

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

In the Matter of
Federal-State Joint Board on
Universal Service
Request for Review by
Big River Telephone Company, LLC
CC Docket No. 96-45
CC Docket No. 97-21

Order

Adopted: March 14, 2007

Released: March 14, 2007

By the Acting Deputy Chief, Wireline Competition Bureau:

I. INTRODUCTION AND BACKGROUND

1. In this Order, we deny the request filed by Big River Telephone Company, LLC (Big River or Petitioner) seeking review of the Decision on Contributor Appeal issued by the Universal Service Administrative Company (USAC or the Administrator). Specifically, Big River challenges the Administrator's application of adjustments posted to Big River's account and reflected on its July, August, and September 2002 invoices. For the reasons set forth below, we affirm the Administrator's Decision.

A. The Act and the Commission's Rules

2. Section 254(d) of the Communications Act of 1934, as amended (the Act), directs that 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. To this end, the Commission has determined that any entity that provides interstate telecommunications services to the public for a fee must contribute to the Universal Service Fund (USF or Fund). The Commission further directs that

1 Request for Review by Big River Telephone Company, LLC of Decision of Universal Service Administrator in reference to FCC Docket Nos. 97-21 and 96-45, CC Docket Nos. 96-45 and 97-21 (filed April 14, 2004) (Request for Review); Supporting affidavit of Gerard J. Howe, CEO, Big River Telephone Company, CC Docket Nos. 96-45 and 97-21 (filed Aug. 18, 2004) (Howe Affidavit).

2 Administrator's Decision on Contributor Appeal, March 5, 2004 (Administrator's Decision).

3 Request for Review at 1.

4 47 U.S.C. § 254(d).

5 See Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9179, para. 787 (1997) (Universal Service First Report and Order) (subsequent history omitted).

contributions should be based on contributors' interstate and international end-user telecommunications revenues.⁶

3. In the *Second Order on Reconsideration*, the Commission set forth the specific method of computation for universal service contributions.⁷ The Commission required contributors to submit semi-annually a Telecommunications Reporting Worksheet (Worksheet) to collect information from contributors about their end-user telecommunications revenues.⁸ The Worksheet explained that contributions were to be based on billed end-user telecommunications revenues from the prior year.⁹ On September 1 each year, carriers were required to submit revenue data for the six-month period from January 1 through June 30 of that year. This information was then used to calculate universal service support contributions for January through June of the following year. On April 1 each year, carriers were required to submit revenue data for the previous calendar year. This information was then used to calculate contributions for July through December of the same year in which the data were filed, by subtracting the previously filed data for the first half of that year. Thus, for example, under the initial rules, revenue data due on September 1, 1999, would be used to calculate contributions for January through June 2000. Revenue due on April 1, 2000, would be used to calculate contributions for July 2000 through December 2000, by subtracting the revenues contained in the data filed September 1, 1999.¹⁰ This contribution methodology was in effect during the period covered in Big River's Request for Review.¹¹ The Commission modified its contribution methodology to assess contributors based on their projected collected revenues in 2003, which means that contributors now file revenue projections on a quarterly basis and receive a monthly invoice of their obligation from USAC.¹²

B. Request for Review

4. Big River purchased Long Distance Discount, Inc., (LDD) on December 21, 2001, and

⁶ *Id.*; see also 47 C.F.R. § 54.706.

⁷ *Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, CC Docket No. 97-21, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order and Second Order on Reconsideration, 12 FCC Rcd 18400 (1997) (*Second Order on Reconsideration*).

⁸ The Commission adopted the Worksheet and attached it as Appendix C to the *Second Order on Reconsideration*. Subsequent to its issuance of the *Second Order on Reconsideration*, in an effort to reduce administrative burdens on contributors, the Commission consolidated the reporting requirements of the universal service mechanism along with other reporting requirements into the FCC Form 499 Telecommunications Reporting Worksheet (Form 499). *1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms*, CC Docket 98-171, Report and Order 1999 WL 492955, FCC 99-175 (rel. July 14, 1999).

⁹ *Second Order on Reconsideration*, 12 FCC Rcd at 18400, Appendix C.

¹⁰ *Federal-State Joint Board on Universal Service; Petition for Forbearance from Enforcement of Sections 54.709 and 54.711 of the Commission's Rules by Operator Communications, Inc. d/b/a Oncor Communications, Inc.*, CC Docket No. 96-45, Further Notice of Proposed Rulemaking and Order, 15 FCC Rcd 19947 (2000).

