

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

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| In the Matter of |) | |
| |) | |
| Federal-State Joint Board on |) | CC Docket No. 96-45 |
| Universal Service |) | |
| |) | |
| Petition of Federal Transtel, Inc. |) | |
| for Waiver of the Universal |) | |
| Service Fund Contribution Requirements |) | |
| Under Sections 54.703, 54.709, and 54.711 |) | |
| of the Commission's Rules |) | |

**MEMORANDUM OPINION AND ORDER AND
ORDER ON RECONSIDERATION**

Adopted: September 18, 2001

Released: September 20, 2001

By the Commission:

I. INTRODUCTION

1. In this Order, we deny the request of Federal Transtel, Inc. (Federal Transtel) to waive or reconsider the Commission's rules and permit Federal Transtel to recalculate its 1998 and 1999 contributions to the federal universal service mechanisms.¹ Specifically, we conclude that Federal Transtel has failed to demonstrate good cause to grant a waiver. Furthermore, to the extent that Federal Transtel's petition seeks reconsideration of Commission rules that required carriers to base federal universal service contributions on prior year revenues, we deny such request as untimely. In so doing, we also note that the Commission has recently amended its contribution methodology and these changes may address many of the substantive concerns raised in Federal Transtel's petition.²

II. BACKGROUND

A. The Act and the Commission's Rules

2. In section 254 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the Act), Congress instructed the Commission to establish

¹ *Petition of Federal Transtel, Inc. for Waiver or, in the Alternative, for Reconsideration*, CC Docket No. 96-45, filed on July 20, 1999 (Federal Transtel Petition).

² See *Federal-State Joint Board on Universal Service; Petition for Reconsideration filed by AT&T*, Report and Order and Order on Reconsideration, CC Docket No. 96-45, FCC 01-85 (rel. March 14, 2001) (*Contribution Order*).

support mechanisms with the goal of ensuring the delivery of affordable telecommunications service to all Americans, including consumers in high-cost areas, low-income consumers, eligible schools and libraries, and rural health care providers.³ Section 254(d) requires that “[e]very 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

3. In the *Universal Service Order*, the Commission adopted a rule defining the range of contributors required to contribute to the universal service mechanisms.⁵ Under the Commission’s rules, every telecommunications carrier that provides interstate telecommunications service must contribute to the federal universal service mechanisms.⁶ Section 54.709(a) provides, in relevant part, that contributions to the universal service support mechanisms shall be based on contributors’ end-user telecommunications revenues and a contribution factor determined quarterly by the Administrator, the Universal Service Administrative Company (USAC).⁷

B. The Federal Transtel Petition

4. On July 20, 1999, Federal Transtel filed a petition for waiver or reconsideration of the Commission’s universal service contribution rules as applied to the assessment of its 1998 and 1999 contributions to the federal universal service mechanisms. Specifically, Federal Transtel seeks a waiver of the Commission’s rules requiring that contributions to the federal universal service support mechanisms be based on carrier revenue from the prior year. Federal Transtel does not, however, suggest an alternative contribution methodology to calculate its universal service contributions. In support of its request, Federal Transtel argues that: (1) it is not primarily a long distance service provider; (2) it encountered a decline in long distance traffic from 1997 to 1998; and (3) it will suffer extreme financial hardship if it does not receive a waiver.⁸ Federal Transtel contends that it cannot recover universal service contributions from current customers because such action would result in an exodus from its customer base.⁹ In addition,

³ 47 U.S.C. § 254.

⁴ 47 U.S.C. § 254(d).

⁵ *Federal-State Joint Board on Universal Service*, Report and Order, CC Docket No. 96-45, 12 FCC Rcd 8776 at 9173-9179, paras. 777-786 (1997) (subseq. history omitted) (*Universal Service Order*). See 47 C.F.R. § 54.706(a) (“Entities that provide interstate telecommunications to the public, or to such classes of users as to be effectively available to the public, for a fee will be considered telecommunications carriers providing interstate telecommunications services and must contribute to the universal service support programs.”).

