Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matters of	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Access Charge Reform	)	CC Docket No. 96-262
	)	
Petition for Reconsideration and Clarification of the *Fifth Circuit Remand Order* of BellSouth Corporation	)	

ORDER

Adopted: August 19, 2005 **Released: August 22, 2005**

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order, we clarify certain aspects of the Commission's rules in light of the United States Court of Appeals for the Fifth Circuit's ("Fifth Circuit") decision affirming in part, remanding in part, and reversing in part the Commission's *1997 Universal Service Order*.[1] Specifically, we clarify:

- that Commercial Mobile Radio Services (CMRS) providers may recover their universal service contributions through rates charged for all of their services;[2] and
- that the Commission's decision in the *Fifth Circuit Remand Order* applied the Fifth Circuit decision prospectively beginning November 1, 1999.[3]

II. BACKGROUND

2. On May 8, 1997, the Commission issued the *1997 Universal Service Order*, implementing the universal service provisions in section 254 of the Communications Act of 1934, as amended ("the Act").[4] In this order, the Commission required interstate carriers to contribute a

[1] *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) ("*TOPUC*"); *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776 (1997), as corrected by *Federal-State Joint Board on Universal Service*, Erratum, 12 FCC Rcd 8776 (1997), and Erratum, 13 FCC Rcd 24493 (1997), *aff'd in part, rev'd in part, remanded in part sub nom*, *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999), *cert. denied*, 530 U.S. 1210 (2000), *cert. dismissed*, 531 U.S. 975 (2000) ("*1997 Universal Service Order*").

[2] *See infra* paras. 6-10.

[3] *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 (1999) ("*Fifth Circuit Remand Order*"); *see infra* para. 11.

[4] 47 U.S.C. § 254.

percentage of their end user telecommunications revenues to the universal service mechanisms.[5] Specifically, the Commission concluded that contributions for the high-cost and low-income support mechanisms would be based on interstate and international revenues while the schools and libraries and rural health care support mechanisms would be based on intrastate, interstate, and international revenues.[6]

3. On July 30, 1999, the Fifth Circuit issued a decision affirming in part, remanding in part, and reversing in part the Commission's *1997 Universal Service Order*.[7] The Fifth Circuit held that the Commission's methodology for assessing contributions on international revenues did not satisfy the requirement in section 254(d) of the Act that contributions be "equitable and nondiscriminatory" because the contributions of certain interstate carriers that predominantly provide international services could exceed their interstate revenues.[8] Accordingly, the court reversed and remanded for further consideration the Commission's decision to assess contributions based on the international revenues of interstate carriers.[9] The Fifth Circuit also determined that the Commission exceeded its authority under sections 2(b) and 254(d) of the Act when it assessed contributions based on intrastate revenues for the schools and libraries, and rural health care programs.[10] Accordingly, the court reversed the Commission's decision to include intrastate revenues in the contribution base for the schools and libraries, and rural health care support mechanisms.[11]

4. On remand, in its *Fifth Circuit Remand Order*, the Commission removed intrastate revenues from the contribution base for the schools and libraries, and rural health care programs.[12] The Commission also modified the assessment of contributions on international revenues so that contributors whose interstate revenues comprise less than eight percent of their combined interstate and international revenues would only contribute based on their interstate revenues (the "limited international revenues exemption").[13] The Commission made these changes effective on a prospective basis, beginning November 1, 1999.[14]

5. On December 6, 1999, BellSouth Corporation ("BellSouth") filed a petition for reconsideration and clarification of the Commission's *Fifth Circuit Remand Order*.[15] In its petition, BellSouth requests the Commission to clarify and reconsider its decision to implement the Fifth Circuit's

[5] *1997 Universal Service Order*, 12 FCC Rcd at 9173, para. 779.

[6] *Id.* at 9174, 9200, 9203-05, paras. 779, 831, 837-41; *see also* 47 C.F.R. § 54.706(c) (1999).

[7] *TOPUC*, 183 F.3d 393.

[8] *Id.* at 434-35; 47 U.S.C. § 254(d).

[9] *TOPUC*, 183 F.3d at 435.

[10] *Id*. at 447-48; 47 U.S.C. §§ 152(b), 254(d).

[11] *TOPUC*, 183 F.3d at 448.

[12] *Fifth Circuit Remand Order*, 15 FCC Rcd at 1685, para. 15.

[13] *Id*.; 47 C.F.R. § 54.706(c) (1999). The Commission subsequently increased the limited international revenues exemption from eight to twelve percent. *See Federal-State Joint Board on Universal Service*, Further Notice of Proposed Rulemaking and Report and Order, CC Docket No. 96-45, 17 FCC Rcd 3752, 3806-07, paras. 125-28 (2002).

[14] *Fifth Circuit Remand Order*, 15 FCC Rcd at 1679, para. 1.

