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

In the Matters of	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
	)	CC Docket No. 96-262
Access Charge Reform	)	
	)	WC Docket No. 06-122
Universal Service Contribution Methodology	)	
	)	
Petition for Reconsideration and Clarification of the *Fifth Circuit Remand Order* of BellSouth Corporation	)	
	)	
Petition for Reconsideration of the *Fifth Circuit Remand Order* of Arya Communications International Corporation	)	
	)	
Joint Request for Review of Decision of Universal Service Administrator of Cable Plus L.P., and MultiTechnology Services, L.P.	)	
	)	
Request for Review of Pan Am Wireless, Inc.	)	
	)	
Request for Review of USA Global Link, Inc.		

ORDER ON RECONSIDERATION

Adopted: April 9, 2008 **Released: April 11, 2008**

By the Commission:

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Heading Paragraph #

I. INTRODUCTION

1. In this Order, we deny the petitions for reconsideration filed by BellSouth Corporation ("BellSouth") and Arya International Communications Corporation ("Arya") with respect to the Commission's *Fifth Circuit Remand Order*, and confirm the conclusions by the Wireline Competition Bureau ("Bureau") in the *Fifth Circuit Clarification Order*.[1] Specifically, we:

- reconfirm that Commercial Mobile Radio Services ("CMRS") providers may recover their universal service contributions through rates charged for all of their services;
- reject the suggestion that the Commission's eight percent Limited International Revenues Exception ("LIRE") is arbitrary and capricious; and
- deny Petitioners' request for refund of universal service contributions remitted from January 1, 1998 to October 31, 1999, that were based on intrastate telecommunications revenues or international telecommunications revenues in excess of the eight percent LIRE.[2]

II. BACKGROUND

2. On May 8, 1997, the Commission issued the *1997 Universal Service Order*, implementing the universal service provisions in section 254 of the Communications Act of 1934, as amended ("the Act").[3] In this order, the Commission required interstate carriers to contribute a percentage of their end user telecommunications revenues to the Fund.[4]

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[1] *Federal-State Joint Board on Universal Service*, Sixteenth Order on Reconsideration in CC Docket No. 96-45, Eighth Report and Order in CC Docket No. 96-45, Sixth Report and Order in CC Docket No. 96-262, 15 FCC Rcd 1679 (1999) ("*Fifth Circuit Remand Order*"); Petition for Reconsideration and Clarification of BellSouth Corporation, CC Docket No. 96-45 (filed Dec. 6, 1999) ("BellSouth Petition") Petition for Reconsideration of Arya International Communications Corporation, CC Docket No. 96-45 (filed Dec. 6, 1999) ("Arya Petition"). As an attachment to its petition, BellSouth also filed a request for refund of certain of its universal service contributions submitted to the Universal Service Administrative Company (USAC) from January 1, 1998 through October 31, 1999, that is contingent on the Commission's response to its petition. *See* BellSouth Petition, Attach. (Letter from David G. Frolio, Counsel for BellSouth Corporation, to Cheryl Parrino, Chief Executive Officer, Universal Service Administrative Company, dated December 6, 1999). *Federal State Joint Board on Universal Service*, CC Docket Nos. 96-45, 96-262, Order, 20 FCC Rcd 13779 (2005) ("*Fifth Circuit Clarification Order*").

[2] We note, at the outset, that none of the petitioners before us, or any other universal service fund ("USF" or "Fund") contributors, would be out of pocket in the event that we deny retroactive USF refunds. Although the contributors do contribute directly to the USF through contributions made to the Universal Service Administrative Company (USAC), those contributors routinely pass those costs along to customers, usually in a line item on their bills. *See infra* Section III.C.

[3] 47 U.S.C. § 254; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776 (1997), as corrected by *Federal-State Joint Board on Universal Service*, Erratum, 12 FCC Rcd 8776 (1997), and Erratum, 13 FCC Rcd 24493 (1997), *aff'd in part, rev'd in part, remanded in part sub nom*, *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999), *cert. denied*, 530 U.S. 1210 (2000), *cert. dismissed*, 531 U.S. 975 (2000) ("*1997 Universal Service Order*").

[4] *1997 Universal Service Order*, 12 FCC Rcd at 9173, para. 779.

