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

In the Matter of	)	
	)	
2018 Biennial Review of Telecommunications Regulations	)	WC Docket No. 18-378
	)	

COMMENTS

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TABLE OF CONTENTS

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AMERICAN CABLE ASSOCIATION

I. INTRODUCTION & SUMMARY

The American Cable Association ("ACA") hereby submits comments in response to the Federal Communications Commission's ("Commission") Public Notice ("Public Notice") initiating the 2018 biennial review.[1] Every two years, the Commission must review its telecommunications regulations and "repeal or modify" ones that it determines are "no longer necessary in the public interest as the result of meaningful economic competition."[2] In these comments, ACA identifies telecommunications regulations that, in their current form, frustrate the public interest by imposing anti-competitive burdens on smaller operators. In particular, Commission regulations that govern Universal Service Fund ("USF") contributions are implemented in such a manner that smaller

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[1] *FCC Bureaus and Offices Seek Public Comment in 2018 Biennial Review of Telecommunications Regulations*, WC Docket No. 18-378 et al., Public Notice, DA 18-1260 (rel. Dec. 17, 2018).

[2] *See* 47 U.S.C. § 161.

operators often end up bearing unnecessary administrative costs and contributing more than their fair share. ACA thus encourages the Commission to "modify" these regulations, as ACA proposes below, to bring them into alignment with the public interest.

II. THE COMMISSION SHOULD "MODIFY" ITS USF CONTRIBUTION RULES TO RELIEVE SMALLER CONTRIBUTORS FROM UNFAIR, ANTI-COMPETITIVE BURDENS

The Commission's USF programs are funded by contributions from telecommunications carriers and other providers of telecommunications, including interconnected VoIP providers. Contributions are assessed on the basis of a provider's revenues derived from the sale of interstate and international telecommunications directly to end users. Each quarter, providers must contribute to the fund a specified percentage of their assessable revenues. This percentage is known as the "contribution factor," which the Commission determines each quarter based on projections of demand for funds within each of its USF programs.

Compliance with these complex requirements is costly and burdensome, particularly for smaller operators. The costs include not only the contributions themselves, but also substantial administrative and legal costs. The contributions process can also produce arbitrary outcomes that distort competition.

In 2012, the Commission sought comment on comprehensive reform of its contributions rules to reduce their complexity and adapt them to changes in the communications marketplace.[3] While the 2012 FNPRM was sweeping in scope, it also

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[3] *See Universal Service Contribution Methodology and A National Broadband Plan For Our Future*, Further Notice of Proposed Rulemaking, 27 FCC Rcd 5357, ¶ 212 (2012) ("2012 FNPRM").

sought comment on more incremental reforms that can be implemented without fundamentally changing the process. ACA encourages the Commission to move forward with one category of such reforms without further delay. In particular, as ACA explains below, there are discrete ways the Commission can "modify"[4] the contributions process to make it fairer and less burdensome for smaller operators, which would enable them to invest their resources more efficiently and compete more effectively against larger, more highly capitalized competitors. Specifically, the Commission should make the following reforms:

- Base the *de minimis* contributions threshold on assessable revenues rather than projected contributions, and adjust the threshold to account for increases in the contribution factor over time.
- Revise downward the VoIP contributions safe harbor so that it more reasonably approximates the actual percentage of VoIP revenues derived from interstate and international services.
- Streamline traffic study filing requirements for smaller operators that use these studies to allocate jurisdictional percentages of VoIP revenues.

By taking these steps, the Commission would enable smaller telecommunications providers to compete more effectively, resulting in an overall increase in "meaningful economic competition" in telecommunications markets.[5] And because the Commission can make these targeted improvements without deciding the larger issues involved in contributions reform, ACA encourages the Commission to adopt these rule modifications without further delay, as part of its 2018 biennial review.

[4] *See* 47 U.S.C. § 161(b).

[5] *See id*. at (a)(2).

