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Office of the Secretary

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**Subject:** Petition for Forbearance - 47 USC 160(c)  
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WC: 19-232

Attached please find a Petition for Forbearance, submitted on behalf of Network Communications International Corporation.

Please contact undersigned counsel with any questions.

Best regards,

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20054

In the Matter of:

Petition of Network Communications  
International Corporation for Forbearance  
Pursuant to 47 U.S.C. § 160(c) from 47 U.S.C.  
§ 254(d) and 47 C.F.R. § 54.706(a)

WC Docket No.

19-232

PETITION FOR FORBEARANCE  
  
OF  
  
NETWORK COMMUNICATIONS  
INTERNATIONAL CORPORATION

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August 9, 2019

## SUMMARY

Currently, Inmate Calling Service (ICS) providers are required to make contributions to the Universal Service Fund (USF) based on their provision of interstate and international ICS calls originating from correctional facilities located in the United States. Under applicable FCC regulations, ICS providers are permitted to pass through the USF contribution as an ancillary fee charged to ICS customers.

At the same time, a significant portion of ICS customers that are paying USF ancillary fees are otherwise eligible to receive assistance from USF programs. As a result, the payment by ICS customers of USF ancillary fees has led to the absurd result of USF-eligible recipients actually contributing to the very programs from which they receive services.

This Petition for Forbearance requests that the FCC forbear from enforcing the obligation of ICS providers to contribute to the Universal Service Fund for interstate and international ICS calls. This request is limited to just those entities that provide Inmate Calling Services, and is further limited to just the Inmate Calling Service.

As discussed herein, a grant of the instant request would help ensure that ICS customers pay just and reasonable rates for ICS calls. Further, a grant of the instant request will provide more protection for ICS customers than is currently present. Eliminating the USF fee for interstate and international ICS calls will encourage additional contact between inmates and loved ones, which also serves the public interest. Finally, the elimination of USF contributions derived from ICS calls will not harm the USF budget, and will have less of an impact on the USF Contribution Fee than previously approved forbearance petitions.

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programs of the Universal Service Administrative Company ("USAC").<sup>5</sup> Section 54.706(a) of the Commission's rules lists the various classes of telecommunications carriers that are obligated to make USF contributions.<sup>6</sup> Section 54.706(b) of the Commission's rules specifies that the specified telecommunications carriers must base their contributions on "collected interstate and international end-user telecommunications revenue."<sup>7</sup>

Those telecommunications carriers that are required to contribute to the Universal Service Fund programs are permitted to pass through their respective USF contribution to their customers through a line item fee on the customer's bills, so long as the carrier does not mark up the fee beyond the contribution factor established by FCC on a quarterly basis.<sup>8</sup> For example, the FCC recently announced that the 3<sup>rd</sup> quarter 2019 contribution factor will be 24.4%, and reminded carriers that they "may not, during the third quarter of 2019, recover through a federal universal service line item an amount that exceeds 24.4 percent of the interstate telecommunications charges on a customer's bill."<sup>9</sup>

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<sup>5</sup> USAC is responsible for running four programs to ensure "accessible, affordable, and pervasive high-speed connectivity" for US residents located in rural, underserved, and difficult-to-reach areas: (i) the Schools and Libraries (E-rate) Program; (ii) the Rural Health Care Program; (iii) the Lifeline Program; and (iv) the High Cost Program. (see <https://www.usac.org/about/default.aspx>).

<sup>6</sup> 47 C.F.R. § 54.706(a) (2019) (*e.g.*, Operator Services (54.706(a)(3)); Video services (54.706(a)(14)); Resale of interstate services (54.706(a)(16)); Payphone services (54.706(a)(17)); Interconnected VoIP services (54.706(a)(18)); and Prepaid calling card providers (54.706(a)(19)).

<sup>7</sup> 47 C.F.R. § 54.706(b) (2019).

<sup>8</sup> 47 C.F.R. § 54.712 (2019).