Specifically, the Commission concluded that contributions for the high-cost and low-income support mechanisms would be based on interstate and international revenues while the schools and libraries and rural health care support mechanisms would be based on intrastate, interstate, and international revenues.[5]

3. On July 30, 1999, the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") issued a decision affirming in part, remanding in part, and reversing in part the Commission's *1997 Universal Service Order*.[6] The Fifth Circuit held that the Commission's methodology for assessing contributions for the Fund on international revenues did not satisfy the requirement in section 254(d) of the Act that contributions be "equitable and nondiscriminatory" because the contributions of certain interstate carriers that predominantly provide international services could exceed their interstate revenues.[7] Accordingly, the court reversed and remanded for further consideration the Commission's decision to assess contributions based on the international revenues of interstate carriers.[8] The Fifth Circuit also determined that the Commission exceeded its authority under sections 2(b) and 254(d) of the Act when it assessed contributions based on intrastate revenues for the schools and libraries, and rural health care programs.[9] Accordingly, the court reversed the Commission's decision to include intrastate revenues in the contribution base for the schools and libraries, and rural health care support mechanisms.[10]

4. On remand, in its *Fifth Circuit Remand Order*, the Commission removed intrastate revenues from the contribution base for the schools and libraries, and rural health care programs.[11] The Commission also modified the assessment of contributions on international revenues so that contributors whose interstate revenues comprise less than eight percent of their combined interstate and international revenues would only contribute based on their interstate revenues (the "limited international revenues exemption").[12] The Commission made these changes effective on a prospective basis, beginning November 1, 1999.[13]

5. On December 6, 1999, BellSouth filed a petition for reconsideration and clarification of the Commission's *Fifth Circuit Remand Order*.[14] In its petition, BellSouth

[5] *Id.* at 9174, 9200, 9203-05, paras. 779, 831, 837-41; *see also* 47 C.F.R. § 54.706(c) (1999).

[6] *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) ("*TOPUC*").

[7] *Id.* at 434-35; 47 U.S.C. § 254(d).

[8] *TOPUC*, 183 F.3d at 435.

[9] *Id*. at 447-48; 47 U.S.C. §§ 152(b), 254(d).

[10] *TOPUC*, 183 F.3d at 448.

[11] *Fifth Circuit Remand Order*, 15 FCC Rcd at 1685, para. 15.

[12] *Id*.; 47 C.F.R. § 54.706(c) (1999). The Commission subsequently increased the limited international revenues exemption from eight to twelve percent. *See Federal-State Joint Board on Universal Service*, Further Notice of Proposed Rulemaking and Report and Order, CC Docket No. 96-45, 17 FCC Rcd 3752, 3806-07, paras. 125-28 (2002) ("*2002 Universal Service Order*").

[13] *Fifth Circuit Remand Order*, 15 FCC Rcd at 1679, para. 1.

[14] *See generally*, BellSouth Petition. As an attachment to its petition, BellSouth also filed a request for refund of certain of its universal service contributions submitted to the USAC from January 1, 1998 through October 31, 1999, that is contingent on the Commission's response to its petition. *See* BellSouth Petition, Attach. (Letter from David G. Frolio, Counsel for BellSouth Corporation, to Cheryl Parrino, Chief Executive Officer, Universal Service Administrative Company, dated Dec. 6, 1999).

requests that the Commission clarify and reconsider its decision to implement the Fifth Circuit's decision on a prospective basis and to provide retroactive refunds for contributions based on intrastate revenues for the period from January 1, 1998 through October 31, 1999.[15] BellSouth also requests that the Commission clarify that CMRS providers may lawfully recover the cost of their federal universal service contributions through charges associated with all of their telecommunications services.[16]

6. On December 6, 1999, Arya filed a petition seeking reconsideration of that portion of the *Fifth Circuit Remand Order* in which the Commission established the Limited International Revenues Exception ("LIRE").[17] Arya argues that the threshold established for the LIRE – eight percent – was arbitrary and capricious, and should be reversed.[18] Arya argues further that even if the LIRE is valid, any contributions collected for the Fund prior to the Fifth Circuit's decision in excess of what would have been owed under the LIRE should be refunded.[19]