¹¹ Howe Affidavit at 1-2.

¹² See *Federal-State Joint Board on Universal Service, 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms, Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990, Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size, Number Resource Optimization, Telephone Number Portability, Truth-in-Billing and Billing Format*, CC Docket Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, 98-170, Report and Order and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 24952, 24970, para. 29 (2002).

immediately began to operate as a carrier.¹³ On March 20, 2002, Big River filed FCC Form 499-A for the full year 2001, reporting LDD's revenue on Big River's FCC Form 499-A.¹⁴ Upon review of the FCC Form 499-A, USAC informed Big River that USAC was making an upward adjustment of \$158,887.09 to revenue reported by Big River for 2001.¹⁵

5. Commission regulations require that an appeal of an Administrator's decision be filed with USAC within 60 days of the issuance of that decision.¹⁶ USAC posted the adjustments at issue on Big River's July, August, and September 2002 invoices, respectively. Big River's appeal to USAC is dated November 13, 2003 – over a year after the September 2002 invoice reflecting the last of the charges at issue.¹⁷ Based on this information, USAC found that Big River filed its appeal to USAC after the Commission's 60-day filing deadline. USAC declared the appeal untimely filed and denied it.¹⁸ USAC stated, however, that if it had considered the merits of Big River's Appeal, it would have affirmed the decision to apply the adjustments. USAC explained that when a contributor purchases another contributor, the purchasing company must report the revenues of both companies on the next FCC Form 499-A filing. USAC stated that a review of Big River's account demonstrates that the adjustments applied to Big River's account were properly applied and accurately reflected the reported revenue of the combined companies.¹⁹

6. On April 7, 2004, Big River filed its appeal of the Administrator's Decision with the Commission. Big River contends that the debt in question is incumbent upon the prior owner, LDD, and not Big River. Big River states that it purchased the assets of LDD on December 21, 2001, and asserts that the debt relates to revenues collected prior to the purchase. Big River further states that it did not purchase the liabilities of LDD.²⁰ Big River did not challenge the Administrator's finding that its appeal was untimely, and offers no reason for the late filing of its appeal with USAC.

III. DISCUSSION

7. The Commission has delegated authority to the Wireline Competition Bureau to consider petitions for review of decisions by the Administrator.²¹ Section 54.723 of the Commission's rules specifies that the standard of review is *de novo*.²²

8. USAC articulated two grounds for denying the appeal. First, USAC denied the appeal as untimely filed. In its appeal to the Commission, Big River offers no facts to counter USAC's conclusion

¹³ Howe Affidavit at 1.

¹⁴ Howe Affidavit at 2; *see also*, Administrator's Decision at 2.

¹⁵ Howe Affidavit, Exh. B (Letter from USAC to Philip Abbenhaus, Big River Telephone Company, LLC, dated July 22, 2002).

¹⁶ 47 C.F.R. § 54.720.

¹⁷ For purposes of 47 C.F.R. § 54.720, USAC's invoice is a decision by the Administrator. USAC prints instructions to this effect on the reverse side of each invoice sent to contributors, including information on how to dispute the charges contained on the invoice.

¹⁸ Administrator's Decision at 1-2.

¹⁹ *Id.* at 2.

²⁰ Request for Review at 1. Big River indicates that it has filed a lawsuit against LDD in order to collect, among other things, the unpaid USF fees. Howe Affidavit, Exh. E (Letter from John Jennings, V.P. Controller, Big River, to Tisha Littleton, Federal Communications Commission, dated November 3, 2003).

²¹ 47 C.F.R. § 54.722(a).

²² 47 C.F.R. § 54.723.

regarding the timeliness of its appeal to USAC, or circumstances that would explain the late filing. Accordingly, we find that USAC was correct in dismissing the appeal as untimely.

9. Second, USAC found that even if the appeal had been timely filed with USAC, USAC would have denied the appeal on the merits. For the reasons set forth below, we find that the Administrator properly billed Big River for the USF obligations resulting from Big River's provision of interstate telecommunications services to end-users in calendar year 2001. We further conclude that USAC appropriately denied the Big River's appeal. We therefore deny the Request for Review.