<sup>9</sup> See *3<sup>rd</sup> Quarter 2019 USF Contribution Factor is 24.4 Percent*, Public Notice, DA 19-559, pg. 5 (June 12, 2019) (*3<sup>rd</sup> Qtr. USF PN*).

When the FCC adopted rules to limit the type and amount of ancillary service fees that providers of Inmate Calling Services could charge their customers,<sup>10</sup> the FCC permitted Inmate Calling Service providers to pass through the providers' USF contribution obligation to their customers as an Authorized Fee.<sup>11</sup> This rule was left untouched by the subsequent 2017 DC Circuit decision to reverse and remand other aspects of the *ICS Order*.<sup>12</sup> As a result, ICS providers are permitted to recover the USF contribution from ICS customers every time the provider completes an interstate or international ICS call.

NCIC believes that the imposition of the USF fee on ICS calls has a deleterious impact on inmates and their families, and that the FCC should forbear from requiring ICS providers to contribute to the Universal Service Fund. As discussed below, inmates and their families are often the least able to pay high rates and fees to remain in communication during incarceration, and, as a recent study noted, "people in prison and jail are disproportionately poor compared to the overall U.S. population."<sup>13</sup>

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<sup>10</sup> *Rates for Interstate Inmate Calling Services*, Second Report and Order, 30 FCC Rcd 12,763 (2015) (*Second ICS Order*).

<sup>11</sup> See 47 C.F.R. 64.6000(b) (2019) ("Authorized Fee is a government authorized, but discretionary, fee which a Provider must remit to a federal, state, or local government, and which a Provider is permitted, but not required, to pass through to Consumers. An Authorized Fee may not include a markup, unless the markup is specifically authorized by a federal, state, or local statute, rule, or regulation."); See also 47 C.F.R. § 64.6070(a) (2019) ("No Provider shall charge any taxes or fees to users of Inmate Calling Services, other than those permitted under §64.6020, Mandatory Taxes, Mandatory Fees, or Authorized Fees.").

<sup>12</sup> *Global Tel\*Link v. F.C.C.*, 866 F.3d 397 (D.C. Cir. 2017).

<sup>13</sup> See *Mass Incarceration: The Whole Pie 2019*, dated March 19, 2019 ([www.prisonpolicy.org/reports/pie2019.html](http://www.prisonpolicy.org/reports/pie2019.html)) (citing its earlier studies of the pre-incarceration incomes of those imprisoned in state prisons is 41% less than non-incarcerated people of similar ages, and that people in jail have a median annual income that is 54% less than non-incarcerated people of similar ages.).

Universal Service Fund programs were established to ensure the availability of “accessible, affordable, and pervasive high-speed connectivity.” To require inmates and their families to pay an additional 24.4% fee on each completed interstate and international call undermines the Universal Service goals contained in Section 254 of the Act and does not serve the public interest. By eliminating the obligation imposed on ICS providers to pay into the Universal Service Fund, inmates and their families will no longer be subject to the fee. Finally, the requested relief will have a *de minimis* effect on USF contribution levels and the USF fund.

## II. FORBEARANCE STANDARD

Section 10(a) of the Act establishes the standard by which the FCC is to review petitions for forbearance.<sup>14</sup> In particular, the FCC is directed to forbear from applying any regulation or provision of the Act if the petitioner can demonstrate that:

- a) Enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
- b) Enforcement of such regulation or provision is not necessary for the protection of consumers; and
- c) Forbearance from applying such provision or regulation is consistent with the public interest.

Previously, the FCC has favorably reviewed petitions for forbearance that would eliminate certain classes of telecommunications services from USF contribution requirements.