[15] Petition for Reconsideration and Clarification of BellSouth Corporation, CC Docket No. 96-45, filed December 6, 1999 ("BellSouth Petition"). As an attachment to its petition, BellSouth also filed a request for refund of certain of its universal service contributions submitted to the Universal Service Administrative Company (USAC) from January 1, 1998 through October 31, 1999, that is contingent on the Commission's response to its petition. *See* BellSouth Petition, Attach. (Letter from David G. Frolio, Counsel for BellSouth Corporation, to Cheryl Parrino, Chief Executive Officer, Universal Service Administrative Company, dated December 6, 1999).

decision on a prospective basis and to provide retroactive refunds for contributions based on intrastate revenues for the period from January 1, 1998 through October 31, 1999.[16] BellSouth also requests that the Commission clarify that CMRS providers may lawfully recover the cost of their federal universal service contributions through charges associated with all of their telecommunications services.[17]

III. DISCUSSION

1. Recovery of Universal Service Contributions

6. In response to BellSouth's petition requesting clarification of the Commission's rules, we clarify that the *TOPUC* decision did not undermine the validity of the Commission's decision that CMRS providers may recover their contributions from customers through rates charged for all services. The relevant portion of the Fifth Circuit's decision in *TOPUC* related to the manner in which the Commission may require carriers to contribute to the Universal Service Fund (USF).[18] The manner in which carriers may recover their universal service contributions through assessments on customers was not before the court.[19] Thus, we clarify that the *TOPUC* decision did not affect the Commission's finding in the *Fourth Reconsideration Order* that CMRS providers may "recover their contributions through rates charged for all their services."[20] In fact, the Commission has made clear that carriers have significant flexibility in the manner in which they may recover universal service contribution costs. Carriers are not required to recover their universal service costs from subscribers at all. If they choose to do so, carriers may recover these costs through their standard service charges or through a separate line-item.[21]

7. Carriers that choose to recover universal service costs through a separate line-item may express the charge as a flat amount or as a percentage.[22] Since the *Fourth Reconsideration Order* and the Fifth Circuit decision in *TOPUC*, the Commission has held that it is unreasonable for carriers, including CMRS providers, to include on subscriber bills line-item charges that reflect a mark up from the assessment that the carrier pays.[23] For example, if a carrier is assessed 10 percent of its interstate telecommunications revenues for purposes of universal service contributions, it may not include a line-item on a subscriber's bill that reflects an amount greater than 10 percent of the interstate portion of the bill.[24] This requirement is codified in section 54.712 of the Commission's rules.[25]

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[16]BellSouth Petition at 2, 7-13, 16-17. We do not address BellSouth's request to reconsider the Commission's decision to implement the Fifth Circuit's decision on a prospective basis or BellSouth's request for refund of its Universal Service Fund contributions based on intrastate revenues filed as part of its petition for reconsideration and clarification. *See* BellSouth Petition and Attach. Rather, BellSouth's request for reconsideration and refund will be addressed in a subsequent Commission order.

[17]*Id*. at 7-8.

[18]*See TOPUC*, 183 F.3d at 446-48 (the Commission may not assess carrier contributions based on combined interstate and intrastate revenues).

[19]*Id.*

[20]*Federal-State Joint Board on Universal Service*, Fourth Order on Reconsideration and Report and Order, CC Docket No. 96-45, 13 FCC Rcd 5318, 5489, para. 309 (1997) ("*Fourth Reconsideration Order*").

[21]*See Federal-State Joint Board on Universal Service*, Report and Order and Second Further Notice of Proposed Rulemaking, CC Docket No. 96-45, 17 FCC Rcd 24952, 24974, 24978-80, paras. 40, 53-55 (2002) ("*Report and Order*").

[22]*Report and Order*, 17 FCC Rcd at 24978-79, para. 53.

[23]*Id*. at 24978, para. 49.

[24]*See id.,* para. 51.

[25]47 C.F.R. § 54.712.

8. Because, however, of the inherent difficulty in defining and ascertaining which calls over a mobile wireless system are "interstate," the Commission has long permitted CMRS providers to assume for purposes of calculating their USF contributions that a prescribed percentage of their total end user telecommunications revenues is interstate.[26] The Commission adopted its "safe harbor" rule so that USF contributors "that cannot derive interstate revenues from their books of account or that cannot derive the line-by-line revenue breakdowns from their books of account may provide on the USF Worksheet good faith estimates of these figures."[27] Most recently, the Commission revised its contribution and recovery rules for CMRS providers to permit those utilizing the safe harbor procedure to report as interstate, for contribution purposes, 28.5 percent of their total end user telecommunications revenues and to calculate the interstate portion of individual customer bills, for recovery purposes, as 28.5 percent of the total amount of telecommunications charges on each bill.[28] Thus, in lieu of calculating its actual interstate revenues, a CMRS provider may contribute 28.5 percent of its total telecommunications revenues times the contribution factor.

