

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

In the Matter of
Universal Service Contribution Methodology
Request for Review of Decision of the Universal
Service Administrator by BT Americas Inc.
WC Docket No. 06-122
USAC Audit CR2015CP004

ORDER

Adopted: August 2, 2022

Released: August 2, 2022

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this order, we deny in part and grant in part a request filed by BT Americas Inc. (BT Americas) pursuant to sections 54.719-54.722 of the Commission's rules, for review of a decision by the Universal Service Administrative Company (USAC). BT Americas challenges USAC's determination that the company had assessed federal universal service fund (USF or Fund) pass-through charges in excess of amounts permitted by the Commission's rules for certain customers and had failed to properly report that revenue in its 2014 FCC Form 499-A. USAC directed BT Americas to refund the erroneous charges to its customers, or alternatively, to include the amounts in its assessable revenues on Line 403 of a revised Form 499-A. BT Americas asserts that the overcharges, which were caused by a billing error and attributable to non-assessable revenue only, are not prohibited by the Commission's rules and are covered by contractual arrangements mutually agreed upon between the company and its customers. BT Americas argues that USAC exceeded its authority in directing BT Americas to refund the overcharges to its customers or report it as assessable revenue.

2. BT Americas concedes that it assessed pass-through charges with respect to non-telecommunications services. We find that USAC correctly determined that BT Americas assessed these charges in excess of allowable amounts permitted by the Commission's rules, but that USAC erred in directing BT Americas to report the overcharges on Line 403 of a revised Form 499-A, where it would be subject to federal USF contribution obligations. To the extent that BT Americas cannot, or will not, within a commercially reasonable timeframe reimburse its customers for the USF overcharges collected, we direct USAC to refer the matter to the Enforcement Bureau for further action.

1 Request for Review by BT Americas Inc. of Decision of the Universal Service Administrator, WC Docket No. 06-122 (filed May 21, 2021) (BT Americas Request for Review); 47 CFR §§ 54.719-54.722.

2 BT Americas Request for Review at 2; USAC Audit Report for BT Americas Inc. (Filer ID 809483), June 30, 2017 (Audit Report) (Confidential).

3 BT Americas Request for Review at 2.

II. BACKGROUND

A. The Act and the Commission's Rules

3. 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.⁴ To this end, the Commission has determined that any entity that provides interstate telecommunications to the public for a fee must contribute to the Fund.⁵ The Commission has also directed that contributions be made “on the basis of its projected collected interstate and international end-user telecommunications revenues, net of projected contributions.”⁶ The Commission has designated USAC as the entity responsible for administering the universal service support mechanisms.⁷

4. The Commission's rules allow contributors to recover the costs of universal service contributions by passing through an explicit charge to their customers.⁸ If a contributor chooses to do so, the amount of the federal universal service line-item charge may not exceed the assessable portion of that customer's bill times the relevant contribution factor.⁹ Further, contributors are prohibited from recovering unrelated costs through universal service line-items and from averaging contribution costs across all end-user customers.¹⁰ In adopting rules governing the recovery of universal service contributions costs from end-user customers, the Commission concluded that elimination of mark-ups in contributors' universal service line-item charges would protect consumers and alleviate end-user confusion regarding the universal service line item and that such action would improve consumers' understanding of their telephone bills.¹¹

B. BT Americas' Petition for Review

5. BT Americas is a provider of domestic and international long distance services, private line services, toll teleconferencing services, non-telecommunications services, information services, cloud security, and professional services including consulting and management.¹² On June 30, 2017, USAC

⁴ 47 U.S.C. § 254(d).

⁵ 47 CFR § 54.706(a); 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. 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).

⁶ 47 CFR § 54.706(b); see also *Universal Service First Report and Order*, 12 FCC Rcd at 9171, para. 772.

⁷ *Changes to the Board of Directors of the National Exchange Carrier Association, Inc.; Federal-State Joint Board on Universal Service*, CC Dockets Nos. 96-45, 97-21, Report and Order and Second Order on Reconsideration, 12 FCC Rcd 18400, 18423–24, para. 41 (1997) (*Universal Service Second Order on Reconsideration*); see 47 CFR § 54.701.

⁸ 47 CFR § 54.712.