7. In 2005, the Bureau issued an order that granted in part the Petition filed by BellSouth seeking clarification of the *Fifth Circuit Remand Order*.[20] Specifically, in that order the Bureau clarified that: (1) CMRS providers may recover their universal service contributions through rates charged for all of their services; and (2) the Commission's decision in the *Fifth Circuit Remand Order* applied the Fifth Circuit decision in *TOPUC* prospectively beginning November 1, 1999.[21] In the *Fifth Circuit Clarification Order*, however, the Bureau specifically declined to address BellSouth's request that the Commission reconsider the prospective application of the *Fifth Circuit Remand Order,* and did not address the petition filed by Arya.[22]

III. DISCUSSION

A. Recovery of Universal Service Contributions

8. In response to BellSouth's petition requesting clarification of the Commission's rules, we clarified previously that the *TOPUC* decision did not undermine the validity of the Commission's decision that CMRS providers may recover their contributions from customers through rates charged for all services.[23] The relevant portion of the Fifth Circuit's decision in *TOPUC* related to the manner in which the Commission may require carriers to contribute to the USF.[24] The manner in which carriers may recover their universal service contributions through assessments on customers was not before the court.[25] Thus, the Bureau clarified that the *TOPUC*

[15] BellSouth Petition at 2, 7-13, 16-17.

[16] *Id*. at 7-8.

[17] Arya Petition at 1; *Fifth Circuit Remand Order*, 15 FCC Rcd at 1690-91, paras. 27-29.

[18] *Id*. at 2.

[19] *Id*.

[20] *See generally, Fifth Circuit Clarification Order*, 20 FCC Rcd 13779.

[21] *Id.* at 13779, para. 1.

[22] *Id.* at 13781, n. 16.

[23] *Id.* at 13781, para. 6.

[24] *See TOPUC*, 183 F.3d at 446-48 (the Commission may not assess carrier contributions based on combined interstate and intrastate revenues).

[25] *Id.*

decision did not affect the Commission's finding in the *Fourth Reconsideration Order* that CMRS providers may "recover their contributions through rates charged for all their services."[26] In fact, the Commission has made clear that carriers have significant flexibility in the manner in which they may recover universal service contribution costs. Carriers are not required to recover their universal service costs from subscribers at all. If they choose to do so, carriers may recover these costs through their standard service charges or through a separate line-item.[27] We do not alter that conclusion here.

9. We reiterate that providers that choose to recover universal service costs through a separate line-item may express the charge as a flat amount or as a percentage.[28] Because, however, of the inherent difficulty in defining and ascertaining which calls over a mobile wireless system are "interstate," the Commission has long permitted CMRS providers to assume for purposes of calculating their USF contributions that a prescribed percentage of their total end user telecommunications revenues is interstate.[29] The Commission's rules allow "wireless telecommunications providers [to] continue to recover contribution costs in a manner that is consistent with the way in which companies report revenues to [USAC]" on their USF Worksheets.[30] Thus, CMRS providers may include a universal service line-item on a subscriber's bill that does not reflect that particular subscriber's interstate usage.[31]

B. Retention of the Limited International Revenues Exception

10. In the *Fifth Circuit Remand Order,* the Commission established a limited exception to universal service contribution requirements for entities with interstate end-user telecommunications revenues that constitute less than eight percent of their combined interstate and international end-user telecommunications revenues.[32] Arya does not challenge the establishment of the LIRE *per se,* but asserts that the Commission's *Fifth Circuit Remand Order* failed to articulate a satisfactory explanation for adopting the eight percent threshold, thus rendering the decision arbitrary and capricious.[33] Arya asserts that the Commission "offered no

[26] *Fifth Circuit Clarification Order*, 20 FCC Rcd *at* 13781, paras. 6-7; *Federal-State Joint Board on Universal Service*, Fourth Order on Reconsideration and Report and Order, CC Docket No. 96-45, 13 FCC Rcd 5318, 5489, para. 309 (1997) ("*Fourth Reconsideration Order*").

[27] *See Federal-State Joint Board on Universal Service*, Report and Order and Second Further Notice of Proposed Rulemaking, CC Docket No. 96-45, 17 FCC Rcd 24952, 24974, 24978-80, paras. 40, 53-55 (2002) ("*Report and Order*").