A. Base the *De Minimis* Exemption on Assessable Revenues and Set an Appropriate Threshold

The Commission should reform the *de minimis* contributions exemption to make it fairer and more administratively efficient. Under Section 54.708 of the Commission's rules, a telecommunications carrier is exempt from contributing to the USF and from filing the Telecommunications Reporting Worksheet (Forms 499-A and 499-Q) in a given year if its annual contributions would have totaled less than $10,000.[6] To determine its annual contribution burden, a provider multiplies each quarter's assessable revenues by that quarter's contribution factor, and then adds up the quarterly amounts.

As the Commission noted in the 2012 FNPRM, "tying *de minimis* status" to a carrier's annual contribution burden "creates administrative burdens and uncertainty for many qualifying providers and USAC."[7] Because annual contribution obligations are calculated on the basis of quarterly contribution factors, which often change every quarter and are not announced far in advance, it can be difficult for a provider to predict at the beginning of the year whether it will qualify that year for the exemption. As a result, smaller providers may decide to file Form 499-Qs and make quarterly contributions as precautionary measures, only to discover at year's end that they qualify for the exemption after all and these measures were unnecessary. In other words,

[6] *See* 47 CFR § 54.708; *see also* 47 U.S.C. § 254(d) (expressly granting the Commission authority to exempt *de minimis* contributors from the obligation to contribute to USF). The "*de minimis*" exemption set forth in section 54.708 also applies to interconnected VoIP providers, although such providers are not exempt from filing the Form 499-A. *See* 47 CFR § 54.708.

[7] 2012 FNPRM, ¶ 212.

providers that qualify for the exemption end up incurring costs and burdens that undermine the exemption's very purpose.[8]

To address this problem, the Commission proposed in the 2012 FNPRM that it base the *de minimis* threshold simply on a provider's assessable revenues in a given year rather than on the contributions that the operator would make in that year.[9] ACA supports this approach, and it encourages the Commission to implement it without further delay. As the Commission observed, a provider would be able to determine "with increased certainty" whether it qualifies for the exemption if it need only project its assessable revenues for the year and not also take into account quarterly contribution factors.[10]

In addition to moving to a *de minimis* threshold that is calculated based only on assessable revenues, the Commission should set the threshold at a level that ensures that at least the class of providers originally intended to receive relief would receive relief today. Steady increases in the contribution rate over past decades have effectively pushed the threshold downward, without any affirmative decision by the Commission to change the threshold. As a result, more and more small providers that would have benefitted from the exemption at the time it was created find themselves disqualified, and therefore obligated to contribute directly to the fund and incur the

[8] As the Commission observed in the 2012 FNPRM, "the uncertainty caused by today's *de minimis* exemption extends beyond potentially qualifying entities to any providers from which they purchase telecommunications—if the potentially qualifying provider turns out to be *de minimis*, then the underlying provider should have contributed on its revenues from sales to that provider; if not, then the underlying provider has no such obligation." 2012 FNPRM, ¶ 212.

[9] 2012 FNPRM, ¶ 213.

[10] *Id.*, ¶ 214.

administrative costs associated with direct contribution. To reverse this trend, the Commission should set a revenue-based threshold of at least $200,000 of assessable revenues. A threshold set today at $200,000 in assessable revenues would be comparable to the original *de minimis* threshold, which was set at $10,000 in annual contributions based on a contribution factor of approximately 5 percent.[11] Alternatively, should the Commission retain a contributions-based threshold, it should raise it to $40,000 to account for increases in the contribution factor since the current threshold was introduced.[12] The Commission should also adopt a mechanism that automatically adjusts the threshold as necessary over time to account for any further increases or decreases in the contribution factor.