⁹ *Id.* The quarterly universal service contribution factor is determined by the Commission based on the ratio of total projected quarterly expenses of the universal service support mechanisms to the total projected collected end-user interstate and international telecommunications revenues, net of projected contributions. 47 CFR § 54.709.

¹⁰ See *Federal-State Joint Board on Universal Service et al.*, 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, 24978, para. 51 (2002) (*2002 Universal Service Contribution Methodology Order*).

¹¹ *2002 Universal Service Contribution Methodology Order*, 17 FCC Rcd at 24978, paras. 49–50.

finalized an audit of BT Americas' compliance with FCC Form 499-A contributor filing requirements for calendar year 2014. The audit contained multiple findings, two of which, Finding #2 and Finding #7, are at issue in this appeal.¹³ First, USAC determined that BT Americas had omitted a portion of its pass-through federal universal service fund charges from Line 403 of their Form 499-A (Finding #2).¹⁴ USAC determined that BT Americas incorrectly assessed on some customers federal universal service pass-through charges in excess of allowable amounts permitted by section 54.712 of the Commission's rules, and then reported only the amount of federal universal service pass-through charges that it correctly assessed, rather than the total amount actually billed to customers.¹⁵ USAC directed BT Americas to refund the overcharges to its customers (Finding # 7),¹⁶ or, if it chose not to refund the customers, to include the overcharged amounts in its total gross revenues on Line 403 of the Form 499-A.¹⁷ BT Americas filed an appeal with USAC on August 29, 2017 related to certain issues associated with the audit, including those at issue here.¹⁸ USAC granted the appeal with respect to the other parts of the audit, but denied the company's appeal of audit Finding #7 and Finding #2.¹⁹ BT Americas filed the instant Request for Review on May 21, 2021.

6. In its Request for Review, BT Americas concedes that its pass-through charges were excessive because they applied those charges to non-telecommunications services that were not assessable.²⁰ Nevertheless, it requests that the Bureau vacate and overturn USAC's audit decision to the extent it requires BT Americas to refund its customers the USF charges billed on the improperly billed revenue or to report this revenue as assessable on a revised Form 499-A.²¹ BT Americas asserts that USAC erred in applying section 54.712 of the rules, arguing that the rule does not apply to the billing error that occurred.²² BT Americas further argues that USAC's directive to refund the overcharges to customers is an impermissible interference in BT Americas' private carriage contracts, which include provisions to address billing errors and refunds of overcharges, here most notably time limits for customers to challenge charges imposed by BT Americas.²³ BT Americas also argues that USAC lacks the authority to order BT Americas to report USF overcharges on Line 403 of the Form 499-A because the overcharges at issue were assessed on non-assessable services and would therefore be reported as non-assessable revenue on Line 418 of the Form 499-A.²⁴

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¹² BT Americas Request for Review at 3; Exh. 3 at 7 (USAC Audit).

¹³ BT Americas Request for Review at 4.

¹⁴ *Id.*; USAC Audit at 16–19.

¹⁵ BT Americas Request for Review at 5; USAC Audit at 17, 30-31.

¹⁶ BT Americas Request for Review at 2; USAC Audit at 31.

¹⁷ BT Americas Request for Review at 4; USAC Audit at 17. *See also* Letter from USAC to Denise Smith, Counsel to BT Americas at 4 (Mar. 22, 2021) (USAC Appeal Decision).

¹⁸ BT Americas Request for Review at 4.

¹⁹ *Id.* at 5.

²⁰ *Id.* at 8 (“It is undisputed that the misbilled charges involved non-assessable services or items.”)

²¹ *Id.* at 5.

²² *Id.* at 5-9.

²³ *Id.* at 11-22.

²⁴ *Id.* at 22-23. BT argues that only “telecommunications” or “telecommunications revenues” are subject to USF contributions and the USF fees at issue here were assessed on non-assessable service and would therefore be reported on line 418 of the Form 499-A.