[28] *Report and Order*, 17 FCC Rcd at 24978-79, paras. 49-53. Since the *Fourth Reconsideration Order* and the *Fifth Circuit Clarification Order*, the Commission has held that it is unreasonable for carriers, including CMRS providers, to include on subscriber bills line-item charges that reflect a mark up from the assessment that the provider pays. For example, if a telecommunications provider is assessed 10 percent of its interstate telecommunications revenues for purposes of universal service contributions, it may not include a line-item on a subscriber's bill that reflects an amount greater than 10 percent of the interstate portion of the bill. This requirement is codified in section 54.712 of the Commission's rules. *See* 47 C.F.R. § 54.712.

[29] *See Federal-State Joint Board on Universal Service*, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-45, 13 FCC Rcd 21252, 21254-60, paras. 5-15 (1998) ("*Interim Safe Harbor Order*"); *see also Fifth Circuit Clarification Order*, 20 FCC Rcd at 13782, para. 8.

[30] *See Reconsideration Order*, 18 FCC Rcd at 1426, para. 8; *see also Fifth Circuit Clarification Order*, 20 FCC Rcd at 13782, para. 9.

[31] *Fifth Circuit Clarification Order*, 20 FCC Rcd at 13782, para. 9.

[32] *Fifth Circuit Remand Order*, 15 FCC Rcd at 1687, para. 19; 47 C.F.R. § 54.706(c).

[33] Arya Petition at 4.

explanation" for its choice of eight percent, and accordingly its decision should be reconsidered.[34] We disagree.

11. As explained in the *Fifth Circuit Remand Order*, a provider of interstate and international telecommunications is not required to contribute based on its international telecommunications end-user revenues if its interstate telecommunications end-user revenues constitute less than eight percent of its combined interstate and international end-user telecommunications revenues.[35] The Commission further stated that the rule is intended to exclude from the contribution base the international end-user telecommunications revenues of any telecommunications provider whose annual contribution, based on the provider's interstate and international end-user telecommunications revenues, would exceed the amount of its interstate end-user telecommunications revenues.[36] The Commission concluded that the rule is consistent with the determination of the Fifth Circuit that requiring a carrier to pay more universal service contributions than it derives from interstate revenues violates the requirement in section 254(d) of the Act that universal service contributions be equitable and nondiscriminatory.[37]

12. In selecting the relevant threshold, the Commission explained that selection of eight percent provided sufficient margin of safety based on the contribution factors at the time, such that a provider's contribution would not exceed the amount of its interstate end-user telecommunications revenues.[38] Selecting a fixed percentage for the LIRE rather than tying it to the established contribution factor, which fluctuates quarterly, also ensured that the Commission could meet the statutory requirement that the USF contribution mechanism remain specific and predictable.[39] Moreover, in 2002 the Commission revised the LIRE to address certain changes in the telecommunications marketplace, and increased the exception threshold to twelve percent.[40] Accordingly, Arya's argument that the Commission failed to articulate its rationale for selecting the eight percent threshold is without merit, and we decline to reconsider the LIRE threshold.

C. Retroactive Application of *TOPUC* and the *Fifth Circuit Remand Order*

13. In the *Fifth Circuit Clarification Order,* the Bureau clarified that the *Fifth Circuit Remand Order* applied the Fifth Circuit decision prospectively from the effective date of the Fifth Circuit's mandate.[41] Upon further consideration, we confirm the conclusion of the Bureau and deny BellSouth's request to apply the *Fifth Circuit Remand Order* on a retroactive basis. Further, we deny the request by Arya to retroactively apply the LIRE to contributions made prior to the Fifth Circuit's mandate.

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[34] *Id*. at 5.

[35] *See* 47 C.F.R. § 54.706(c); *see also Fifth Circuit Remand Order*, 15 FCC Rcd at 1687 para. 19.

[36] *Id.*

[37] *See id., citing TOPUC*, 183 F.3d at 434-35.

[38] *Fifth Circuit Remand Order*, 15 FCC Rcd at 1687-88, paras. 19-20, n. 56.

[39] 47 U.S.C. § 254(b)(5); *Fifth Circuit Remand Order*, 15 FCC Rcd at 1687, n. 56.

[40] *2002 Universal Service Order*, 17 FCC Rcd at 3806-07, paras. 125-128.

[41] *See Fifth Circuit Clarification Order*, 20 FCC Rcd at 13783, para. 11; *Fifth Circuit Remand Order*, 15 FCC Rcd at 1679, para. 1.