A. Universal Service Contributions and Prior Year End-user Telecommunications Revenues

10. A carrier's obligation to contribute to universal service arises when the carrier begins to provide telecommunications services to the public for a fee.²³ It is undisputed that Big River purchased LDD on December 21, 2001, and began providing interstate telecommunications service on or around that date,²⁴ the same date that its obligation to contribute to the universal service fund based on revenues from those customers arose. The issue in dispute, therefore, concerns the basis for assessing Big River's contribution obligation. As described above, the contribution methodology in effect during the period of time covered in Big River's request assessed *current* contributions based on *historical* gross-billed revenues that were reported six months earlier. In practice, this meant that the amount contained on USAC's invoices reflected previously reported revenues.²⁵

11. Under the contribution methodology in effect during the period of time at issue, USAC was correct to bill Big River based on LDD's reported revenue. Big River is under the mistaken belief that, under the previous contribution methodology, contributions collected by USAC satisfy historical obligations. To the contrary, contributions to USAC satisfy *current* obligations that, at the time in question, were based on reported revenues from the prior year.²⁶ Thus, as required by our rules, the amount of Big River's universal service obligation in 2001 was based in part on the end-user revenues that LDD reported in 2001. We therefore disagree with Big River when it asserts that it is not responsible for the \$158, 887.09 in adjustments applied by USAC to its July, August, and September 2002 invoices. We find that the Administrator acted properly in posting the adjustments to Big River's 2002 invoices.

B. Obligation to Report End-user Telecommunications Revenues

12. Both federal and Commission precedent make clear that legal duties to comply with a federal regulatory scheme cannot be "contracted away." Both the Supreme Court and the Commission have stated, "[i]f a regulatory statute is otherwise within the powers of Congress ... its application may not be defeated by private contractual provisions."²⁷ Because the Act and the Commission's rules require

²³ See *Universal Service First Report and Order*, 12 FCC Rcd at 9179, para. 787.

²⁴ Howe Affidavit at 1.

²⁵ *Second Order on Reconsideration*, 12 FCC Rcd at 18400, Appendix C

²⁶ See, e.g., *Federal-State Joint Board on Universal Service*, CC Docket Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, 98-170, Report and Order and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 24952, 24959, 24569, paras. 11, 29 (2002) (*Interim Contribution Methodology Order*); see also 47 C.F.R. § 54.709(a).

²⁷ *Connolly v. Pension Ben. Guar. Corp.*, 475 U.S. 211, 224 (1986); *Preemption of Local Zoning Regulation of Satellite Earth Stations*, IB Docket No. 95-59, CS Docket No. 96-83, Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 11 FCC Rcd 19276, 19304, para. 45 (1996); *Review of the Commission's Regulations Governing Television Broadcasting Television Satellite Stations Review of Policy and Rules*, MM Docket Nos. 91-221 and 87-8, Memorandum Opinion and Second Order on Reconsideration, 16 FCC Rcd 1067, 1087, para. 54 & n.118 (2001).

carriers to contribute to universal service, a purchaser of assets cannot, by contract, shift this obligation to the seller. The seller may agree to pay on behalf of a purchaser, and the Administrator may accept payments from the seller, but if the seller does not pay on the purchaser's behalf, the purchaser must pay.²⁸ Here, even if LDD contracted to pay Big River's universal service obligations,²⁹ Big River retained the contribution obligation. We therefore conclude that the Administrator properly billed Big River during 2001 for the universal service obligations resulting from Big River's end-user telecommunications revenues.

V. ORDERING CLAUSE

13. ACCORDINGLY, IT IS ORDERED, pursuant to the authority contained in Sections 1, 4(i), 4(j) and 254 of the Communications Act of 1934, as amended, 47 USC §§ 151, 154(i), 154(j) and 254, and pursuant to authority delegated under sections 0.91, 0.291, and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 54.722(a), that the Request for Review filed by Big River Telephone Company, LLC IS DENIED.

14. IT IS FURTHER ORDERED that, pursuant to authority delegated under sections 0.91, 0.291 and 1.102 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 1.102, this Order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Renee R. Crittendon
Acting Deputy Chief,
Wireline Competition Bureau

²⁸ See, e.g., *Request for Review by Homer Community Consolidate*, File No. NEC.70C.03-10-00.09700014, CC Docket Nos. 96-45 and 97-21, Order, 16 FCC Rcd 9353 (Com. Car. Bur. 2001) (rejecting a claim by an applicant that it should be excused for its failure to timely file its form with the Administrator because it relied upon a third-party that filed the form late).

²⁹ We have not reviewed any agreement, and are not making a ruling on its contents nor on Petitioner's claims regarding LDD's obligations to Big River.