III. DISCUSSION

7. Section 54.712(a) of the Commission's rules states that "[i]f a contributor chooses to recover its federal universal service contribution costs through a line item on a customer's bill the amount of the federal universal service line-item charge may not exceed the interstate telecommunications portion of that customer's bill times the relevant contribution factor."²⁵ BT Americas argues that USAC erroneously applied section 54.712(a) because this rule was adopted to prevent the mark-up of the USF contributions factor, and is a "purely mathematical provision" that prohibits contributors from calculating their contribution assessments using a contribution rate that exceeds the relevant contribution factor and should not be applied to "inadvertent billing errors."²⁶ We disagree. Section 54.712(a) contains no such exception. Although BT Americas acknowledges that it "inadvertently and erroneously" applied USF contribution pass-through charges to telecommunications equipment charges, managed services, and other non-assessable services,²⁷ it asserts that it did not mark up the contribution factor associated with its USF surcharges and that the "error is in billing, not in a calculation of the USF rates charges."²⁸ BT Americas argues that section 54.712 therefore does not apply to the overcharges at issue, and hence USAC erred by applying that rule "not to the rate that BT Americas assesses for USF surcharges, but to an error in the application of the surcharge to a service."²⁹ BT Americas reading of section 54.712(a) is tortuous, effectively arguing its unjust enrichment in violation of the express language of a Commission rule should be permitted because it occurred through error rather than intention. We reject this argument.

8. Section 54.712 was adopted to prohibit "the practice of marking up federal universal service line-item charges above *the relevant assessment*."³⁰ Carriers' contributions "are assessed on the basis of projected collected interstate and international revenues."³¹ Thus, contrary to BT Americas' argument, the rule not only prohibits carriers from using an excessive contribution factor, but also prohibits companies from including other unrelated costs in the assessment of the revenues that form the basis for the calculation.³² Further, when it adopted the rule, the Commission stated that "[a]ny carrier that applies a federal universal service line-item charge above the relevant assessment amount could be subject to enforcement action for violating the rules we adopt herein."³³ Under BT Americas' interpretation of section 54.712, the Commission should have here warned of rule violations with respect to any carrier that applies "a USF assessment rate above the relevant assessment percentage." Instead, the Commission warned of rule violations regarding any carrier that applies "a line item charge above the relevant assessment amount." This wording of the rule is clear – the Commission did not merely intend to prohibit application of an improper rate, but also intended to prohibit the billing of excessive "charges" or "amounts" in federal universal service line items in consumer bills. In other words, if the line item charge exceeds what is permitted, it is prohibited.

²⁵ 47 CFR § 54.712(a). The rule uses the term "interstate", but the Commission has construed "interstate" broadly to include international telecommunications revenues. *See Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9174-75, para. 779 (1997).

²⁶ *Id.* at 5-9.

²⁷ *Id.* at 2.

²⁸ *Id.* at 8.

²⁹ *Id.* at 7.

³⁰ *2002 Universal Service Contribution Methodology Order*, 17 FCC Rcd at 24978, para. 49 (emphasis added).

³¹ *Id.* at 24978, para. 49 ("[o]nce carriers' contributions are assessed on the basis of projected collected interstate and international revenues, carriers may not mark up federal universal service line item charges above the relevant contribution factor.").

³² *Id.* at 24977, para. 48.

³³ *Id.* at 24978, para. 49.

9. BT Americas offers no support for its strained reading of the rule and its reasoning is inconsistent with the intent of the rule, which is to protect consumers and to ensure that federal universal service line items on customer bills accurately reflect the extent of a carrier's contribution obligations.³⁴ Taken to its logical conclusion, BT Americas' interpretation of the rule would suggest that contributors may pass erroneous charges to consumers under the guise of USF charges as long as those charges are calculated using the relevant contribution factor. This interpretation must fail.

10. Having established that BT Americas has collected excessive USF fees from its customers in contravention of section 54.712 of the Commission's rules, the proper remedy is for BT Americas to refund the overcharges to its customers.³⁵ We reject BT Americas' argument that the requirement to refund its customers for the improperly assessed USF fees is an impermissible interference in the contracts it negotiated with its customers.³⁶ It is well established that the legal duties to comply with a federal regulatory scheme cannot be contracted away. The Supreme Court and the Commission have stated, "[i]f the regulatory statute is otherwise within the power of Congress... its application may not be defeated by private contractual provisions."³⁷ Specifically, "[p]arties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them."³⁸ As an entity required to contribute to universal service, BT Americas is bound by the rules governing contribution recovery limitations.³⁹ BT Americas cannot rely on the provisions of its own contracts to assert that it can retain overcharges collected in contravention of federally mandated universal service obligations. When a carrier assesses USF pass through charges in excess of the amount permitted by the Commission's rules, it should reimburse the affected customers.⁴⁰ To the extent BT Americas cannot, or

