

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

In the Matter of)	
)	
Universal Service Contribution Methodology)	WC Docket No. 06-122
)	
Federal-State Joint Board on Universal Service)	CC Docket No. 96-45
)	
1998 Biennial Regulatory Review-Streamlined)	CC Docket No. 98-171
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)	CC Docket No. 90-571
Hearing and Speech Disabilities, and the Americans)	
with Disabilities Act of 1990)	
)	
Administration of the North American Numbering)	CC Docket No. 92-237
Plan and North American Numbering Plan Cost Rec)	NSD File No. L-00-72
Contribution Factor and Fund Size)	
)	
Number Resource Optimization)	CC Docket No. 99-200
)	
Telephone Number Portability)	CC Docket No. 95-116
)	
Truth-in-Billing and Billing Format)	CC Docket No. 98-170
)	
American Public Communications Counsel Petition)	
for Reconsideration)	
)	
Petition for Clarification)	
Or, in the Alternative Reconsideration,)	
filed by Central Atlantic Pennsylvania Payphone)	
Association)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: February 26, 2013

Released: February 27, 2013

By the Commission:

I. INTRODUCTION

1. In this order, we address a petition filed by the Central Atlantic Pennsylvania Payphone Association (CAPA) seeking clarification, or in the alternative reconsideration, of the Commission's 2008 *Centrex Waiver Reconsideration Order*.¹ In that order, the Commission granted a request seeking modification of that portion of the Commission's 2003 *Centrex Waiver Order* that provided an interim waiver of section 54.712 of the Commission's rules,² to permit local exchange carriers (LECs) to recover certain contribution costs associated with Centrex customers on a per-line basis from multi-line business customers through a federal universal service line item, to the extent that the interim waiver was applied to independent payphone service providers (PSPs).³ CAPA requests that we clarify that the 2008 *Centrex Waiver Reconsideration Order* requires LECs to refund to PSPs any above-cost universal service charges LECs collected from PSPs before the Commission modified the interim waiver in the 2008 *Centrex Waiver Reconsideration Order*.⁴ For the reasons discussed below, we deny CAPA's request. We find that both the 2003 *Centrex Waiver Order* and the 2008 *Centrex Waiver Reconsideration Order* were changes in Commission policy that applied prospectively and, insofar as the LECs' imposed charges were tariffed pursuant to the 2003 waiver and deemed lawful, those charges are not subject to refunds.

II. BACKGROUND

2. In 2002, the Commission adopted section 54.712, which allows carriers to recover federal universal service fund (USF or Fund) contributions amounts from their customers as a separate line item on the customer's bill, but limits such recovery amount to the interstate portion of the bill times the relevant USF contribution factor.⁵ Subsequently, the Commission released the 2003 *Centrex Waiver Order* granting, in relevant part, an interim waiver of section 54.712 to permit LECs to continue

¹ Petition for Clarification or, in the Alternative Reconsideration, by Central Atlantic Pennsylvania Payphone Association, CC Docket No. 96-45 et al. (filed Mar. 14, 2008) (CAPA Petition); *Federal-State Joint Board on Universal Service et al.*, CC Docket No. 96-45 et al., Order on Reconsideration, 23 FCC Rcd 2567 (2008) (*2008 Centrex Waiver Reconsideration Order*).

² See *Federal-State Joint Board on Universal Service et al.*, CC Docket No. 96-45 et al., Order and Second Order on Reconsideration, 18 FCC Rcd 4818 (2003) (*2003 Centrex Waiver Order*); 47 C.F.R. § 54.712.