⁶ 47 C.F.R. §§ 54.706, 54.709.

⁷ 47 C.F.R. § 54.709.

⁸ Federal Transtel Petition at 3. Federal Transtel asserts that its primary business is billing and collection. Federal Transtel, however, also “buys and sells long distance service.” In 1997, Federal Transtel’s sales from long distance service generated \$6,008,812. In 1998, Federal Transtel’s sales from long distance service generated \$4,289,962. *Id.*

⁹ Federal Transtel Petition at 2-3.

Federal Transtel alleges that, because the Commission did not provide sufficient notification that it intended to base 1998 contributions on prior year revenues, it was unable to identify those clients to whom it could pass through the universal service charge, develop billing formulas, and bill its 1997 clients for universal service charges.

III. DISCUSSION

5. We conclude that Federal Transtel has failed to demonstrate that good cause exists to grant its request to waive the Commission's rules and thereby permit the recalculation of its 1998 and 1999 contributions to the federal universal service mechanisms. Consistent with the Commission's prior decisions, we conclude that granting such a request would be contrary to the principle of competitive neutrality and Congress' mandate that all carriers contribute to the federal universal service mechanisms on an equitable and nondiscriminatory basis.¹⁰ To the extent that Federal Transtel seeks reconsideration of the requirement to base federal universal service contributions on prior year revenues, we conclude that such request is untimely. In addition, many of Federal Transtel's concerns have been addressed in a recent Commission proceeding.¹¹

A. Federal Transtel's Waiver Petition

6. Generally, the Commission's rules may be waived for good cause shown.¹² As noted by the Court of Appeals for the D.C. Circuit, however, agency rules are presumed valid.¹³ The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.¹⁴ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.¹⁵ Waiver of the Commission's rules is therefore appropriate only if special circumstances warrant a deviation from the general rule, and such a deviation will serve the public interest.

¹⁰ See, e.g., *Federal-State Joint Board on Universal Service; Petitions for Waiver or Reconsideration of Sections 54.706, 54.709, and/or 54.711 of the Commission's Rules*, Memorandum Opinion and Order and Seventeenth Order on Reconsideration, CC Docket No. 96-45, 15 FCC Rcd 20769 (1999); *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.*, Memorandum Opinion and Order, CC Docket No. 96-45, FCC 01-51 (rel. Feb. 13, 2001) (*Oncor Forbearance Order*).

¹¹ In light of recent significant developments in the interstate telecommunications marketplace, such as the entry of Regional Bell Operating Companies, the Commission has taken steps on an industry-wide basis to reduce the interval between the accrual of revenue and the assessment of carrier contributions. See *Contribution Interval Order*.

¹² 47 C.F.R. § 1.3.

¹³ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), cert. Denied, 409 U.S. 1027 (1972).

¹⁴ *Northeast Cellular Telephone Co., v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

¹⁵ *WAIT Radio*, 418 F.2d at 1159; *Northeast Cellular*, 897 F.2d at 1166.

7. We are not persuaded that Federal Transtel's alleged inability to recover contributions in 1998 and 1999 from its current customers is a special circumstance warranting waiver of the prior year revenue contribution methodology. The Commission does not require carriers to recover their universal service contributions from customers. Rather, the Commission has given carriers the flexibility to decide whether and how they should recover their contributions, as markets become increasingly competitive.¹⁶ Although the Commission permits carriers to pass through all or part of their universal service contributions to their customers, the requirement to contribute remains whether or not a carrier passes such costs through to its customers. In addition, carriers are not precluded from anticipating the possible effects of declining revenues in the following year and reserving a portion of their current revenues to meet the contribution obligations that arise in the following year. Contrary to Federal Transtel's contention, the obligation to contribute to the universal service mechanisms based upon prior year revenues was not retroactively imposed on carriers.¹⁷ Carriers were given notice in July 1997 that contributions to the federal universal service mechanisms in 1998 would be based on prior year revenues.¹⁸ Therefore, we conclude that carriers were provided with sufficient notice to develop business plans in anticipation of the implementation of the universal service contribution methodology beginning January 1, 1998.