9. The Commission has held that CMRS providers also are not required "to conduct traffic studies on a customer-by-customer basis to calculate contribution recovery line-items."[29] The Commission's rules allow "wireless telecommunications providers [to] continue to recover contribution costs in a manner that is consistent with the way in which companies report revenues to [USAC]" on their USF Worksheets.[30] Thus, CMRS providers may include a universal service line-item on a subscriber's bill that does not reflect that particular subscriber's interstate usage. For example, a CMRS provider may determine a subscriber's interstate usage for purposes of a recovery line-item using either a company-wide traffic study, if the company has conducted one, or the safe harbor. Moreover, section 254 does not dictate the manner in which carriers may recover their universal service costs from subscribers.[31] The line-item, however, should accurately reflect the particular CMRS provider's federal universal service assessment.[32] Thus, for example, if a CMRS carrier contributes to the USF by using the Commission's safe harbor rule (which assumes that 28.5 percent of the CMRS provider's revenues came from interstate telecommunications revenues), the line-item on a subscriber's bill may not represent an amount that exceeds the contribution factor times 28.5 percent of the subscriber's total telecommunications service charges. At the same time, the CMRS provider may include a line-item based on 28.5 percent of the subscriber's charges for all telecommunications services even if the particular subscriber did not make or receive any interstate telephone calls during the billing period.[33] As the Commission stated in the

[26] *See Federal-State Joint Board on Universal Service*, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-45, 13 FCC Rcd 21252, 21254-60, paras. 5-15 (1998) ("*Interim Safe Harbor Order*").

[27] *Id.* at 21256, para. 7.

[28] *Report and Order*, 17 FCC Rcd at 24964-68, paras. 20-27.

[29] *Federal-State Joint Board on Universal Service*, Order and Order on Reconsideration, CC Docket No. 96-45, 18 FCC Rcd 1421, 1426, para. 8 (2003) ("*Reconsideration Order*") (the Commission further refined its contribution and recovery rules for CMRS providers that do not use the safe harbor procedure and, instead, report their interstate telecommunications revenues on the basis of a company-specific traffic study).

[30] *Reconsideration Order*, 18 FCC Rcd at 1426, para. 8.

[31] *See* 47 U.S.C. § 254.

[32] *See* 47 C.F.R. § 54.712.

[33] *See Report and Order*, 17 FCC Rcd at 24978, para. 51 & n.131. We note that the Commission made a similar determination in deciding to assess a subscriber line charge (SLC) on all subscribers to local service even where customers did not subscribe to long distance services. *See*, *e.g.*, *Petition of SoundNet Emergency Communications for a Declaratory Ruling Interpreting Section 69.104 of the Commission's Rules*, DA 96-1919, Order, 11 FCC Rcd. 20410, 20412-13, paras. 7-8 (1996). Specifically, the Commission determined that a SLC is to be assessed upon each end user who subscribes to a telephone line even if the customer uses no long distance services. *Id*. at 20412-

(continued....)

Reconsideration Order, "the Commission did not intend to preclude wireless telecommunications providers from continuing to recover contribution costs in a manner that is consistent with the way in which companies report revenues to USAC."[34]

10. Accordingly, we clarify that, as the Commission found in the *Fourth Reconsideration Order*, CMRS providers may recover their USF contributions through rates charged for all their services, consistent with section 54.712 as described above. We further clarify that the Fifth Circuit's decision in *TOPUC* did not alter this finding.

2. Application of the *Fifth Circuit Remand Order*

11. In addition, we also clarify the Commission's decision in the *Fifth Circuit Remand Order* to apply the Fifth Circuit decision prospectively.[35] The Commission implemented its *Fifth Circuit Remand Order* in response to the *TOPUC* decision. The court's mandate from the *TOPUC* decision took effect on November 1, 1999.[36] Accordingly, the Commission adopted modifications to its rules in the *Fifth Circuit Remand Order* consistent with those portions of the court's decision concerning the assessment and recovery of universal service contributions, as well as the Commission's Lifeline program for low-income consumers.[37] These rule changes became effective on a prospective basis, beginning November 1, 1999.[38]

IV. ORDERING CLAUSE

12. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 5(c), 201, 202, and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 155(c), 201, 202, and 254, and sections 0.91, 0.291, 1.106, 54.706, 54.722 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 1.106, 54.706, and 54.722, that BellSouth Corporation's Petition for Reconsideration and Clarification of the Commission's *Fifth Circuit Remand Order* IS GRANTED, IN PART, to the extent provided herein.

FEDERAL COMMUNICATIONS COMMISSION

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13, para. 7. The Commission stated that minimal use of a subscriber line does not relieve the customer of the obligation of paying the SLC, because the full costs of the subscriber line are incurred no matter what the level of long distance usage, and the same portion of those costs is allocated to the interstate jurisdiction. *Id*. Therefore, even a telephone line that is used only for intrastate calls imposes costs that must be recovered through interstate service rates. *Id*. at 20413, para. 8. Similarly, subscribers receive a benefit from having the ability to make or receive an interstate telephone call, even if they rarely take advantage of this opportunity. *See also National Ass'n of Regulatory Utility Com'rs v. FCC*, 737 F.2d 1095, 1111-1115 (D.C.Cir. 1984) (upholding the Commission's assessment of SLC's on all telephone subscribers).

[34] *Reconsideration Order*, 18 FCC Rcd at 1426, para. 8.

[35] *See Fifth Circuit Remand Order*, 15 FCC Rcd at 1679, para. 1.

[36] *Id*.; *see supra* para. 3.

[37] *See Fifth Circuit Remand Order*, 15 FCC Rcd at 1679, para. 1.

[38] *Id*.