

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

In the Matter of
Tata Communications (America), Inc., and
Tata Communications (Guam), L.L.C
Request for Waiver of Section 54.706(a)
of the Commission's Rules
WC Docket No. 06-122

ORDER

Adopted: March 25, 2021

Released: March 25, 2021

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order, we address a petition for limited waiver by Tata Communications (America) Inc. and Tata Communications (Guam), L.L.C. (collectively, Tata). Tata seeks waiver of section 54.706(a), or alternatively section 54.706(c), of the Commission's rules to allow Tata, as a predominantly international carrier, to maintain its eligibility for the limited international revenue exemption (LIRE) for contribution purposes once its interstate revenues exceed the current qualifying threshold for that exemption. For the reasons discussed below, we find that good cause exists to grant a retroactive waiver of sections 54.706(a)-(c) for revenue reporting year 2020 and prospectively for revenue reporting year 2021, subject to the limitations set forth below, to allow Tata to continue to contribute to the Universal Service Fund (USF or Fund) based solely on its interstate end-user telecommunications revenues.

II. BACKGROUND

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 Fund. The Commission has also directed that contributions be made "on the basis

1 Petition for Waiver by Tata Communications (America), Inc. and Tata Communications (Guam), L.L.C., WC Docket 06-122 (filed March 29, 2019) (Petition for Waiver). The Petition for Waiver was placed on Public Notice on April 3, 2019. Wireline Competition Bureau Seeks Comment on Tata Communications (America), Inc. and Tata Communications (Guam), L.L.C., WC Docket No. 06-122, DA 19-250 (WCB April 3, 2019). No Comments or reply comments were filed.

2 Petition for Waiver at 4, 8. See 47 CFR §§ 54.706(a), (c).

3 47 U.S.C. § 254(d).

4 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). The Commission also requires certain other providers of interstate telecommunications to contribute to the universal service fund.

(continued....)

of its projected collected interstate and international end-user telecommunications revenues, net of projected contributions.”⁵

3. The Commission’s rules, however, limit the contribution obligation for entities providing predominantly international services.⁶ Specifically, the LIRE exempts a provider from including in its contribution base its international end-user telecommunications revenues if its interstate end-user telecommunications revenues comprise less than 12% of its combined interstate and international end-user telecommunications revenues.⁷ The Commission established the LIRE in 1999 in response to a remand from the U.S. Court of Appeals for the Fifth Circuit holding that the Commission’s previous rule, which had required providers with limited interstate telecommunications revenues to contribute based on both their interstate and international revenues but exempted providers without interstate telecommunications revenues,⁸ was “arbitrary and capricious and manifestly contrary to the statute” because it required many predominantly international carriers to “contribute more in universal service payments than they will generate from interstate service.”⁹ The court also found that the rule was not “equitable and nondiscriminatory” as required by section 254(d) of the Act because it “damages some international carriers . . . more than it harms others.”¹⁰

B. Tata Communications Request for Waiver

4. Tata Communications provides a range of telecommunications and data solutions to enterprise and carrier customers, including multi-protocol label switching virtual private networks, voice termination service, telepresence, content delivery, and cloud offerings.¹¹ Tata states that it has always qualified for the LIRE because its telecommunications revenues are predominantly international in nature.¹² Tata seeks a waiver of section 54.706 of the Commission’s rules “insofar as it would require Tata Communications to begin contributing to the USF based on its combined interstate and international

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See, e.g., Universal Service Contribution Methodology et al., WC Docket Nos. 06-122, 04-36, CC Docket Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, 98-170, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518 (2006) (*2006 Universal Service Contribution Methodology Order*) (requiring interconnected voice over Internet protocol providers to contribute to the universal service fund because they are providers of interstate telecommunications). The Act and the Commission’s rules do, however, exempt certain carriers from the contribution requirement. For example, carriers are not required to contribute directly to the universal service fund in a given year if their contribution for that year would be less than \$10,000. 47 CFR § 54.708. Likewise, carriers with purely intrastate or international revenues are not required to contribute. *Universal Service First Report and Order*, 12 FCC Rcd at 9174, para. 779. Certain government entities, broadcasters, schools, libraries, systems integrators, and self-providers are also exempt from the contribution requirement. 47 CFR § 54.706(d). Unless a carrier meets one of the exemptions, however, it must contribute to the universal service fund.