Finally, the Commission should adopt its proposal in the 2012 FNPRM that it exempt a provider from filing Form 499-Qs in the year following a year that it qualifies for the *de minimis* exemption.[13] This rule modification would eliminate many unnecessary filings and contributions, and would give more certainty to smaller operators seeking to determine their contribution obligations each year. Moreover, under this modified rule, a provider that is relieved from filing 499-Qs would still

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[11] *See Universal Service Contribution Methodology and A National Broadband Plan For Our Future* WC Docket No. 06-122, Comments of the American Cable Association at 6 (filed July 9, 2012). Because these smaller providers tend to rely on wholesale providers—who are required to contribute on revenues they derive from the sale of telecommunications to *de minimis* providers—the contributions of these smaller providers will still largely be captured by the fund even if increasing numbers qualify for the *de minimis* exemption. *See supra* note 8. Moreover, a decrease in the number of direct contributors could reduce administrative processing, billing, and audit costs for USAC.

[12] *See Proposed First Quarter 2019 Universal Service Fund Contribution Factor*, CC Docket No. 96-45, Public Notice, DA 18-1249 (rel. Dec. 12, 2018) (proposing a quarterly contribution factor of 20.0 percent for the first quarter of 2019, which has since gone into effect); *see also* 47 CFR § 54.709(a)(3).

[13] 2012 NPRM, ¶ 216.

ultimately be required to contribute to the fund if it determined that its annual contribution (or assessable revenues) exceeded the *de minimis* threshold.

B. Revise Downward the VoIP Safe Harbor

As part of the USF contributions process, a provider must determine what percentage of its end-user telecommunications revenues is derived from interstate and international services. Interconnected VoIP providers may determine these percentages by directly assessing their end-user revenues or conducting traffic studies, or, alternatively, they can use a safe harbor of 64.9 percent.[14] When it established this safe harbor in 2006, the Commission based it on the percentage of interstate and international revenues that, at the time, was typical of "wireline toll services."[15] The Commission reasoned that "VoIP services are often marketed as a substitute for" such services, and that, accordingly, it would be reasonable to expect the two kinds of services to have comparable mixes of intrastate, interstate, and international traffic.[16]

However accurate these observations were in 2006, they do not accurately portray the marketplace in which interconnected VoIP services are provided today. Interconnected VoIP is now the predominant means by which American households receive fixed-line telephone service.[17] Customers typically use interconnected VoIP

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[14] *See Universal Service Contribution Methodology* et al., Report and Order and Further Notice of Proposed Rulemaking, 21 FCC Rcd 7518, ¶ 53 (2006) ("2006 Order"). There are no codified rules on how to allocate revenues. Instead, the Commission provides guidance in Form 499-A Instructions.

[15] The Commission explained that "wireline toll service" is a telephone service that encompasses "interstate, intrastate toll, and international services." *See* 2006 Order, ¶ 54. Wireline toll service is "colloquially referred to as landline long distance." *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1237 (D.C. Cir. 2007).

[16] *See* 2006 Order, ¶ 53.

[17] *See Communications Marketplace Report* et al., GN Docket No. 18-231 et al., Report, FCC 18-181 ¶ 205 ("Our most recent data from the June 2017 Form 477 show there are 55 million end-user switched access lines, including 22.5 million residential lines, and 64 million interconnected VoIP subscriptions, including 40 million residential subscriptions.").

service for both local and long-distance calling. They do not use the service primarily as a substitute for wireline toll service, nor is the service marketed primarily on that basis.

Because the interconnected VoIP services of today are not comparable to "wireline toll service," there is no longer any reason to expect that the two services would have comparable traffic mixes. Indeed, evidence suggests that the current VoIP safe harbor dramatically overstates the percentage of interconnected VoIP revenues derived from interstate and international traffic. In 2012, the Commission indicated that the "average percentage for VoIP traffic studies is 22.1 percent interstate/international, with the median study reporting 14.7 percent interstate/international."[18] In other words, the average percentage reported in traffic studies was approximately one-third of the safe harbor percentage, and at least half of filers reported interstate revenues that were less than one-fourth of the amount they would have reported using the safe harbor.