In particular, the FCC granted a petition for forbearance from the application of Section 254(d) of the Act, and Section 54.706 of the FCC’s rules, filed by NTCA and U.S. Telecom Association to eliminate the obligation of rural incumbent local exchanges carriers to make USF

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<sup>14</sup> 47 U.S.C. §160(a).



contributions in connection with their broadband Internet access transmission services.<sup>15</sup> In that case, the FCC concluded that the USF contributions did not serve a consumer protection purpose and that the contributions collected by the rural incumbent local exchange carriers were *de minimis* in comparison to the total USF fund contributions.<sup>16</sup> The FCC has also favorably acted upon petitions for forbearance where it was shown that the requested forbearance would reduce consumer rates and “ensure that rates are just, reasonable and non-discriminatory.”<sup>17</sup>

### III. THE PETITION SATISFIES THE FORBEARANCE STANDARDS

In 2015, the FCC determined that the inmate calling service “is a prime example of market failure” that is “characterized by increasing rates, with no competitive pressures to reduce rates.”<sup>18</sup> In adopting the Second Report and Order, the FCC permitted ICS providers to pass through the USF contributions to ICS customers as an Authorized Fee.<sup>19</sup>

As discussed below, a grant of the instant Petition will lead directly to the reduction of the cost of interstate and international ICS calls for inmates and their families, will eliminate administrative costs for ICS providers, and will not impair the Universal Service Fund goals.

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<sup>15</sup> *Petition of NTCA-The Rural Broadband Association and the United States Telecom Association for Forbearance Pursuant to 47 U.S.C. § 160(c) from Application of Contribution Obligations on Broadband Internet Access Transmission Services*, Order, 33 FCC Rcd 5719 (2018) (*NTCA Petition*).

<sup>16</sup> *Id.* at ¶¶ 13, 16.

<sup>17</sup> *Telecommunications Carriers Eligible for Universal Service Support (Cricket and NTCH Petitions for Forbearance)*, Order, 26 FCC Rcd. 13,723, 13,728 (2011).

<sup>18</sup> *Second ICS Order*, 30 FCC Rcd at 12,765.

<sup>19</sup> *Id.* at 12,770. *See also* 47 C.F.R. §§ 64.6000(b), 64.6070(a) (2019).

**A. Grant of the Petition Will Help Ensure that Inmate Calling Service Rates Are Just, Reasonable And Not Discriminatory.**

When the FCC adopted the First Report and Order in WC Docket 12-375, it imposed an interim interstate ICS cap of \$0.21 per minute for debit and prepaid calls, and \$0.25 per minute for collect calls.<sup>20</sup> However, ICS providers are both (i) required to contribute to the USF programs, and (ii) permitted to pass this contribution on to its customers.

Thus, while a fifteen minute debit or prepaid interstate ICS call is capped at \$3.15, ICS consumers will be paying an additional \$0.76 in the 3<sup>rd</sup> quarter of 2019 as a result of the pass through of the USF fee for interstate ICS calls.<sup>21</sup> As the interim cap only applies to interstate ICS calls, the 24.4% fee that is passed through for international ICS calls is most certainly much higher.<sup>22</sup>

On the other hand, eliminating the USF fee for interstate and international ICS calls will lead to reduced rates for nearly a fifth of all ICS calls.<sup>23</sup> In NCIC's experience, most customers have a fixed amount to spend on ICS calls each month, usually no more than \$75.00.<sup>24</sup> Should the FCC grant the instant petition, more of customer's limited resources could be spent on communicating with inmates, rather than paying into the USF fund.

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<sup>20</sup> *Rates for Interstate Inmate Calling Services*, Report and Order, 28 FCC Rcd 14,107, 14,111 (2013) (*First ICS Order*).

<sup>21</sup> The USF fee would be \$0.91 for a 15 minute collect call.

<sup>22</sup> *Second ICS Order*, 30 FCC Rcd at 12,911 ("some international rates from county correctional institutions [are] set as high as \$17.85 to \$45 for a 15-minute call.").

<sup>23</sup> *Second ICS Order*, 30 FCC Rcd at 12,768 (estimating that 80% of ICS calls are intrastate, with the remaining being either interstate or international calls).

<sup>24</sup> *See also Workshop on Further Reform of Inmate Calling Services*, Testimony of Vincent Townsend, President, Pay-Tel Communications, Inc., at pg. 138. *See also First ICS Order*, Statement of Acting Chairwoman Mignon Clyburn, pg. 2.