14. In considering whether to give retroactive application to a new rule, the courts have held that when there is a "substitution of new law for old law that was reasonably clear," the new rule may justifiably be given solely prospective effect in order to "protect the settled expectations of those who had relied on the preexisting rule."[42] By contrast, retroactive effect is appropriate for "new applications of [existing] law, clarifications, and additions."[43] In cases in which there are "new applications of existing law, clarifications, and additions," the courts start with a presumption in favor of retroactivity.[44] However, retroactivity may be denied "when to apply the new rule to past conduct or to prior events would work a 'manifest injustice.'"[45] Based on the equitable factors discussed below, we conclude that retroactive application would work a manifest injustice that defeats the presumption of retroactivity. Accordingly, we affirm the *Fifth Circuit Remand Order*.[46]

15. At the outset, we recognize that this case involves conflicting equitable considerations that are somewhat novel. Unlike recent Commission precedent in which the D.C. Circuit has applied the "manifest injustice" standard,[47] this case does *not* involve the more common situation that pits one group of carriers against another. Rather, at its essence, the decision of whether to give retroactive effect to the Fifth Circuit decision requires us to assess the equities of significantly increasing collection from current USF contributors *and their customers* in order to attempt to flow refunds to millions of customers of an earlier decade. Thus, this is ultimately a complicated dispute about how to handle a transaction that affects customer groups over different time periods.[48] In evaluating whether retroactivity would produce a manifest injustice, we focus our analysis on the benefits and burdens to the affected parties.[49]

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[42] *Williams Natural Gas Co. v. FERC,* 3 F.3d 1544, 1554 (D.C.Cir.1993).

[43] *Id*.; *Pub. Serv. Co. of Colo. v. FERC,* 91 F.3d 1478, 1488 (D.C.Cir.1996); *see also Aliceville Hydro Assocs. v. FERC,* 800 F.2d 1147, 1152 (D.C.Cir.1986) (discussing the distinction between "new applications of law" and "substitutions of new law for old law").

[44] *See*, *e.g.*, *Health Ins. Ass'n of Am. v. Shalala,* 23 F.3d 412, 424 (D.C.Cir.1994).

[45] *Verizon Tel. Cos. v. FCC*, 269 F.3d 1098, 1011 (D.C.Cir. 2001) ("*Verizon*"); *Clark-Cowlitz Joint Operating Agency v. FERC,* 826 F.2d 1074, 1081 (D.C.Cir.1987) (en banc) (quoting *Thorpe v. Housing Auth. of the City of Durham,* 393 U.S. 268, 282, 89 S.Ct. 518 (1969)); *see also Consol. Freightways v. NLRB,* 892 F.2d 1052, 1058 (D.C.Cir.1989); *Cassell v. FCC,* 154 F.3d 478, 486 (D.C.Cir.1998) ("*Cassell*") (declining to "plow laboriously" through the *Clark-Cowlitz* factors, which "boil down to a question of concerns grounded in notions of equity and fairness"). Similarly, the Supreme Court has held that retroactive relief may also be denied under "special circumstances," but only the "most compelling," such as "grave disruption or inequity." *National Fuel Gas Supply Corp. v. FERC*, 59 F.3d 1281, 1288 (D.C. Cir. 1995) ("*National Fuel*") (quoting *Ryder v. U.S.*, 515 U.S. 177, 184 (1995)). This rule governs the effect of federal court decisions on agency proceedings as well as other court cases. *See National Fuel*, 59 F.3d at 1289.

[46] *See Fifth Circuit Remand Order*, 15 FCC Rcd 1679.

[47] *See, e.g*., *Qwest Services Corp. v. FCC*, 509 F.3d 531 (D.C. Cir. 2007) and *Verizon*, 269 F.3d 1098.

[48] This evaluation is further complicated by arguments set out in MCI's opposition, explaining that incumbent local exchange carriers (LECs) passed through the vast majority of their contribution costs to interexchange carriers (IXCs) in the form of increased access charges. *See* Opposition of MCI at 3-5. As a result, MCI alleges that incumbent LECs would have to pass refunds through to IXCs to avoid windfalls. MCI argues that because the LECs' future collections would have to be increased to pay for the refunds, "IXCs would themselves end up as the funding source of their pass-through refunds, thus completing a process that is almost entirely circular." Id. at 3.

