cir. 1995) ("*TUPOC*").

contribute."¹⁷ As further noted by the Commission, the universal service rules are intended to be competitively neutral and should "neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another."¹⁸

The fairness principle articulated in *TOPUC* merely brings these elements together. As *TOPUC* demonstrates, fairness under Sections 254(b)(4) and 254(d) means more than indiscriminately assigning contribution requirements to any carrier conceivably benefitting from universal service. The Commission's suggestion that it can assess international revenues without adjusting contribution levels to fit exclusively and predominantly international service providers' PSTN use and USF benefit runs afoul of *TOPUC*'s fairness principle and the Communications Act's "equitable and non-discriminatory contribution" requirement. Any Commission effort to modify the existing international-only and LIRE exemptions must recognize the distinction between international and interstate service providers and ensure that any USF contribution obligations imposed on international providers are commensurate with the benefits they derive from the PSTN and USF.

The Communications Act, which speaks, in Section 254(d), to only providers of "interstate telecommunications services" as universal service contributors, and *TOPUC* prohibit the Commission from eliminating the international-only and LIRE exemptions. BBG Communications firmly believes that, even if the Commission had the authority to override the Communications Act and the Court decision, which it does not, such action would be contrary to the public interest. As other parties in this proceeding have pointed out, many of the providers

¹⁷ *Universal Service First Report and Order*, 12 FCC Rcd at 9184-9185, ¶¶ 796-97.

¹⁸ FNPRM at ¶ 8 (citing *Universal Service First Report and Order*, 12 FCC Rcd at 8801, ¶ 47).

relying on the international exemptions are traditional wireline and prepaid calling card services.¹⁹ Low-income and elderly consumers often rely upon these services for international calls – rather than Internet-based communications services, for example, which generally require access to and familiarity with computer-based technologies.²⁰ Eliminating the international-only and LIRE exemptions could hinder the ability of international service providers to provide quality, affordable service to customers who have few, if any, other international service options. Such an outcome would defeat the purpose of universal service and contravene the public interest.

In sum, if the Commission believes the current international exemptions create unacceptable market distortions, it must correct these distortions without razing the distinction between international service providers and interstate service providers codified in the Communications Act and *TOPUC*, and without visiting disproportionate harm on international service providers and their customers. Whether the Commission retains its current revenues-based system or moves to a connections-based, numbers-based, or hybrid system, BBG Communications submits that the Commission must continue to provide an exemption or functionally-equivalent safe harbor for exclusively or predominantly international service providers.

¹⁹ See, e.g., *Ex Parte Letter of Ad Hoc Coalition of International Telecommunications Companies*, WC Docket Nos. 05-337 and 06-122, CC Docket No. 96-45 (Nov. 18, 2009); *FNPRM* at ¶ 197.

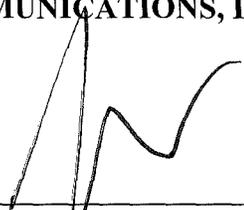
²⁰ See *id.*

WHEREFORE, BBG Communications, Inc. respectfully requests that in the course of reforming the contribution methodology for the Universal Service Fund, the Commission preserve its international-only and LIRE exemptions, or adopt a functionally-equivalent safe harbor for international-only service providers and providers of predominantly international services with limited interstate revenue.

Respectfully submitted,

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