Because the current safe harbor overestimates the interstate and international components of interconnected VoIP traffic so drastically, most providers find it more economical to incur the costs of preparing and submitting traffic studies than to use the safe harbor. Smaller providers tend to be the few providers that use the safe harbor because, for them, the same cost-benefit analysis reaches the opposite conclusion. As the idiom goes, these providers end up being caught between a rock and a hard place. The costs of engaging consultants to prepare up to five traffic studies annually and using counsel to file them would exceed the amount by which they overpay as a result of using the safe harbor. Accordingly, they continue to contribute on the basis of a safe harbor that bears no resemblance to their actual traffic. This means not only that the

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[18] 2012 NPRM, ¶ 125.

provider is placed at a competitive disadvantage relative to larger wireline operators that report based on reasonable estimates of actual revenues, but also that its customers overpay the universal service contribution (and other fees keyed to the Form 499).

Furthermore, the providers that use the VoIP safe harbor are placed at a competitive disadvantage relative to their smaller wireless competitors because the USF contribution rules allow mobile wireless providers to use a much lower safe harbor of 37.1 percent.[19] There is no reason to assume that, as a percentage of total end-user telecommunications revenues, the interstate and international revenues of interconnected VoIP service providers are nearly twice as high as those of mobile wireless providers. Indeed, because mobile wireless service is inherently mobile, the better assumption is that mobile wireless revenues are the ones weighted more heavily towards interstate and international traffic.

For these reasons, the Commission should revise downward the VoIP safe harbor to a level that more accurately reflects today's mix of traffic. The average percentage that the Commission reported in its 2012 analysis of traffic studies—22.1 percent—would be a far more reasonable proxy for actual interstate revenues than the current 64.9 percent figure. At minimum, the Commission should lower the safe harbor to 37.1 percent to achieve parity with the mobile wireless safe harbor.

C. Streamline Traffic Study Filing Requirements

An interconnected VoIP provider that uses traffic studies to allocate the jurisdictional percentages of its VoIP revenue must submit a traffic study with each quarterly Form 499-Q. These repetitive filings generate significant administrative

[19] *See* 2012 NPRM, ¶ 123.

burdens and legal costs, particularly for smaller providers, all without serving any necessary purpose. While the studies might theoretically promote accurate reporting of revenues, a provider that underreports assessable revenues through its Form 499-Qs will owe USAC a true-up payment that is calculated using a formula that disfavors the provider. Accordingly, in the absence of any requirement to produce quarterly traffic studies there would remain a strong incentive to report revenues accurately. At any rate, the availability of the true-up process means that minor inaccuracies in estimated quarterly revenues, especially by smaller providers, are not consequential in terms of the contributions USAC ultimately collects.

Given these facts, the Commission should allow smaller providers to rely on the prior year's annual traffic study as the basis for the revenue estimates a provider includes in each of its Form 499-Qs the following year. This modest change to the contributions process would relieve smaller operators of significant administrative burdens, while ensuring that there remains a reasonable factual basis for a provider's quarterly estimates. This approach also preserves the mechanism—the annual traffic study filed in connection with Form 499-A—that is necessary to determine a provider's ultimate liability in a given year.

In addition, the Commission should clarify that it is not necessary for a VoIP provider to file a "traffic study" when it determines its jurisdictional allocations by measuring 100 percent of its traffic for the reporting period. When all of the traffic is measured, the provider is reporting its "actual" interstate revenue, as opposed to a

"study" using statistical "sampling techniques" with a "margin of error."[20] Furthermore, there is no benefit when a provider explains the statistical "confidence level" and "margin of error" of a 100 percent sample.

III. CONCLUSION

ACA appreciates the opportunity to file comments in the Commission's 2018 biennial review, and it encourages the Commission to take its comments under consideration.

Respectfully submitted,

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[20] *See* USAC, 2012 Telecommunications Reporting Worksheet (Form 499-A) Instructions at 25 (March 2012), https://transition.fcc.gov/Forms/Form499-A/499a-2012.pdf (explaining that, when performing traffic studies, "[s]ampling techniques must be designed to produce a margin of error of no more than one percent with a confidence level of 95%. If the sampling technique does not employ a completely random sample (*e.g.*, if stratified samples are used), then the respondent must document the sampling technique and explain why it does not result in a biased sample.").