⁵ 47 CFR § 54.706(b); *see Universal Service First Report and Order*, 12 FCC Rcd at 9202, para. 836.

⁶ 47 CFR § 54.706(c).

⁷ *Id.*

⁸ The Commission’s previous rule required all entities providing interstate telecommunications to the public for a fee to contribute to universal service support based on their interstate and international revenues, unless they qualified for the *de minimis* exception. *See* 47 CFR §§ 54.706, 54.708 (1999). It made no exception for entities that derived most, but not all, of their revenue from international telecommunications. *See id.*

⁹ *Texas Office of Public Utility Counsel v. Federal Commc ’ns Comm ’n*, 183 F.3d 393, 434-435 (5th Cir. 1999) (*TOPUC*).

¹⁰ *Id.*; *see Federal-State Joint Board on Universal Service; Access Charge Reform*, CC Docket Nos. 96-45, 96-252, Eighth Report and Order, 15 FCC Rcd 1679, 1687-89, paras. 19-22 (1999) (*Universal Service Eighth Report and Order*).

¹¹ Petition for Waiver at 1.

¹² *Id.* at 2.

telecommunications revenues upon exceeding the 12% LIRE threshold.”¹³ Tata proposes that the Commission could adopt two safeguards to ensure that the relief granted by the waiver would remain consistent with the public interest: (1) the waiver would be terminated upon the effectiveness of any Commission rule that revises the LIRE on an industry-wide basis, and (2) the continued applicability of a waiver would be conditioned on Tata’s percentage of interstate revenue remaining below the current contribution factor.¹⁴ Tata also offers to periodically self-certify that it is in compliance with the waiver.¹⁵

5. In its petition, Tata asserted that because of recent changes in the jurisdictional mix of its telecommunications revenues, it anticipated that in the near future, given the current contribution factor, its assessable interstate telecommunications revenues would exceed 12% of its combined assessable interstate and international revenue for the first time, which would result in the company losing its LIRE eligibility.¹⁶ Tata claimed that if it were to no longer qualify for the LIRE, its contribution obligation would significantly increase to an amount that far exceeds the company’s total interstate telecommunications revenues.¹⁷ Tata argued that the significant increase in contributions based on a modest incremental gain in interstate revenues would violate the equitable and non-discriminatory requirements of section 254(d) of the Act as interpreted by the Fifth Circuit¹⁸ and would dramatically increase Tata’s contribution obligation to a level that would have negative effects on competition and harm the public interest.¹⁹

6. Tata also argued that the projected contribution obligation resulting from a loss of the company’s LIRE status would far exceed any incremental revenue that it would derive from serving an additional purchaser of interstate service or expanding an existing relationship with current customer.²⁰ Tata asserted that absent a waiver, it would have an incentive to stop further expansion of its interstate telecommunications business and to possibly terminate existing business relationships to avoid the significant increase in its contribution obligation that results from having to pay contributions on its international revenue as well as on its interstate revenue.²¹ Tata also argued that its customers would lose out on the competitive benefits flowing from the company’s participation in a marketplace that is primarily dominated by incumbent providers, including lower prices, improved service quality and innovative technology solutions.²²

7. In a recently filed *ex parte*, Tata asserts that it has, in fact, recently lost its eligibility for the LIRE largely due to changes in the jurisdictional mix of the company’s end-user telecommunications revenue, exposing the company to a significantly higher USF contribution obligation.²³ Tata states that the increased contribution burden has adversely impacted its customers and has “made it difficult to

¹³ Petition for Waiver at 3. Specifically, Tata seeks a waiver of section 54.706(a). In the alternative, Tata requests a waiver of the 12% LIRE threshold in section 54.706(c) to the extent it effectuates the same result. *Id.* at 3-4, 8. *See* 47 CFR §§ 54.706(a) and (c).

¹⁴ Petition for Waiver at 11-12.

¹⁵ *Id.* at 12.

¹⁶ *Id.* at 5.

¹⁷ *Id.* at 2, 7-8.

¹⁸ *See TOPUC*, 183 F.3d at 434-435.