³ Sections 69.131, 69.153(e), and 69.158 of our rules give local exchange carriers the option of recovering their contribution costs from Centrex customers through a universal service line item, that uses the equivalency ratios established for Centrex lines under our rules governing the presubscribed interexchange carrier charge (PICC). 47 C.F.R. §§ 69.131, 69.153(e), 69.158. In 1997, the Commission adopted, for purposes of the PICC, a ratio of up to nine Centrex lines to one private branch exchange (PBX) trunk. See *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure*, CC Docket Nos. 96-262, 94-1, 91-213, Second Order on Reconsideration and Memorandum Opinion and Order, 12 FCC Rcd 16606, 16616-18, paras. 33-38 (1997). The Commission subsequently granted local exchange carriers the option of applying this equivalency ratio to the recovery of universal service contribution costs from Centrex customers. See *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers*, CC Docket Nos. 96-262 and 94-1, Sixth Report and Order; *Low-Volume Long-Distance Users*, CC Docket No. 99-249, Report and Order; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Eleventh Report and Order, 15 FCC Rcd 12962 (2000), *aff'd in part, rev'd in part and remanded in part, Texas Office of Public Util. Counsel v. FCC*, 265 F.3d 313 (5th Cir. 2001). See also *2003 Centrex Waiver Order*.

⁴ CAPA Petition at 1-2, 4-6.

⁵ See *Federal-State Joint Board on Universal Service et al.*, CC Docket No. 96-45 et al., Report and Order and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 24952, 24974-83, paras. 40-63 (2002); 47 C.F.R. § 54.712 ("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").

recovering from multi-line business customers federal universal service contribution costs through universal service line-items using the equivalency ratios established for Centrex lines under the Commission's rules governing the presubscribed interexchange carrier charge.⁶ The *2003 Centrex Waiver Order* became effective on April 1, 2003.

3. The American Public Communications Council (APCC) filed a petition seeking modification of the interim waiver granted in the *2003 Centrex Waiver Order* to the extent it permitted LECs to use equivalency ratios to assess USF charges on its multi-line business customers that were PSPs.⁷ In the *2008 Centrex Waiver Reconsideration Order*, the Commission granted APCC's petition for reconsideration and modified the interim waiver to prohibit LECs from charging additional USF line-item amounts related to the Centrex adjustments to PSPs.⁸ The Commission concluded that allowing for an upward adjustment of the universal service line-item to compensate for the Commission's treatment of Centrex services results in charges associated with payphone lines that are not cost-based, and that the application of the Centrex-adjusted portion of the universal service line item to PSPs is inconsistent with Commission decisions promoting the goals of section 276 of the Communications Act of 1934, as amended (Act).⁹ The Commission directed PSPs to identify themselves to their respective underlying LECs within 30 days and provided LECs with 90 days after the effective date of the *2008 Centrex Waiver Reconsideration Order* to comply with the decisions contained in the order.¹⁰

4. *CAPA Petition.* CAPA is an industry trade organization whose members are independent payphone providers that own and operate payphones in Pennsylvania.¹¹ CAPA filed a petition for clarification, or in the alternative, reconsideration of the Commission's *2008 Centrex Waiver Reconsideration Order*.¹² CAPA argues that because application of the interim waiver of section 54.712 to PSPs resulted in charges that were not cost-based and that imposition of such charges was inconsistent with section 276 of the Act, the Commission should clarify its order and direct LECs to refund the amount of any non-cost-based charges assessed on payphone providers pursuant to the *2003 Centrex Waiver Order*.¹³ CAPA also argues that LECs should refund those amounts as a matter of fairness and equity.¹⁴

⁶ See *supra* note 3.

⁷ American Public Communications Council, Petition for Reconsideration, CC Docket No. 96-45 et al. (filed Apr. 30, 2003).

⁸ *2008 Centrex Waiver Reconsideration Order*, 23 FCC Rcd at 2567, 2570, paras. 1, 8.

⁹ *Id.* at 2569-70, paras. 7-8. Congress enacted section 276 of the Act to "promote competition among payphone service providers and promote the widespread deployment of payphone service to the benefit of the general public[.]" 47 U.S.C. § 276(b).

¹⁰ *2008 Centrex Waiver Reconsideration Order*, 23 FCC Rcd at 2570, para. 9.

¹¹ See CAPA Petition at 2.

¹² See generally *id.*

¹³ *Id.* at 4.

¹⁴ *Id.* at 4-6.