[49] As the D.C. Circuit has previously noted, retroactivity determinations "boil down to a question of concerns grounded in notions of equity and fairness." *Cassell v. FCC*, 154 F3d 478, 486 (D. C. Cir. 1998).

To do this, we necessarily consider how the refund mechanisms would function and the potential effect of any refund on our statutory obligations under section 254 of the Act.

16. First, a decision to compel refunds would require USAC to refund to the contributing carriers more than one billion dollars in monies already disbursed to thousands of schools, libraries and rural health care providers.[50] Because of the resulting shortfall in current USAC funds, USAC would, in turn, have to significantly increase collections from current USF contributors and their customers by raising the contribution factor applied to today's interstate and international revenue. Indeed, some estimates show that USAC would need to collect an additional $1.6 billion from current contributors, which likely would be passed through by the carriers to today's consumers.[51] The net effect of any such refund would be that 2008 consumers subsidize charges that should have been paid by consumers in 1998 and 1999 had the Commission assessed only interstate and international revenue (and excluded intrastate revenue). In our view, such an outcome – higher USF charges to today's customers – would be fundamentally at odds with our Section 254 mandate to preserve and advance universal service.[52] Today's consumers would have to shoulder the burden of the refunds while having no responsibility for causing the underlying problem. The harms to today's end-users and to the universal service system itself would be undeniable should retroactive effect be given to the Fifth Circuit decision.

17. Ironically, despite the hardships of a refund on current consumers, those end-users who bore the erroneous costs in 1998-99 would not necessarily reap benefits from refunds. As a practical matter, because USF contribution charges are generally passed through by the contributing entity to its customers,[53] contributors would have to use 1998 and 1999 billing information to ensure that the consumers who paid the USF received the refunds.[54] This effort, which would be difficult in even the best of times, is here further complicated because many of the carriers that contributed to the USF based on intrastate and international revenue no longer exist; they would thus be unavailable to receive the refund and disburse it to the appropriate 1998 and 1999 consumers. Even those carriers who still conduct business may have great difficulties tracking customers from this earlier period, given customer churn.

18. At the same time, those customers who could be successfully identified would not be assured of obtaining their money from the carriers.[55] As even BellSouth concedes, attempting

[50] *See* AT&T Corporation Comments on Petitions for Reconsideration and Clarification, CC Docket Nos. 96-45 and 96-262, at 4 (filed Apr. 24, 2000) (AT&T Comments)(estimating that refunds of amounts assessed on intrastate revenues alone would be approximately $1.6 billion); *see also* Opposition of MCI Worldcom, Inc., CC Docket Nos. 96-45 and 96-262, at 2 (filed Apr. 24, 2000) (MCI Worldcom Comments).

[51] AT&T Comments at 4.

[52] *See* 47 U.S.C. § 254(d); *see also Alenco Comm'ns, Inc. v. FCC*, 201 F.3d 608, 620 (5th Cir. 2000) ("Because universal service is funded by a general pool subsidized by all telecommunications providers - and thus indirectly by customers - excess subsidization in some cases may detract from universal service by causing rates unnecessarily to rise, thereby pricing some consumers out of the market.").

[53] *See id*. at 6; *see also*, AT&T Comments at 5 (arguing that USF charges by BellSouth and others based on intrastate revenues were also passed through to IXCs, and that any refund should be passed through to the IXCs as well).

[54] BellSouth Petition at 7.

[55] *See* MCI Worldcom Comments at 3-5. MCI claims that incumbent local exchange carriers (LECs) passed through the vast majority of their contribution costs to interexchange carriers (IXCs) in the form of increased access charges, thus incumbent LECs would have to pass refunds through to IXCs to avoid windfalls. *Id*. at 3-4. MCI asserts that (continued....)

to facilitate refunds would be "a bit like unscrambling eggs."[56] Our rules focus on carrier contributions rather than cost recovery, and the rules afford carriers discretion on how to pass through these costs to their customers. As a result, with costs passed along in a variety of ways, it would be extraordinarily difficult for the Commission to develop an effective framework for directing carriers' refund efforts.[57] Moreover, any individual refunds to former customers (to the extent these customers can be identified and located) are likely to be small amounts, which would be further reduced by the offset from increased universal service charges on their current telephone bills.[58] The only realistic conclusion we can draw is that the potential benefits of refunds for contributors or end-user customers are extremely speculative.[59]