¹⁹ Petition for Waiver at 8-10.

²⁰ at 10-11.

²¹ *Id.* at 9.

²² *Id.* at 9.

²³ *See* Letter from Mathew A. Brill, Latham & Watkins, LLP to Marlene H. Dortch, FCC (filed Feb. 5, 2021) (*Ex Parte Letter*).

maintain the competitiveness of its service offerings in the international telecommunications marketplace.”²⁴

III. DISCUSSION

8. Generally, the Commission’s rules may be waived for good cause shown.²⁵ The Commission may exercise its discretion to waive a rule where the specific facts make strict compliance inconsistent with the public interest.²⁶ Waiver of the Commission’s rules is therefore appropriate if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest.²⁷

9. We conclude that special circumstances exist to grant a limited waiver of the LIRE-qualifying threshold to allow Tata to continue contributing to the Fund based solely on its interstate revenues. We find that given the rise in the contribution factor as described below, the current LIRE-qualifying threshold is inadequate to ensure that Tata is not subject to contributions that exceed its interstate revenue. We also conclude that based on the circumstances presented, granting Tata’s waiver request retroactively for 2020 and prospectively for 2021, subject to the limitations discussed below, is consistent with the public interest.

10. When the Commission created the LIRE in 1999, it set the LIRE-qualifying factor at 8%. At that time, the contribution factor was expected to be 5.8995%.²⁸ When the Commission raised the threshold in 2002 to 12%, the contribution factor had risen to 6.808% and was expected to increase above 8% at some point that year.²⁹ Both times, the Commission set the threshold several percentage points above the prevailing contribution factor to provide “a margin of safety” that would account for fluctuations in the contribution factor.³⁰ In 2012, the Commission recognized the difficulty of establishing the LIRE-qualifying factor based on assumptions that rely on forecasting changes in the contribution base as well as changes in the demand for universal service support, two factors that affect the contribution factor.³¹ The Commission therefore sought comment on whether the Commission should set the LIRE-qualifying factor based upon a formula setting the LIRE-qualifying threshold a small percentage above the current or anticipated contribution factor, rather than a fixed percentage.³² That proceeding remains pending, and the LIRE-qualifying threshold, which has not been adjusted since 2002, is currently well below the current 31.8% contribution factor,³³ and even further below the recently

²⁴ *Ex Parte Letter* at 1.

²⁵ 47 CFR § 1.3.

²⁶ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

²⁷ The Commission may, on an individual basis, take into account considerations of hardship, equity, or more effective implementation of overall policy. *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166.

²⁸ See *Universal Service Eighth Report and Order*, 15 FCC Rcd at 1687-89, paras. 19-22; *Federal State Board on Universal Service et al.*, Report and Order and Further Notice of Proposed Rulemaking, 17 FCC Rcd 3752, 3806, para. 125 (2002) (*2002 First Contribution Methodology Order and FNPRM*).

²⁹ See *2002 First Contribution Methodology Order and FNPRM*, 17 FCC Rcd at 3806, paras. 125-128.

³⁰ *Universal Service Eighth Report and Order*, 15 FCC Rcd at 1687, para. 19, n.56; *2002 First Contribution Methodology Order and FNPRM*, 17 FCC Rcd at 3806, para. 125.

³¹ *Universal Service Contribution Methodology, A National Broadband Plan for Our Future*, WC Docket No. 06-122, GN Docket No. 09-51, Further Notice of Proposed Rulemaking, 27 FCC Rcd 5357, 5428-33, paras. 193-208 (2012).

³² *Id.* at 5433, para 207.