5. Several commenters, all LECs, filed oppositions to CAPA's petition.¹⁵ The commenters argue that LECs properly relied on the *2003 Centrex Waiver Order* to recover a portion of USF contributions due on Centrex revenues from all their multi-line business customers, including PSPs.¹⁶ They argue that the prohibition against retroactive rulemaking prevents the Commission from applying the *2008 Centrex Waiver Reconsideration Order* on a retroactive basis and from requiring refunds of amounts charged based on the waiver.¹⁷ In response, CAPA argues that the *2008 Centrex Waiver Reconsideration Order* did not create a new rule, but rather clarified an existing Commission policy that PSPs should not pay above-cost rates for universal service.¹⁸

III. DISCUSSION

6. We deny the relief sought by CAPA. We find that the *2003 Centrex Waiver Order* allowed LECs to assess averaged USF charges on their multi-line business customers, including PSPs, and that the waiver was in effect until it was modified prospectively by the *2008 Centrex Waiver Reconsideration Order*. Accordingly, PSPs are not entitled to refunds for USF charges collected by the LECs prior to the effective date of the *2008 Centrex Waiver Reconsideration Order*. In addition, CAPA has not provided any evidence or legal argument that would warrant reconsideration of that order.

7. We find no merit in CAPA's argument that the absence of a specific reference to PSPs in the *2003 Centrex Waiver Order* indicates that the Commission did not intend for the waiver to apply to those providers. CAPA makes an unsupported statement that there is a "long line of separate cases and proceedings addressing issues specific to [PSPs] apart from the larger class of 'multi-line business customers,'" and that the absence of a specific reference to PSPs in the *2003 Centrex Waiver Order* leads to the conclusion that it was unreasonable for the LECs to apply the interim waiver to PSPs.¹⁹ We disagree. The fact that the Commission addressed certain issues specific to PSPs in unrelated separate proceedings does not lead to a conclusion that the Commission intended the *2003 Centrex Waiver Order* to exclude PSPs from the relevant determination or that it was unreasonable for LECs to interpret the order as including PSPs as a subset of their multi-line business customers.²⁰ By its terms, the *2003 Centrex Waiver Order* applied to all multi-line business customers without exception, and LECs were not obligated to read an unwritten exception into that order.

8. We next decline to grant CAPA's request that the Commission order *post hoc* refunds. LECs that assessed USF charges consistent with the waiver before the *2008 Centrex Waiver Reconsideration Order* took effect were in compliance with the applicable law at the time. Moreover, in

¹⁵ See Opposition of Verizon, CC Docket Nos. 96-45 et al. (filed May 14, 2008) (Verizon Opposition); Comments of Qwest Communications International, Inc. in Opposition to Central Atlantic Pennsylvania Payphone Association Petition, CC Docket Nos. 96-45 et al. (filed May 14, 2008) (Qwest Comments); Reply Comments of AT&T in Support of Oppositions of Verizon and Qwest, CC Docket Nos. 96-45 et al. (filed May 29, 2008) (AT&T Reply Comments).

¹⁶ Verizon Opposition at 2.

¹⁷ AT&T Reply Comments at 3; Qwest Comments at 4-6; Verizon Opposition at 4-7.

¹⁸ Reply Comments of the Central Atlantic Pennsylvania Payphone Association, CC Docket Nos. 96-45 et al. (filed May 29, 2008) (CAPA Reply Comments).

¹⁹ *Id.* at 4.

²⁰ See, e.g., *Revision of ARMIS Annual Summary Report (FCC Report 43-01) et al.*, CC Docket No. 86-182, Order, 20 FCC Rcd 19377, 19379, para. 8 (Wireline Comp. Bur. 2005) (modifying the Automated Reporting Management Information System (ARMIS) Report 43-08 "to clarify that Payphone Lines are a subset of Multiline Business Switched Access Lines").

