

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of

Coral Wireless d/b/a Mobi PCS Request for  
Review of the Decision of the Universal  
Service Administrator

Federal-State Joint Board on Universal Service

CC Docket No. 96-45

Federal-State Joint Board on Universal Service  
High-Cost Universal Service Support

WC Docket No. 05-337

**REQUEST FOR STAY PENDING RECONSIDERATION**

Pursuant to Sections 1.41 and 1.43 of the Commission's rules, 47 C.F.R. §§ 1.41, 1.43, Coral Wireless d/b/a Mobi PCS (“Coral”) requests that the Federal Communications Commission (the “FCC” or “Commission”) issue a stay, pending reconsideration, of the Order<sup>1</sup> denying Coral’s Request for Review<sup>2</sup> of a decision by the Universal Service Administrative Company (“USAC”) on grounds that were never before raised in the underlying proceeding and for which there is no support in the record. Coral's likelihood of succeeding on the merits, combined with the balance of harms, strongly supports grant of the requested stay. Specifically, the Order cannot, under applicable law, be allowed to stand in light of its fundamental flaws, including the complete absence of evidence on the record to support the Bureau's action. Coral -- and consumers in Hawaii -- will be irreparably harmed if USAC reclaims support before the Commission considers Coral's Petition, but nobody would be harmed by granting the requested stay. Accordingly, grant of the stay would serve the public interest.

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<sup>1</sup> *Coral Wireless d/b/a Mobi PCS Request for Review of the Decision of the Universal Service Administrator et al.*, CC Docket No. 96-45, WC Docket No. 05-337, Order (rel. Aug. 7, 2014) (*Order*).

<sup>2</sup> Request for Review of the Decision by Universal Service Administrator by Coral Wireless d/b/a Mobi PCS, CC Docket No. 96-45, WC Docket No. 05-337 (filed Dec. 10, 2012) (*Request for Review*).

## **I. GRANTING THE STAY WOULD SERVE THE PUBLIC INTEREST**

Coral satisfies the requirements for receiving a stay pending review of the Petition, and requests that the Commission act on its request by September 30, 2014. A stay is warranted here because (1) the Order is subject to a significant challenge on which Coral is likely to prevail on the merits, (2) Coral will suffer irreparable harm if implementation of the Order is not stayed, (3) no other parties will be harmed by issuance of a stay, and (4) granting a stay serves the public interest.

In evaluating requests for stays pending consideration of Petitions for Reconsideration, the FCC utilizes the four criteria established in *Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921 (D.C. Cir. 1985) ("Virginia Petroleum Jobbers"). See *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Order, 23 FCC Rcd. 1705, 1706-07 (2008) (Citing *Virginia Petroleum Jobbers*, 259 F.2d at 925.) Using these criteria, the Commission evaluates (1) petitioner's likelihood of success on the merits; (2) the threat of irreparable harm absent the grant of preliminary relief; (3) the degree of injury to other parties if relief is granted; and (4) the public interest. *Id.* The Commission weighs the importance of each element depending on the conditions of the case, and no single factor is dispositive. *Id.* However, if there is an overwhelming showing regarding at least one of the four factors, the Commission may find that a stay is warranted. *Id.* In this case, Coral's likelihood of success is high, and the balance of harms demonstrates that the Commission should grant the stay.

### **A. Coral is Likely to Prevail on the Merits of its Petition for Reconsideration**

The Bureau based the denial solely on its conclusion that Coral necessarily must have over-reported lines because Coral allegedly could not have used the lines at issue to provide

telecommunications services, which in turn is based on the Bureau's false assumption that Coral's customers could not have chosen the end points of their calls because Coral's Terms of Service *permitted* Coral to route calls during the sixty-day period before disconnection for non-payment to Coral's customer service desk. The Bureau's conclusion, and thus the Order itself, could be sustainable only if *none* of Coral's customers had the possibility<sup>3</sup> of placing *any* calls to the destination of his or her choice during the sixty-day period before disconnection for non-payment. However, the record in this proceeding demonstrates that all of Coral's customers had the possibility of placing calls to the destination of his or her choice at all times before disconnection.

First, all customer calls were routed in accordance with customer consent. Coral's terms and conditions permitted, but did not require, Coral to route all non-emergency outbound calls to its customer service center, starting thirty days after receiving a customer's last prepayment.<sup>4</sup> Each Coral customer consented to Coral's terms and conditions by using Coral's services, and thus all calls routed pursuant to these terms and conditions were routed in accordance with the customer's choice.<sup>5</sup> Therefore, even if Coral had routed every single non-emergency call to customer service during sixty-day period before disconnection for non-payment, the calls nonetheless would have been routed to the destination of each customer's choice. Thus, all of the

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<sup>3</sup> It is irrelevant whether any of Coral's customers actually placed any calls at all. Order at ¶ 14. ("Section 54.307 of the Commission's rules does not specify a requirement for customer usage.").