19. In contrast, the costs and burdens of a refund requirement are concrete. Although the amount of any consumer refund would be minute, the number of customers potentially affected would run into the millions. As a result, the carriers' administrative burdens to disburse such refunds would be enormous. Potentially carriers' administrative costs could overwhelm the amounts available for distribution as refunds; just as bad, those administrative costs might be passed along to end-users through other increased charges. Further, the likelihood for significant confusion in administering any refund program has been repeatedly recognized by commenters.[60] The anticipated confusion would, in turn, impinge on the Commission's obligation to ensure the "sufficiency" of the USF based on "equitable" contributions.[61] In our view, imposing an unworkable refund obligation for only the most speculative of benefits does not serve the public interest or comport with our statutory obligations under section 254.

20. We conclude that considerations of fairness and equity militate strongly against retroactive application and defeat the presumption of retroactivity.[62] Requiring refunds of this magnitude would compel USAC to raise the USF contribution factor. That would cause manifest injustice for today's consumers, as they shoulder higher bills while bearing no culpability for the refund problem. At the same time, we strongly doubt it would be possible to ensure that the refunds provided by USAC be passed through appropriately to end-users.

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because future collections would have to be increased to pay for the refunds, "IXCs would themselves end up as the funding source of their pass-through refunds, thus completing a process that is almost entirely circular." *Id*. at 3.

[56] BellSouth Petition at 13.

[57] Although the Commission has used a carrier's current customers to achieve restitution of prior period over earnings pursuant to regulated rates, *AT&T Earnings on Interstate and Foreign Services During 1978*, CC Docket No. 79-187, Decision, 102 FCC2d 52 (1984), such an approach here would be inconsistent with the universal service funding objectives because of the differing carriers, the variety of rate structures, and customer churn.

[58] *See* MCI Worldcom Comments at 3.

[59] *See id*. at 2-5 (arguing retroactive application would serve no useful purpose).

[60] *See id*. at 4 (retroactive application would create tremendous confusion and administrative burdens); AT&T Comments at 4 (retroactive application would require massive refunds resulting in grave disruption to the administration of the USF program); BellSouth Reply, CC Docket Nos. 96-45 and 96-262, at 3-4 (filed May 8, 2000) (refunding contributions retroactively would be complex and would warrant a rulemaking proceeding); *but see* Teleglobe Comments, CC Docket Nos. 96-45 and 96-262, at 4 (filed April 24, 2000) (arguing for retroactive application).

[61] *See* 47 U.S.C. § 254(b); MCI Worldcom Comments at 3-5 (noting that the net effect of efforts to "true up" contributions for carriers would likely have no net effect, while creating confusion and significant administrative burdens and expenses).

[62] *See Exxon Co., USA v. FERC*, 182 F.3d 30, 49 (D.C. Cir. 1999).

Moreover, any customers who received a small refund check would benefit little because they, too, would be saddled with higher USF charges going forward. In contrast, some carriers could conceivably obtain windfalls where payments are not flowed through to their former customers. Neither logic nor fairness supports such a result, which works a "manifest injustice" not only upon current end-users, but upon the Universal Service program as a whole. Under these circumstances, we decline to order retroactive application of the Fifth Circuit's decision.

21. We also disagree with BellSouth that a series of Supreme Court decisions culminating in *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995), mandates retroactive application of the Fifth Circuit's decision here.[63] The Fifth Circuit did not specifically mandate that its decision be applied to the litigants before it, Cincinnati Bell and COMSAT Corporation (COMSAT), and neither party sought a refund from the Commission of its universal service contributions.[64] As the Fifth Circuit did not apply the new rule to the litigants before it, there is no selective retroactivity here.[65] Accordingly, we affirm our decision in the *Fifth Circuit Remand Order* to apply the Fifth Circuit decision prospectively.[66] Thus, we deny BellSouth's petition for reconsideration and request for refund of its individual assessments based on its intrastate contributions.

