good cause to waive notice and comment is established.

List of Subjects in 45 CFR Part 2102

Administrative practice and procedure, Sunshine Act.

This document was prepared under the direction of Thomas Luebke, Secretary, U.S. Commission of Fine Arts, 401 F Street, NW., Suite 312, Washington, DC 20001.

■ For the reasons stated in the preamble, the Commission of Fine Arts hereby amends 45 CFR part 2102 to read as follows:

PART 2102—MEETINGS AND PROCEDURES OF THE COMMISSION

■ 1. The authority citation for part 2102 continues to read as follows:

Authority: 5 U.S.C., App. 1.

■ 2. In § 2102.12 revise paragraphs (b) and (c) to read as follows:

§ 2102.12 Responses of Commission to submissions.

* * * * *

(b) In the case of plans submitted with a permit application subject to the Old Georgetown Act (§ 2101.1(c)), if the Commission does not respond with a report on such plans within forty-five days after their receipt by the Commission, its approval shall be assumed and a permit may be issued by the government of the District of Columbia.

(1) In the case of a concept application submitted for a project subject to the Old Georgetown Act (§ 2101.1(c)), the Commission's approval is valid for two years. At the end of the two years, the original owner for the project may submit a new concept application requesting to extend the approval for one more year. The Commission, however, may decline to extend its approval.

(2) [Reserved]

(c) In the case of plans submitted with a permit application subject to the Shipstead-Luce Act (§ 2101.1(b)), if the Commission does not respond with a report on such plans within thirty days after their receipt by the Commission, its approval shall be assumed and a permit may be issued by the government of the District of Columbia.

(1) In the case of a concept application for a project subject to the Shipstead-Luce Act (§ 2101.1(b)), the Commission's approval is valid for two years. At the end of the two years, the original owner for the project may submit a concept application requesting to extend the approval for one more year. The Commission, however, may decline to extend its approval.

(2) [Reserved]

* * * * *

Dated: May 12, 2008.

Thomas Luebke,

Secretary, U.S. Commission of Fine Arts.

[FR Doc. E8–11238 Filed 5–21–08; 8:45 am]

BILLING CODE 6330–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 54

[CC Docket Nos. 96–45, 96–262, 97–121; WC Docket No. 06–122; FCC 08–101]

Universal Service Fund Contribution

AGENCY: Federal Communications Commission.

ACTION: Final rule; petition on reconsideration.

SUMMARY: In this document, the Commission denies the petitions filed by BellSouth Corporation (BellSouth), Arya International Communications Corporation (Arya), Cable Plus L.P. and MultiTechnology Services, L.P., Pan Am Wireless, Inc., and USA Global Link with respect to the Commission's *Fifth Circuit Remand Order*, and confirms the conclusions by the Wireline Competition Bureau (Bureau) in the *Fifth Circuit Clarification Order*.

DATES: Effective June 23, 2008.

FOR FURTHER INFORMATION CONTACT: Thomas Buckley, Senior Deputy Chief or Carol Pomponio, Attorney, Wireline Competition Bureau, Telecommunications Access Policy Division at (202) 418–7400 (voice), (202) 418–0484 (TTY).

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Order on Reconsideration*, in CC Docket Nos. 96–45, 96–262, 97–121 and WC Docket No. 06–122, released April 11, 2008. The full text of this document is available for public inspection during regular business hours in the FCC Reference Center, Room CY–A257, 445 12th Street, SW., Washington, DC 20554.

I. Introduction

1. In this *Order on Reconsideration*, the Commission denies the petitions for reconsideration filed by BellSouth and Arya with respect to the Commission's *Fifth Circuit Remand Order*, 64 FR 60349–01, November 5, 1999 and confirms the conclusions by the Bureau in the *Fifth Circuit Clarification Order*. Specifically, the Commission reconfirms that Commercial Mobile Radio Services (CMRS) providers may recover their universal service contributions through rates charged for all of their services; rejects the suggestion that the Commission's eight percent Limited International Revenues Exception (LIRE) is arbitrary and capricious; and denies 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. In addition to the petitions filed by BellSouth and Arya, several carriers sought refunds or excuse from payment for universal service fund contributions following the *Texas Office of Public Utility Counsel* (*TOPUC*) decision, 183 F.3d 393 (5th Cir. 1999), by filing appeals with the Universal Service Administrative Company (USAC) or directly with the Commission. In the Cable Plus L.P. and MultiTechnology Services, L.P., and Pan Am Wireless, Inc. appeals, the petitioners, like BellSouth in its petition for reconsideration, seek refund of their universal service contributions based on intrastate revenues. In the USA Global Link appeal, the petitioner, like Arya in its petition for reconsideration, seeks refund of its universal service contribution based on international revenues. The Commission denies these requests as well.

II. Discussion

2. In response to BellSouth's petition requesting clarification of the Commission's rules, the Commission 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. 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 universal service fund (USF). The manner in which carriers may recover their universal service contributions through assessments on customers was not before the court. Thus, the Bureau clarified that the *TOPUC* decision did not affect the Commission's finding in the *Fourth Reconsideration Order*, 63 FR 2094–01, January 13, 1998, that CMRS providers may ''recover their contributions through rates charged for all their services.'' 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. The Commission does not alter that conclusion here.

3. The Commission reiterates 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. Because 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. 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. 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.

4. 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. 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. Arya asserts that the Commission ''offered no explanation'' for its choice of eight percent, and accordingly its decision should be reconsidered. The Commission disagrees.

5. 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. 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. 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.

6. 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. 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. Moreover, in 2002 the Commission revised the LIRE to address certain changes in the telecommunications marketplace, and increased the exception threshold to twelve percent. Accordingly, the Commission finds that Arya's argument that the Commission failed to articulate its rationale for selecting the eight percent threshold is without merit, and the Commission declines to reconsider the LIRE threshold.

7. 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. Upon further consideration, the Commission confirms the conclusion of the Bureau and denies BellSouth's request to apply the *Fifth Circuit Remand Order* on a retroactive basis. Further, the Commission denies the request by Arya to retroactively apply the LIRE to contributions made prior to the Fifth Circuit's mandate.

8. 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.'' By contrast, retroactive effect is appropriate for ''new applications of [existing] law, clarifications, and additions.'' In cases in which there are ''new applications of existing law, clarifications, and additions,'' the courts start with a presumption in favor of retroactivity. However, retroactivity may be denied ''when to apply the new rule to past conduct or to prior events would work a 'manifest injustice.' '' Based on the equitable factors discussed below, the Commission concludes that retroactive application would work a manifest injustice that defeats the presumption of retroactivity. Accordingly, the Commission affirms the *Fifth Circuit Remand Order*.

9. At the outset, the Commission recognizes that this case involves conflicting equitable considerations that are somewhat novel. Unlike recent Commission precedent in which the DC Circuit has applied the ''manifest injustice'' standard, 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 the Commission 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. In evaluating whether retroactivity would produce a manifest injustice, the Commission focuses its analysis on the benefits and burdens to the affected parties. To do this, the Commission necessarily considers how the refund mechanisms would function and the potential effect of any refund on its statutory obligations under section 254 of the Act.

10. 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. 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. 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 the Commission's view, such an outcome—

higher USF charges to today's customers—would be fundamentally at odds with its section 254 mandate to preserve and advance universal service. 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.

11. 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, contributors would have to use 1998 and 1999 billing information to ensure that the consumers who paid the USF received the refunds. 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.

12. At the same time, those customers who could be successfully identified would not be assured of obtaining their money from the carriers. As even BellSouth concedes, attempting to facilitate refunds would be ''a bit like unscrambling eggs.'' The Commission's 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. 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. The only realistic conclusion the Commission can draw is that the potential benefits of refunds for contributors or end-user customers are extremely speculative.

13. 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. The anticipated confusion would, in turn, impinge on the Commission's obligation to ensure the ''sufficiency'' of the USF based on ''equitable'' contributions. In the Commission's view, imposing an unworkable refund obligation for only the most speculative of benefits does not serve the public interest or comport with the Commission's statutory obligations under section 254.

14. The Commission concludes that considerations of fairness and equity militate strongly against retroactive application and defeat the presumption of retroactivity. 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, the Commission strongly doubts it would be possible to ensure that the refunds provided by USAC be passed through appropriately to end-users. 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, the Commission declines to order retroactive application of the Fifth Circuit's decision.

15. The Commission also disagrees 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. 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. As the Fifth Circuit did not apply the new rule to the litigants before it, there is no selective retroactivity here. Accordingly, the Commission affirms its decision in the *Fifth Circuit Remand Order* to apply the Fifth Circuit decision prospectively. Thus, the Commission denies BellSouth's petition for reconsideration and request for refund of its individual assessments based on its intrastate contributions.

16. 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. The Fifth Circuit accordingly found the Commission's decision to be contrary to section 254's ''equitable and nondiscriminatory'' language. The Fifth Circuit remanded that portion of the *1997 Universal Service Order* to the Commission for further consideration. 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. For that reason and for the same reasons that justify prospective-only effect of the Fifth Circuit's *TOPUC* decision discussed above, the Commission declines to give the *Fifth Circuit Remand Order* retroactive effect as to contributions based on international telecommunications revenues.

17. 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. 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. 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. The Commission denies these requests as well for the reasons stated above.

III. Paperwork Reduction Act of 1995 Analysis

18. This document does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. In addition, therefore, it does not contain any new or modified ''information collection burden for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

IV. Final Regulatory Flexibility Certification

19. The Regulatory Flexibility Act of 1980, as amended (RFA), requires that a regulatory flexibility analysis be prepared for notice-and-comment rulemaking proceedings, unless the agency certifies that ''the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.'' The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. A ''small business concern'' is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).

20. The Commission sought written public comment on the initial regulatory flexibility analysis (IRFA) incorporated into the *NPRM*, 61 FR 10499–01, March 14, 1996, and the *Recommended Decision*, 61 FR 63778–01, December 2, 1996, on the final regulatory flexibility analysis incorporated into the *1997 Universal Service Order*, and on the supplemental final regulatory flexibility analysis incorporated into the *Fifth Circuit Remand Order*.

21. In the IRFAs, the Commission sought comment on possible exemptions from the proposed rules for small telecommunications companies and measures to avoid significant economic impact on small entities, as defined by the RFA. No comments in response to the IRFAs, other than those summarized in the *1997 Universal Service Order*, were filed. In response to the FRFA contained in the *1997 Universal Service Order*, one commenter argued that the Commission did not satisfy the requirements of the RFA by considering alternatives to the cap on recovery of corporate operations expenses. Those comments were fully addressed in the *Fourth Order on Reconsideration*.

22. No comments or petitions for reconsideration in response to the IRFAs or FRFA, other than those described above, were filed and none of the comments filed pertain to the issues raised in the *Fifth Circuit Remand Order*. The Commission in that order nonetheless addressed small business concerns by giving incumbent LECs greater flexibility in structuring their recovery of universal service contributions and by creating an exception from the contribution requirements for certain providers of international telecommunications services.

23. In this order, the Commission reconfirms that CMRS providers may recover their universal service contributions through rates charged for all of their services; rejects the suggestion that the Commission's eight percent LIRE is arbitrary and capricious; and denies 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. This has no new effect on any party and does not create any additional burden on small entities.

24. Therefore, the Commission certifies that the requirements of the order will not have a significant economic impact on a substantial number of small entities.

25. In addition, the order and this final certification will be sent to the Chief Counsel for Advocacy of the SBA, and will be published in the **Federal Register**. The Commission will not send a copy of this Order on Reconsideration pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A), because this order does not change previously adopted rules.

V. Ordering Clauses

26. 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*.

27. *It is further ordered that* this order *shall become effective* June 23, 2008.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E8–11258 Filed 5–21–08; 8:45 am]

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