³⁴ *Id.*

³⁵ See, e.g., *Universal Service Contribution Methodology, Request for Review of Decision of the Universal Service Administrator by Clear World Communications Corporation*, CC Docket No. 06-122, Order, 26 FCC Rcd 6234, 6238 at para. 20 (WCB 2011) (*Clear World*) ("To the extent Clear World cannot, or will not, reimburse its customers for the excessive amounts of contribution costs collected, we direct USAC to refer the matter to the Enforcement Bureau for Further investigation.").

³⁶ BT Americas Request for Review at 11-19. BT Americas argues that requiring it to refund overcharges to its customers violates the *Sierra-Mobile* doctrine, which prohibits the Commission from modifying private contracts, except in very narrow circumstances. *Id.* at 16. This doctrine, however, is limited to the Commission's "just and reasonable" review of rates for services under section 201 of the Act. See, e.g., *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956); *IDB Mobile Communications, Inc. v. COMSAT Corporation*, Memorandum Opinion and Order, 16 FCC Rcd 11474 (2001). The matter before us involves a pass-through charge of a government mandated fee, not a rate charged for a service.

³⁷ *Connolly v. Pension Ben. Guar. Corp.*, 475 U.S. 211, 224 (1986); See also, *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.117 (2001); *In the Matter of Federal-State Joint Board on Universal Service Petition of Review American Cyber Corp. et al.*, CC Docket Nos. 96-45, 02-6, Order, 22 FCC Rcd 4925, para. 18 (WCB 2007); *In the Matter of Federal-State Joint Board on Universal Service Request for Review by Big River Telephone Company, LLC*, CC Docket 96-45, CC Docket 97-21, Order, 22 FCC Rcd 4974, para. 12 (WCB 2007).

³⁸ *Connolly v. Pension Ben. Guar. Corp.*, 475 U.S. 211, 224 (1986) (citing to *Norman v Baltimore & Ohio R. Co.*, 294 U.S. 240, 307-308 (1935)).

³⁹ See, e.g., 47 CFR § 54.712 (referring to *contributor* recovery of USF charges).

⁴⁰ See, e.g., *Clear World*, 26 FCC Rcd at 6241-42, paras. 19-20.

will not, reimburse its customers for the unlawful contribution overcharges, we direct USAC to promptly refer the matter to the Enforcement Bureau for further action.

11. Finally, we conclude that USAC did err in directing BT Americas to report the overcharges on line 403 of a revised Form 499-A, where it would be subject to federal USF contribution obligations. The Commission's rules expressly prohibit marking up federal universal service line-item charges above the relevant assessment amount,⁴¹ but they do not provide that a provider must contribute to the USF based on non-assessable equipment and services, independent of the prohibition on excessive mark-ups.⁴² Here, the overcharges were the result of BT Americas billing its customers for USF charges on non-assessable equipment and services. It therefore would be inappropriate to require BT Americas to report those overcharges as assessable on a revised Form 499-A. Instead, the appropriate remedy for such an unlawful action is to refund customers for those contribution overcharges. Accordingly, we grant BT Americas' request for review to the extent that USAC found that it was required to report the overcharges on Line 403 of a revised Form 499-A, where such improperly collected revenue would be subject to federal USF contribution obligations.

IV. ORDERING CLAUSES

12. ACCORDINGLY, IT IS ORDERED, pursuant to the authority contained in sections 1-4 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 254, and sections 0.91, 0.291, and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 54.722(a), the request for review filed by BT Americas Inc. is hereby DENIED in part and GRANTED in part.

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

FEDERAL COMMUNICATIONS COMMISSION

Trent B. Harkrader
Chief
Wireline Competition Bureau

⁴¹ 47 CFR § 54.712.

⁴² See *id.* § 54.706(b) (requiring contributors to contribute to the USF based on interstate and international end user telecommunications revenues).