granting the PSPs request for modification, the *2008 Centrex Waiver Reconsideration Order* did not hold that the waiver granted in 2003 was inconsistent with the Act.²¹ Rather, the *2008 Centrex Waiver Reconsideration Order* changed Commission policy and thus was properly applied prospectively.²² The prospective nature of the *2008 Centrex Waiver Reconsideration Order* is underscored by the fact that the Commission explicitly modified the 2003 waiver, and established a 90-day grace period for LECs to come into compliance with the new policy.²³

9. We also reject CAPA's argument that, as a matter of equity and fairness, the Commission should direct LECs to refund universal service pass-through charges collected from PSPs.²⁴ Indeed, we find no support for CAPA's argument that the LECs "will reap the financial benefits of the PSP overpayments made" between the effective dates of the *2003 Centrex Waiver Order* and the *2008 Centrex Waiver Reconsideration Order*.²⁵ The amounts in dispute were USF pass-through charges to recover amounts that LECs were obligated to contribute to the Fund, and nothing in the record before us suggests that these amounts were not paid into the Fund. Therefore, the tariffed charges were not funds with which the LECs unjustly enriched themselves.²⁶ We also agree with Verizon that, insofar as the charges were tariffed pursuant to the 2003 waiver and deemed lawful, those charges are not subject to refunds.²⁷

10. We also deny CAPA's request to reconsider the *2008 Centrex Waiver Reconsideration Order*.²⁸ Reconsideration of a Commission's decision may be appropriate when the petitioner cites error of fact or law, or represents new facts or changed circumstances which raise substantial or material questions of fact which otherwise warrant Commission review of its prior action.²⁹ CAPA has provided no basis for reconsideration under the framework set forth in section 1.429 of our rules.

²¹ See *2008 Centrex Waiver Reconsideration Order*, 23 FCC Rcd at 2569, para. 7 (explaining that applying the waiver to PSPs "contravenes our goal to advance the pro-competitive statutory aims of section 276").

²² We need not decide whether the *2003 Centrex Waiver Order* and the *2008 Centrex Waiver Reconsideration Order* were rulemaking or adjudicatory orders. Either way, we find that the *2008 Centrex Waiver Reconsideration Order* does not apply retroactively. See *Williams Natural Gas Co. v. FERC*, 3 F.3d 1544, 1554 (D.C. Cir. 1993) (when an adjudicatory order substitutes new law for old law that was reasonably clear, "it may be necessary to deny retroactive effect to a rule announced in an agency adjudication in order to protect the settled expectations of those who had relied on the preexisting rule"); see also *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988); *id.* at 216-221 (Scalia, J., concurring) (explaining that rules "have legal consequences only for the future").

²³ *2008 Centrex Waiver Reconsideration Order*, 23 FCC at 2570, para. 9. We are not persuaded by CAPA's argument that the 90-day compliance period established the timeframe in which LECs were required to provide refunds to PSPs.

²⁴ CAPA Petition at 5-6; CAPA Reply Comments at 9-11.

²⁵ CAPA Petition at 6.

²⁶ 47 C.F.R. § 54.712.

²⁷ See 47 U.S.C. § 204(a)(3) (providing that tariffs are deemed lawful unless the Commission takes action before a tariff becomes effective); *ACS of Anchorage v. FCC*, 290 F.3d 403, 411 (D.C. Cir. 2002) (stating that, if a rate is lawful, "refunds are thereafter impermissible as a form of retroactive ratemaking"); Verizon Opposition at 6-7.

²⁸ Although CAPA filed its petition pursuant to section 1.429(a) of our rules, it noted that it is not seeking modification of the order, but rather a clarification. CAPA Petition at 1 n.1.

²⁹ 47 C.F.R. § 1.429.

IV. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED, pursuant to sections 1, 2, 4(i)-(j), 254, 276, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i)-(j), 254, 276, 405, and section 1.429 of the Commission's rules, 47 C.F.R. § 1.429, that the petition for clarification or, in the alternative reconsideration, filed by the Central Atlantic Pennsylvania Payphone Association is hereby DENIED.

12. IT IS FURTHER ORDERED that, pursuant to section 1.103 of the Commission's rules, 47 C.F.R. § 1.103, this Order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary