

revenues from the lease of satellite space segment capacity. The Commission finds that, because the lease of space segment capacity does not constitute a telecommunications service, COMSAT was not required to contribute to the TRS Fund on the basis of such services. The Commission therefore grants the application for review, and order that COMSAT be refunded its prior TRS Fund contributions based on the provision of leased satellite space segment capacity.

II. Discussion

2. Before reaching the substantive issues before us, the Commission addresses procedural issues raised by COMSAT's Application for Review Supplement. Section 1.115(c) of our rules bars a party from presenting questions of law in an application for review that it did not raise in its pleading below. In its initial Petition, COMSAT only argued that its service was not an interstate service. Because it did not argue before the Bureau that the service did not qualify as telecommunications or a telecommunications service, § 1.115(c) of the Commission's rules would ordinarily act as a bar to raising the argument now. In addition, COMSAT failed to raise the argument in its original Application for Review, presenting it only in the supplement that was filed in 1999, long after the time for filing such supplements had expired.

3. The Commission has authority, however, to consider COMSAT's argument that its service did not constitute telecommunications or a telecommunications service on our own motion. In particular, the Commission has previously noted that it may use the pendency before it of a timely petition filed by a party as a basis for considering on the Commission's own motion arguments belatedly raised by the party. That circumstance is present here. COMSAT filed a timely application for review of the Bureau Decision. In addition, COMSAT reiterated its position when it submitted its TRS payments. Further, because the legal question of whether leased space segment is telecommunications has already been presented to and resolved by the full Commission, applying that ruling here is straightforward, consistent with the policy of not addressing arguments that have not previously been reviewed, and, as set forth, clearly dispositive of the pending matter. By contrast, were the Commission to ignore this issue, we would have to reach the legal question of whether COMSAT's lease of transponder capacity should be

deemed an "interstate" service. The Commission therefore exercises our discretion to consider the "telecommunications"/ "telecommunications service" argument.

4. Turning to the merits of COMSAT's Application for Review, the lease of bare space segment capacity can not constitute a "telecommunications service," because the Commission previously determined that it is not "telecommunications" and does not involve the transmission of information. Section 64.604(c)(5)(iii)(A) of the Commission's rules states that "[e]very carrier providing interstate telecommunications services shall contribute to the TRS Fund on the basis of interstate end user telecommunications revenues." In the *TRS III Order*, 58 FR 39671, July 26, 1993, the Commission explained this rule by stating that "[o]ur general approach is to identify all interstate common carrier services and to assess a contribution factor against the revenues from those services." Although the Act did not define "common carrier services" at that time, section 225 of the Communications Act, which governs TRS services, defines "common carrier," in relevant part, as "any common carrier engaged in interstate communication by wire or radio as defined in section 3 * * *" Section 3, in turn, defines "communication by radio" as "the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services * * * incidental to such transmission."

5. Applying these definitions to the facts at hand, the Commission finds that, leasing bare space segment capacity, under these circumstances, does not constitute a common carrier service, because the satellite operator "merely provid[es] its customer with the exclusive right to transmit to a specified piece of hardware on the satellite." Therefore, entities, including COMSAT, are not required to include revenues derived from leasing bare space segment capacity in determining their TRS contributions. This would normally end our inquiry and the refunds in issue could be ordered.

6. But because Congress mandated that COMSAT be regulated as a common carrier pursuant to section 401 of the Communications Satellite Act of 1962 (Satellite Act), a question exists about COMSAT's eligibility for refunds. All of the services COMSAT provides, even though some or all of them may involve the leasing of bare space segment capacity, are regulated as common

carrier (*i.e.*, telecommunications) services under Title II of the Act. Does this fact mean that revenues from COMSAT's lease of bare space segment capacity, which is treated as common carriage due to section 401 of the Satellite Act, must be included in COMSAT's TRS contribution calculations? For the reasons given, the Commission concludes that section 401 does not require that COMSAT include revenues derived from leasing bare space segment capacity in determining its TRS contributions.

7. The Satellite Act authorized the formation of COMSAT and generally tasked it with the establishment of a single global telecommunications satellite system, which came to be known as INTELSAT. The Commission, in turn, was generally tasked by Congress to oversee COMSAT's implementation of the Satellite Act. Section 401 makes clear that the Commission was to exercise its statutory authority under the Communications Act to assure that COMSAT carried out the obligations imposed on it by Congress. The Commission was also to ensure "nondiscriminatory use of, and equitable access to" INTELSAT space segment "under just and reasonable charges, classifications, practices, regulations, and other conditions." The common carrier regulation implemented pursuant to authority of section 401 over services COMSAT provides (even those such as lease of bare space segment capacity) afforded an effective and proven means to oversee COMSAT's special role and further the goals of the Satellite Act.

8. By contrast, a decision to treat COMSAT's lease of bare space segment capacity as common carriage (telecommunications service) for the purpose of contributions to the TRS Fund, does not even pertain to COMSAT's special role or advance any goals of the Satellite Act. Therefore, it would be unreasonable to read into section 401 or any other Satellite Act provision a requirement that the contributions in issue be made to the TRS Fund. Because COMSAT's TRS contributions, paid under protest subject to the pending challenge, were not, in fact, required by the Communications Act, Satellite Act, or the Commission's rules, the Commission grants COMSAT's request for a refund and direct NECA to refund the full amount of COMSAT's prior contributions based on the provision of leased bare space segment capacity.

III. Ordering Clause

9. It is ordered, pursuant to section 5(c)(5) of the Communications Act of