Moreover, ICS providers incur administrative costs in collecting USF fees from inmates and their families and forwarding them to USAC. Because most, if not all, ICS providers provide only ICS to the public, the elimination of the obligation to collect and remit USF fees will also lead to the reduction in the ICS providers' cost of providing ICS to the public.

Based on these considerations, a grant of the instant petition will satisfy the first forbearance standard by reducing interstate and international ICS rates to a more just and reasonable level. Also, by reducing the amount that inmates and their families pay, the FCC will be taking significant steps to ensure that ICS rates are not unjustly or unreasonably discriminatory when compared with competitive telecommunications services available to the general public.

**B. Forbearance Is Necessary For The Protection Of Consumers.**

As noted above, ICS consumers already pay higher rates than those paid for non-ICS competitive telecommunications services. The imposition of the USF fee on interstate and international ICS rates has the effect of further increasing the cost of ICS calls, which Commissioner Michael O'Rielly recently concluded was 'like a tax on consumer phone bills.'<sup>25</sup>

Compounding the impact of this tax is the fact that inmates and their families are among the least able to pay these additional costs and are the very same individuals that are expected to benefit from USF programs. The USF Lifeline program provides subsidized broadband service for low income individuals and families. Eligibility for the program is pegged to the federal poverty guidelines, so that an individual would be eligible if she had an annual income of no more

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<sup>25</sup> *A Need USF Budgetary Cap*, Commissioner Michael O'Rielly, April 2, 2019 (<https://www.fcc.gov/news-events/blog/2019/04/02/needed-usf-budgetary-cap>)

than \$16,862, and a household of four would be eligible if their combined annual income is no more than \$34,763, or if the household participates in government programs such as Supplemental Nutrition Assistance Program or Medicaid.<sup>26</sup>

It is unquestionable that incarceration falls most heavily on those with low incomes. Moreover, when one parent is incarcerated, the absence of one parent's salary is even more extreme. A recent study by the Brookings Institute showed that nearly half of the men in prison came from families with household annual earnings of \$33,000 or less, and that "between 40 and 50 percent of the prison population grew up in families in the bottom quintile [less than \$14,000 annual income] of the income distribution."<sup>27</sup> The impact of incarceration is greatest on families, which experience, on average, a 22 percent reduction in family income when the father is incarcerated.<sup>28</sup>

Another study, led by the Ella Baker Center for Human Rights, conducted a nationwide survey of the impact of incarceration on the families of inmates.<sup>29</sup> According to the *Baker Center Study*, 80% of incarcerated individuals came from low-income backgrounds, and 65% of families with an incarcerated member were unable to meet their family's basic needs.<sup>30</sup> In fact, "[f]orty-nine percent struggled with meeting basic food needs and 48% had trouble meeting basic housing

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<sup>26</sup> See *Federal Poverty Guidelines* (<https://www.lifelinesupport.org/ls/do-i-qualify/federal-poverty-guidelines.aspx>). See also *How to Prove Participation* (<https://www.lifelinesupport.org/ls/do-i-qualify/how-to-prove-participation.aspx>).

<sup>27</sup> See Looney, Adam and Nicholas Turner, *Work and Opportunity Before and After Incarceration*, The Brookings Institution, March 2018, pg. 13.

<sup>28</sup> See The Annie E. Casey Foundation, *Children of Incarcerated Parents, a Shared Sentence*, April 18, 2016, pg. 3.

<sup>29</sup> See Ella Baker Center for Human Rights, et. al., *Who Pays? The True Cost of Incarceration on Families*, September 2015 ("Baker Center Study") (<http://whopaysreport.org/who-pays-full-report/>).