³³ See *Proposed First Quarter 2021 Universal Service Contribution Factor*, CC Docket No. 96-45, DA 20-1480, Public Notice (Dec. 14, 2020).

announced 33.4% contribution factor for second quarter 2021.³⁴ The Commission has recognized that the disparity between the contribution factor and the LIRE threshold could result in a contributor being required to contribute to the universal service fund an amount that exceeds its interstate end-user telecommunications revenue, and accordingly, has announced each quarter that should a contributor face this situation, the contributor may petition the Commission for a waiver of the LIRE threshold.³⁵

11. Given the current disparity between the LIRE-qualifying threshold and the contribution factor, we agree with Tata that a waiver of the threshold in this case is warranted to promote the statutory purposes of ensuring that contributions are made on an “equitable and nondiscriminatory basis” under section 254(d) of the Act.³⁶ We also agree with Tata that a waiver of the 12% LIRE-qualifying threshold is in the public interest because it allows Tata to continue competing in the international marketplace.³⁷ Indeed, the record indicates that due to the disparity between the LIRE-qualifying threshold and the increased contribution factor, Tata has lost its LIRE eligibility and is experiencing “significantly increased contribution burdens,” which is negatively impacting its ability to remain competitive.³⁸ Accordingly, we find that under the circumstances presented here, a waiver of sections 54.706(a)-(c) to allow Tata to retain its LIRE eligibility, retroactively, for 2020 and prospectively for 2021 will serve the public interest.³⁹

12. We find that placing limitations on the waiver of sections 54.706(a)-(c) is warranted to ensure that the exemption from contributing to the Fund based on international revenues remains justified and the relief granted remains consistent with the public interest.⁴⁰ We decline to grant an open-ended conditional waiver as Tata requests. To the extent Tata seeks a waiver for 2022, it must file a request to renew or extend this waiver at that time, accompanied by the requisite showings supporting its request, consistent with our waiver rule and precedent. Accordingly, this waiver remains in effect through year-end 2021 or the effective date of any rule adopted by the Commission to revise the LIRE on an industry-wide basis, whichever should occur first. Finally, we limit the waiver to Tata’s direct USF contribution obligations only. Thus, if Tata’s interstate revenues were ever to decline to a level that would qualify Tata for *de minimis* status, Tata would not be exempt from payment of indirect USF contributions.⁴¹

IV. CONCLUSION

13. We find that special circumstances and good cause exist to waive the 12% LIRE-qualifying threshold in section 54.706(a)-(c) of the Commission’s rules as it applies to Tata’s contribution obligation for calendar years 2020 and 2021, subject to the limitations outlined above. We direct USAC

³⁴ See *Proposed Second Quarter 2021 Universal Service Contribution Factor*, CC Docket No. 96-45, DA 21-308, Public Notice (Mar. 12, 2021).

³⁵ See *id.* at 4.

³⁶ See 47 USC § 254(d); *TOPUC*, 183 F.3d at 434-435; *Universal Service Eighth Report and Order*, 15 FCC Rcd at 1687-89, paras. 19-22; see also *Petition for Waiver* at 5-8.

³⁷ *Petition for Waiver* 8-11. *Ex Parte Letter* at 1. We note that no party has opposed Tata’s waiver request.

³⁸ *Ex Parte Letter* at 1.

³⁹ We additionally find that in order to provide Tata with the requested relief, a waiver of section 54.706(b) is also necessary, and we now do so *sua sponte*.

⁴⁰ See *Petition for Waiver* at 11-12.

⁴¹ If, in the future, Tata were to become a *de minimis* provider, it would not be required to contribute directly to the Fund. See 47 CFR § 54.708 (exempting from contribution any telecommunications provider whose contribution to universal service in any given year is less than \$10,000). To the extent however, that Tata were providing service using telecommunications purchased from an underlying carrier that itself contributes to the Fund, Tata would contribute indirectly through that underlying carrier.

to review Tata's FCC Form 499-As to ensure that the company qualifies for LIRE during the 2020 and 2021 revenue reporting years, consistent with the relief granted herein.

V. ORDERING CLAUSES

14. ACCORDINGLY, IT IS ORDERED that, pursuant to the authority contained in sections 4(i) and 254 (d) of the Communications Act, 47 U.S.C. §§ 4(i) and 254, and the authority delegated by sections 0.91, 0.291, and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 1.3, that the Petition for Waiver filed by Tata Communications (America) Inc. and Tata Communications (Guam), L.L.C. is hereby GRANTED retroactively and prospectively to the extent indicated and subject to the limitations described herein.

15. IT IS FURTHER ORDERED, pursuant to section 1.102(b)(1) of the Commission's rules, 47 CFR § 1.102(b)(1), that this order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Kris Anne Monteith
Chief
Wireline Competition Bureau