<sup>4</sup> *See also* Independent Accountants' Report on Compliance Relating to High Cost Support Received by Coral Wireless LLC d/b/a Mobi PCS (HC-2008-126) for the Year Ended June 30, 2008 (*Deloitte Disclaimed Opinion*) ("Pursuant to the terms and conditions of the Beneficiary's service, each customer agrees that the Beneficiary has the right to place various limits upon the service in the 60 to 90 days preceding the disconnect date."); Order at ¶ 4.

<sup>5</sup> *See* Order at ¶ 4. Courts have long upheld the validity and binding nature of terms and conditions for mobile services contracts where the contract specified that activation and/or use of a phone would constitute acceptance of those terms and conditions. *See, e.g., Schutz v. AT&T Wireless Servs., Inc.*, 376 F. Supp. 2d 685, 692 (N.D.W. Va. 2005) (holding that customer's activation and use of his phone constituted acceptance of AT&T's terms and conditions, including the obligation to abide by the arbitration clause within those terms and conditions.).

calls at issue constitute telecommunications services, and none of the lines at issue here should be excluded.

Second, although Coral's policy *permitted* Coral to route all non-emergency outbound calls to its customer service center starting thirty days after Coral received a customer's last prepayment, there is no evidence on the record to demonstrate that Coral actually routed all non-emergency calls to customer service, and Coral did not in fact do so. Since the routing of calls was raised for the first time in the Order itself, neither the independent auditor nor the IAD requested, and Coral did not provide, any evidence for the record regarding the actual routing of calls. As such, there is no basis on the record to exclude any of the lines at issue.

Third, the Order is based on false assumptions about Coral's treatment of outbound calls, but both the Order and the record in this proceeding are silent on the issue of inbound calls. Neither the statutory definition of either "telecommunications service"<sup>6</sup> or "working loops" in the FCC's rules<sup>7</sup> requires the provision of two-way service. Indeed, if service providers could avoid common carrier regulation merely by providing only one-way services, it is difficult to imagine that any common carriers would exist. Accordingly, there is no basis on the record to exclude any of the lines at issue.

Fourth, the Order is based on the false assumption that every call routed to Coral's customer service was routed against the customer's will.<sup>8</sup> However, at all times before disconnection, Coral's customers could voluntarily call Coral's customer service number for any

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<sup>6</sup> 47 C.F.R. § 54.5.

<sup>7</sup> 47 C.F.R. § 54.307.

<sup>8</sup> Order at ¶ 6.

reason, including, for example, to make an additional payment,<sup>9</sup> and they could always call 911 emergency services.<sup>10</sup> As such, Coral used all of the lines at issue to provide telecommunications services, because every Coral customer had the possibility of voluntarily placing calls to Coral's customer service number or 911. Accordingly, there is no basis on the record to exclude any of the lines at issue.

Fifth, the Bureau provided no statement on, or reference to the record about, the factual basis upon which the Bureau based its decision to deny Coral's Request for Review apart from citing the fact that Coral's policy *permitted, but did not require*, Coral to route all non-emergency outbound calls to its customer service center, starting thirty days after receiving a customer's last prepayment.<sup>11</sup> However, this statement is insufficient on its face to support the Order because, as the Order itself noted, the policy did not require Coral to route *all* non-emergency outbound calls to its customer service center, and Coral in fact did not do so. The Order was also silent with respect to inbound calls. Since the routing of calls was raised for the first time in the Order itself, neither the independent auditor nor the IAD requested, and Coral

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<sup>9</sup> See, e.g., *Management Response to Deloitte Disclaimed Opinion* (explaining that "a [Coral] customer can purchase more pre-paid services at any time until the customer's line is disconnected pursuant to the disconnection policy.").

<sup>10</sup> See 47 C.F.R. § 20.18 (requiring wireless service providers to transmit all calls to 911 to a Public Safety Answering Point); Order at ¶ 4 ("As part of its internal policies, Coral Wireless routes *non-emergency outbound calls* to Coral Wireless's customer service center.") (emphasis added).