<sup>30</sup> See *Baker Center Study*, pg. 7.

needs because of the financial costs of having an incarcerated loved one.”<sup>31</sup> Further, while countless studies have demonstrated the importance of maintaining consistent contact between inmates and their families, the *Baker Center Study* found that “more than one in three (34%) families [go] into debt to pay for phone calls and visits” with incarcerated family members.<sup>32</sup>

Therefore, the pass-through of USF fees on interstate and international ICS calls to already-suffering ICS consumers most certainly leads to the absurd result that inmates and families are actually funding the programs that were established to provide them with financial assistance.<sup>33</sup> As such, the elimination of the USF fee on interstate and international ICS calls would actually provide *more* protection to consumers and satisfy the second forbearance standard.

### **C. Forbearance Will Best Serve The Public Interest**

It is clear, therefore, that the requested forbearance of USF contributions for interstate and international ICS calls would lead to more just and reasonable rates, and that such action would lead to greater protection of ICS consumers. Both are vital public interest goals which are also embedded in the mission of the USF programs.

Just as important as ensuring that the FCC satisfy these goals is that the requested forbearance will have a *de minimis* impact on USF revenues. The budget for all four USF

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<sup>31</sup> See *Baker Center Study*, pgs. 7-9.

<sup>32</sup> See *Baker Center Study*, pg. 31 (citing *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, Washington, DC: The National Academies Press, 2014, 262, 338).

<sup>33</sup> See *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1898) (“a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers...If a literal construction of the words be absurd, the Act must be construed to avoid the absurdity.”).

programs in 2018 was \$11.42 billion.<sup>34</sup> The budget projections for the next five years place the total budget in 2023 as \$12.67 billion.<sup>35</sup>

Previously, the FCC collected comprehensive, but confidential, information from ICS carriers with regard to the revenue generated from interstate and international ICS calls. It has been estimated that ICS providers earn annual revenues of approximately \$1.2 billion a year.<sup>36</sup> Assuming that interstate and international ICS calls comprise roughly 20% of all ICS calls, then the total revenue earned on interstate and international ICS calls is approximately \$240 million.

Therefore, based on the current contribution factor of 24.4%, the amount collected from interstate and international ICS calls will be roughly \$58 million in the 3<sup>rd</sup> quarter of 2019. This amount represents only 0.5% of the USF 2018 budget. Notably, the instant request, if granted, would be less than what the FCC previously found to be *de minimis*. Specifically, when reviewing the NTCA/US Telecom petition for forbearance, the FCC concluded that the reduction in the contribution budget of less than 1% was *de minimis*, and that:

any lost contribution revenues will minimally impact the fund...[and]...the potential benefits of forbearing from assessing these services – including a more level playing field and decreased costs for consumers – outweigh the minimal additional funding base.<sup>37</sup>

Moreover, as demonstrated in Appendix B, should the FCC grant the instant petition, the loss of ICS USF contributions would lead to a difference in the contribution factor of only .15%, which

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<sup>34</sup> See *Universal Service Contribution Methodology*, Notice of Proposed Rulemaking, FCC 19-46, ¶ 9 (2019).

<sup>35</sup> *Id.*, at ¶ 11.

<sup>36</sup> Todd Shields, *Prison Phones Prove Captive Market for Private Equity*, Bloomberg BusinessWeek (October 4, 2012). This figure likely includes revenue earned from ancillary fees as well.

<sup>37</sup> See *NTCA Petition*, 33 FCC Rcd at 5716.

also is similar to the modified contribution factor previously approved in the NTCA/US Telecom petition.<sup>38</sup>

A similar finding should be reached with regard to the exclusion of revenues from interstate and international ICS calls. The USF contribution obligations imposed on ICS providers pursuant to Section 254(d) of the Act and Section 54.706 of the FCC's rules leads to absurd results, especially when it has been shown that the impact on the USF budget will be *de minimis*. By eliminating the obligation imposed on ICS providers to pay into the Universal Service Fund, inmates and their families will no longer be subject to the fee for interstate and international USF calls. Thus, the exercise of forbearance would serve the public interest and not undermine the goals of the USF programs.