22. Further, with respect to Arya's request, the Fifth Circuit's determination regarding contributions based on international revenues was not based on lack of Commission jurisdiction. Rather, the Fifth Circuit found that requiring carriers to contribute on international telecommunications revenues without any limiting principle would result in instances in which predominantly international carriers would be forced to incur prohibitive costs.[67] The Fifth Circuit accordingly found the Commission's decision to be contrary to the Section 254's "equitable and nondiscriminatory" language.[68] The Fifth Circuit remanded that portion of the *1997 Universal Service Order* to the Commission for further consideration.[69] In seeking refunds of amounts assessed on international revenues in excess of the eight percent threshold, however, Arya is not seeking retroactive application of the Fifth Circuit's decision. Rather, it is seeking retroactive application of the Commission's *Fifth Circuit Remand Order,* in which the Commission established the LIRE. Retroactive rulemaking is generally not favored.[70] For that reason and for the same reasons that justify prospective-only effect of the Fifth Circuit's *TOPUC* decision discussed above, we decline to give the *Fifth Circuit Remand Order* retroactive effect as to contributions based on international telecommunications revenues.[71]

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[63] *See* BellSouth Petition at 8-11.

[64] *See, e.g.*, *TOPUC*, Brief of Cincinnati Bell Tel. Co., p. 38 (Feb. 28, 1998) (asking the court to require refunds).

[65] *See Reynoldsville Casket*, 514 U.S. at 752 ("when (1) the Court decides a case and applies the (new) legal rule of that case to the parties before it, then (2) it and other courts must treat that same (new) legal rule as 'retroactive.' applying it, for example, to all pending cases, whether or not those cases involve predecision events."). *See also James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 538 (1991) (selective retroactivity "breaches the principle that litigants in similar situations should be treated the same").

[66] *See Fifth Circuit Remand Order*, 15 FCC Rcd at 1679, para. 1.

[67] *TOPUC,* 183 F.3d at 434-35.

[68] *Id.*

[69] *Id.*

[70] *Bowen v. Georgetown University Hosp*., 488 U.S. 204, 208 (1988).

[71] *Id.*

D. Other Matters

23. In addition to the petitions filed by BellSouth and Arya, several carriers sought refunds or excuse from payment for USF contributions following the *TOPUC* decision by filing appeals with USAC or directly with the Commission.[72] In the Cable Plus and Pan Am Appeals, the appellants, like BellSouth in its petition for reconsideration, seek refund of their universal service contributions based on intrastate revenues.[73] In the USA Global Appeal, the appellant, like Arya in its petition for reconsideration, seeks refund of its universal service contribution based on international revenues.[74] We deny these requests as well for the reasons stated above.

IV. ORDERING CLAUSES

24. Accordingly, IT IS ORDERED, pursuant to sections 1, 2, 4(i), 4(j), 201, 202, 218-220, 254 and 303(r)of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i)-(j), 201, 202, 21-220, 254, and 303(r) that BellSouth Corporation's Petition for Reconsideration and Clarification, Arya International Communications Corporation's Petition for Reconsideration of the Commission's *Fifth Circuit Remand Order*, Cable Plus L.P. and MultiTechnology Services, L.P.'s Joint Request for Review, PanAm Wireless, Inc.'s Request for Review, and USA Global Link, Inc.'s Request for Review ARE DENIED.

25. IT IS FURTHER ORDERED THAT this Order SHALL BECOME EFFECTIVE thirty (30) days after its publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[72] *See* Joint Request for Review of Decision of Universal Service Administrator filed by Cable Plus L.P. and MultiTechnology Services, L.P., CC Docket Nos. 96-45 and 97-121 (filed Jan. 14, 2000) ("Cable Plus Appeal"); Request for Refund of Pan Am Wireless, Inc., CC Docket No. 96-45 (filed Nov. 15, 1999) ('Pan Am Appeal"); Request for Review of USA Global Link, CC Docket Nos. 96-45, 97-121 (filed July 23, 2001) ("USA Global Appeal"); *see also, Fifth Circuit Remand Order*, *Fifth Circuit Clarification Order (*applying the Fifth Circuit decision on a prospective basis).

[73] Cable Plus Appeal at 3 (seeking refund for the period January 1, 1997 through November 1, 1999); Pan Am Appeal at 1 (seeking refund for the period January 1, 1998 through October 1, 1999).

[74] USA Global Link Appeal at 1 (seeking refunds for 1997, 1998 and January to June 1999).