<sup>11</sup> Order at ¶ 4. When considering a request for review, the Bureau must articulate a factual basis for its decision, and the decision must be supported by evidence in the record. See *Safe Extensions, Inc. v. F.A.A.*, 509 F.3d 593, 604 (D.C. Cir. 2007) (finding that where the FAA offered rationales for its decision but provided no evidence to support its assertions, the agency's decision was arbitrary and capricious). An agency's "declaration of fact that is capable of exact proof but is unsupported by any evidence" is insufficient to qualify the decision as non-arbitrary. *Id.* (quoting *McDonnell Douglas Corp. v. Dept. of the Air Force*, 375 F.3d 1182 (D.C. Cir. 2004)). The Bureau must also consider all relevant factors; if it does not have a record supporting its action, the Bureau must expect the case to be remanded for additional investigation or explanation upon any court's review. See *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744, 105 S. Ct. 1598, 84 L. Ed. 2d 643 (1985) (holding that, even for informal actions, an agency must rule based on an adequate record supporting its action, and having considered all relevant factors, in order to withstand review).

did not provide, any evidence for the record regarding the actual routing of calls. As such, there is no basis on the record to exclude any of the lines at issue.

The Bureau also exceeded the permissible scope of review applicable to consideration of requests for review. The sole issue (aside from the procedural errors) before the Bureau was whether the disputed lines were revenue earning.<sup>12</sup> However, the Bureau based the Order on an issue for which Coral made no request to review and for which Coral had no notice or opportunity to be heard: customer consent for the routing of calls. Section 54.723(a) of the Commission's rules provides for *de novo* review of the specific questions presented in a request for review, not for *de novo* review of every potentially relevant issue.<sup>13</sup> If the scope of review were as broad as the Order suggests, parties would be forced to make voluminous filings that address every potential issue in the proceeding, including those that had previously been decided in their favor, to protect their rights in the event that the Bureau would not limit its review to the specifically identified issues submitted in compliance with Section 54.721 of the FCC's rules.<sup>14</sup> In this case, the Order is fundamentally flawed, in no small part because the Bureau, like USAC and IAD, failed to inform Coral of, and permit Coral to comment upon, the issues of call routing during the sixty-day period before disconnection for non-payment and whether Coral was using

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<sup>12</sup> *Deloitte Disclaimed Opinion* (“We were unable to satisfy ourselves concerning the acceptability of the inclusion of lines 60 to 90 days preceding their disconnect date as the FCC Rules do not clearly indicate these lines would be considered other than working loops as described above. As we are unable to clearly determine whether the Beneficiary’s policy is in conflict with the FCC Rules as discussed in the preceding paragraph, we are unable to express, and we do not express, an opinion on the Beneficiary’s compliance referred to above.”).

<sup>13</sup> 47 C.F.R. § 54.723 (“Standard of Review. (a) The Wireline Competition Bureau shall conduct **de novo review of request for review** of decisions issue by the Administrator.”) (emphasis added).

<sup>14</sup> Under 47 U.S.C. § 403, the FCC has the authority to review USAC decisions on its own motion, at any time. *See id. at* ¶ 68. *See also* 47 U.S.C. § 403. However, this review would also presume the exercise of due process: adequate notice and an opportunity for the affected party to be heard, in accordance with principles of administrative law. USAC decisions fall under the scope of the FCC’s ultimate authority, consistent with the FCC’s ultimate responsibility over the universal service support mechanism as specified in 47 U.S.C. § 254.

the lines at issue to provide telecommunications services. Accordingly, the Bureau's Order must be reversed.

Finally, even if all of the disputed lines at issue were excluded, Coral nonetheless would be entitled to receive more than the amount of universal support it actually received, because Coral substantially under-reported the number of lines for which it is legally entitled to receive universal service support. Universal service support is distributed based on total line counts that do not have to list the specific customer with whom each line is associated.<sup>15</sup> The independent auditor here correctly disclaimed its opinion because it could not find that any lines should be excluded. For this reason, there was no reason for Coral or the independent auditor to supplement the record to reflect that Coral was entitled to support for more lines than it reported even if certain lines were excluded. Since the IAD moved to recover support from Coral without disclosing the reasons for its "updated finding" or seeking any input from Coral, the record on this issue remains deficient. Accordingly, to the extent the Commission is unwilling to cease further actions to recover support from Coral as this petition requests, the Commission would have to direct USAC to conduct a new audit to address this issue and other deficiencies in the record.

#### **B. The Balance of Harms Favors Granting a Stay**

Evaluation of the other three criteria, or a balancing of the harms, also supports granting Coral's requested stay. Without a stay, Coral and consumers in Hawaii are likely to suffer irreparable harm. By contrast, no harm would come to any other party if a stay is granted. As such, grant of the stay would serve the public interest.

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<sup>15</sup> 47 C.F.R. § 54.307(b). "In order to receive support... a competitive eligible telecommunications carrier must report to the Administrator the number of working loops it serves in a service area."