#### IV. CONCLUSION

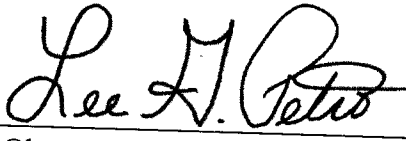
For the foregoing reasons, Network Communications International Corporation respectfully requests that the FCC grant forbearance from USF contribution obligations pursuant to Section 254(d) of the Act and Section 54.706 of its rules for all interstate and international Inmate Calling Service calls provided by Inmate Calling Service Providers pursuant to Section 64.6000(j) of the FCC's rules.

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<sup>38</sup> See Appendix B. To the extent that the estimated ICS revenue combines revenue earned from ICS calls and ancillary fees, then the impact on the USF contribution would be even smaller. See also *NTCA Petition*, 33 FCC Rcd at 5716, nt. 29.

Respectfully submitted,

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## APPENDIX A

### Summary Statement of Scope of Relief Requested and Other Information Required Pursuant to 47 C.F.R. §§ 1.54(a) and (e)

Network Communications International Corporation ("NCIC") respectfully requests that the Federal Communications Commission grant targeted forbearance for all Inmate Calling Service Providers from USF contribution obligations pursuant to Section 254(d) of the Act and Section 54.706 of its rules. For purposes of further clarification:

- 47 C.F.R. § 1.54(a)(1) – Forbearance is sought with respect to 47 U.S.C. ¶254(d) and 47 C.F.R. 54.706;
- 47 C.F.R. § 1.54(a)(2) – Forbearance is sought for all Inmate Calling Service Providers, as defined by 47 C.F.R. § 64.6000(s);
- 47 C.F.R. § 1.54(a)(3) – Forbearance is sought with respect to all interstate and international Inmate Calling Service communications, as defined by 47 C.F.R. §§ 64.6000(j) and 64.6000(l);
- 47 C.F.R. § 1.54(a)(4) – Forbearance is sought within all regions across the United States, its territories, and internationally;

NCIC has not, in a pending proceeding, requested or otherwise taken a position on the relief sought in the Petition.

No party to this Petition is subject to denial of federal benefits pursuant to Section 5301 of the Anti-Drug Abuse Act of 1998, 21 U.S.C. Section 862.

## **APPENDIX B**

### **All Supporting Data Upon Which the Petition Relies**

This Petition relies on the FCC rules, prior orders and public notices, and reports referenced in the Petition.

For purposes of the estimate provided in Section III.C of the Petition with respect to the impact of forbearance relief on the USF contribution factor and other contributors – the 0.15% increase in the contribution factor – NCIC performed the following multi-step calculation:

1. The estimated revenue earned in the Inmate Calling Service is approximately \$1.2 billion;
2. Interstate and international ICS call volume is approximately 20% of all ICS calls, or approximately \$240,000,000;
3. The third quarter USF contribution fee is 24.3252%, and the expected contribution from ICS providers is approximately \$58,380,480 (the “ICS Contribution”);
4. The “USF revenue base” for the third quarter of 2019 is \$11,483,305,614;
5. Subtracting the ICS Contribution revenue estimate of \$58,380,480 as noted in Step 3 from the revenue base identified in Step 4 would yield a revised third quarter 2019 base of \$11,424,925,134.
6. If a revised third quarter 2019 revenue base of \$11,424,925,134 (see Step 5) was substituted for the original figure of \$11,483,305,614 (see Step 4), this would yield a contribution factor of 24.4796% - an estimated increase of 0.15%.

This is only an estimate using publicly available data with regard to (i) total ICS revenue and (ii) interstate and international ICS call volume. However, the estimate derived in terms of the contribution factor impact is likely lower because a portion of the overall ICS market revenue figure also includes Ancillary Service Charges, as defined by Section 64.6020 of the FCC’s rules, which are not subject to the USF Contribution. Therefore, it is likely that the \$240,000,000 figure reflected in Step 2 above will be lower if Ancillary Service Charges are not included.

## **APPENDIX C**

### **Supporting Statements or Affidavits**

Not applicable given limited scope of Forbearance requested.