8. Furthermore, we conclude that such a waiver would not serve the public interest. We note that section 254(d) requires that the Commission establish a universal service contribution mechanism that is "specific, predictable and sufficient" to preserve and advance universal service.¹⁹ As discussed above, in implementing section 254, the Commission adopted rules setting forth the specific method of computation for universal service contributions. To grant retroactively a waiver or reconsideration of those rules to individual carriers from one year to the next creates the potential for continuing uncertainty and confusion in the administration of the fund. We note in particular that Federal Transtel has not suggested how its contributions should be calculated if it were granted a waiver of the Commission's rules. We find that we cannot reconcile granting the waiver with the Act's mandate that the universal service mechanisms be specific and predictable, and that all telecommunications providers of interstate telecommunications service contribute on an equitable and nondiscriminatory basis. This mandate is essential to the preservation and advancement of universal service to ensure that consumers who rely upon universal service funding, including low-income consumers and those residing in rural and high-cost areas, may continue to receive telecommunications at affordable rates.

¹⁶ *Universal Service Order*, 12 FCC Rcd at 9210-11, para. 853.

¹⁷ Federal Transtel Petition at 2.

¹⁸ *Changes to the Board of Directors of the National Exchange Carrier Association, Inc.; Federal-State Joint Board on Universal Service*, Report and Order and Second Order on Reconsideration, CC Docket No. 96-45, 12 FCC Rcd 18400 at App. C (1997) (*Second Order on Reconsideration*).

¹⁹ 47 U.S.C. § 254(d).

B. Federal Transtel's Petition for Reconsideration

9. To the extent that Federal Transtel seeks reconsideration of the universal service contribution methodology, we dismiss that request as untimely. The Commission's rules require that petitions for reconsideration be filed within 30 days after public notice of the Commission action.²⁰ Federal Transtel's petition was filed on July 20, 1999, nearly two years after the deadline to file petitions for reconsideration of the *Second Order on Reconsideration*, in which we adopted the contribution methodology based on prior year revenues.²¹ Accordingly, we dismiss Federal Transtel's petition for reconsideration as untimely filed. Moreover, even if this petition were timely filed, we would not grant such a request. The Commission has recently provided substantive reasoning for denying similar requests.²² We do note, however, that based on a newly developed industry-wide record, the Commission recently took action to reduce the interval between the accrual of revenues by carriers and the assessment for universal service contributions.²³ We believe this action alleviates many of the concerns raised in Federal Transtel's petition. In addition, the Commission has recently sought further comment on how to streamline and reform both the manner in which the Commission assesses carrier contributions to the universal service fund and the manner in which carriers may recover those costs from their customers.²⁴ Although we dismiss Federal Transtel's petition, we will incorporate a copy of its petition into the record relating to the *Contribution Methodology NPRM*.

IV. ORDERING CLAUSE

10. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 254, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 254, and 405, and sections 1.3, 1.429 of the Commission's rules, 47 C.F.R. §§ 1.3, 1.429, that the Petition for Waiver or Reconsideration filed July 20, 1999 by Federal Transtel, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

²⁰ 47 C.F.R. § 1.429(d).

²¹ *Second Order on Reconsideration* at App. C. See also 62 Fed. Reg. 41,294 (Aug. 1, 1997).

²² See generally *Contribution Interval Order*; *Oncor Forbearance Order*.

²³ See *Contribution Interval Order*.

²⁴ *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 Numbering Portability, and Universal Service Support Mechanisms*, Notice of Proposed Rulemaking, CC Docket Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, FCC 01-145 (rel. May 8, 2001) (*Contribution Methodology NPRM*).