**(1) Absent the Requested Stay, Coral Will be Irreparably Harmed**

If the Order is not stayed, Coral will be unnecessarily and irreparably injured in a manner that is fundamentally inconsistent with the principles that the FCC purports to promote through the universal service program.<sup>16</sup> Coral sells prepaid wireless services in Hawaii, providing customers in a remote location with affordable access to necessary telecommunications resources. Coral used the support at issue here long ago to deploy facilities (*i.e.*, base transceiver stations and backhaul systems) badly needed to serve consumers in rural, insular and high-cost areas. Since the audit period, the Commission has dramatically reduced the amount of support that Coral receives, and the reduced amount is no longer sufficient to cover both ongoing operating costs and the disputed amounts. Moreover, the facilities deployed with the disputed amounts are not liquid and thus cannot easily be used to offset the disputed amounts. As such, the disputed amounts would have to be recovered from ongoing operating costs, which would force Coral to decommission far more facilities than it originally purchased with the disputed amounts, and none of these facilities would ever be re-commissioned. Accordingly, a decision by the Commission to recover support more than six years after Coral used them to fund facilities needed to serve consumers in rural and high cost areas would force Coral to decommission far more facilities than the disputed amounts originally funded, which would cause great and irreparable harm both to the consumers of Hawaii and Coral since the decommissioned facilities will never be re-commissioned even if the Commission subsequently grant's Coral's Petition.

None of these irreparable harms are necessary. It took USAC and the Bureau over six years after the independent auditor disclaimed its opinion to issue the Order, and thus it simply cannot be necessary to recover the disputed amounts before the Commission acts on Coral's

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<sup>16</sup> Irreparable harm is found where, without the requested relief, the petitioner will be irremediably injured. *Virginia Petroleum Jobbers*, 259 F.2d at 925.

Petition, particularly since the time needed to act on the Petition lies solely within the Commission's control.

**(2) No Other Parties Would be Harmed by Grant of the Requested Stay**

Granting Coral the requested stay will not harm any other parties. The only parties impacted by the granting of a stay as to this specific funding at issue in the proceeding are Coral and Coral's customer base. All competitive eligible telecommunications carriers receive support based on their submitted subscriber line counts.<sup>17</sup> Eliminating Coral's support does not serve to benefit others or increase the amount of money they will receive, as a carrier may only receive support for lines that it provides. In addition, granting the stay does not harm the Commission in any way. The Commission has already taken two years to act on the Request for Review and can rule on the Petition at any time. Therefore, a decision by the Commission to deny the requested stay and to permit USAC immediately to reclaim the disputed amounts would only harm Coral and consumers in Hawaii to the benefit of nobody.

**(3) The Public Interest Favors Granting the Requested Stay**

In cases involving administration of regulatory statutes designed to promote the public interest, as seen here, consideration of the public interest is a vital element.<sup>18</sup> The high-cost support at issue is meant to help ensure that consumers in rural, insular and high-cost areas have access to affordable services, which is exactly how Coral used the disputed support. Granting a stay would without question prevent Coral from having to de-commission more facilities than the disputed support actually funded -- which would never be re-commissioned -- until the

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<sup>17</sup> 47 C.F.R. § 54.307(b). "A competitive eligible telecommunications carrier shall receive universal service support to the extent that... [it] captures the subscriber lines of an incumbent local exchange carrier (LEC) or serves new subscriber lines in the incumbent LEC's service area."

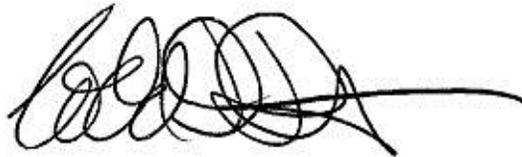
<sup>18</sup> *Id.*

Commission has had a chance to consider Coral's Petition. Accordingly, the public interest strongly favors granting the stay to promote the universal service principles rather than immediately to cause substantial facilities to be de-commissioned permanently even if the Commission ultimately grants Coral's Petition. Even if the Commission ultimately were to deny Coral's Petition, the public interest would be better served by permitting consumers to continue receiving the benefits of support until the Commission is certain that its actions here are correct.

## II. CONCLUSION

For the foregoing reasons, and in order to avoid irreparable harm to its business and its customers, Coral respectfully requests the Commission grant a stay of implementation of its Order until thirty days after the Commission issues its order resolving Coral's Petition.

Respectfully submitted,

A handwritten signature in black ink, appearing to be "Todd D. Daubert", with a long horizontal flourish extending to the right.

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