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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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In the Matter of:)
Federal-State Joint Board on) CC Docket No. 96-45
Universal Service)

**PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION
PETITION FOR PARTIAL RECONSIDERATION AND CLARIFICATION**

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The Personal Communications Industry Association ("PCIA")¹ hereby petitions the Commission for reconsideration of the *Report and Order* in the above-captioned proceeding.² Specifically, PCIA requests the Commission to reconsider its decision to require messaging providers to contribute in full to the federal universal service fund, despite the fact they cannot receive any universal service support monies. In addition, PCIA seeks clarification that, under the rules regarding the basis for assessment of universal service contributions, any carriers that choose to pass through the costs of contribution to their customers should not include the

¹ PCIA is the international trade association created to represent the interests of both the commercial and the private mobile radio service communications industries. PCIA's Federation of Councils includes: the Paging and Narrowband PCS Alliance, the Broadband PCS Alliance, the Specialized Mobile Radio Alliance, the Site Owners and Managers Association, the Association of Wireless System Integrators, the Association of Communications Technicians, and the Private Systems Users Alliance. In addition, as the FCC-appointed frequency coordinator for the 450-512 MHz bands in the Business Radio Service, the 800 and 900 MHz Business Pools, the 800 MHz General Category frequencies for Business Eligibles and conventional SMR systems, and the 929 MHz paging frequencies, PCIA represents and serves the interests of tens of thousands of licensees.

² FCC 97-157 (May 8, 1997) ("*Report and Order*"). The *Report and Order* was published in the Federal Register on June 17, 1997, 62 Fed. Reg. 32862.

recovery of such costs in their end user telecommunications revenues for purposes of calculating their contribution obligations.

I. INTRODUCTION AND SUMMARY

On May 8, 1997, the Commission released the *Report and Order* promulgating the final rules implementing the universal service provisions of Section 254 of the Communications Act of 1934, as amended.³ The rules enacted by the Commission “reflect[ed] virtually all of the Joint Board's recommendations,” and were intended to “establish support mechanisms to ensure the delivery of affordable telecommunications service to all Americans . . .”⁴

First, although PCIA endorses Section 254's overall goal of providing all Americans with access to affordable telecommunications service, it is essential that the Commission reconsider its decision to require paging carriers to contribute to the federal universal service fund on the same basis as “eligible telecommunications carriers.” Contrary to the command of Section 254(d), it is neither “equitable” nor “non-discriminatory” to require messaging providers to contribute on the same basis as all other telecommunications carriers to the universal service fund. Because paging carriers are technically incapable of providing all of the “core” services that constitute universal service, they are ineligible to draw from the fund. Thus, it is inequitable to require paging carriers to contribute the same percentage of their retail revenues to this fund as is contributed by other telecommunications carriers.

³ 47 U.S.C. § 254.

⁴ *Report and Order*, ¶ 1.

The Commission's proposed funding mechanism is also discriminatory, as paging carriers will be indirectly subsidizing any competitors that bundle landline and other services — which are eligible for universal service monies — with messaging services. As the drafters of Section 254 have made clear in their letters to the Commission,⁵ the creation of such competitive distortions is clearly contrary to their intentions.

Second, PCIA requests the Commission to clarify that funds collected from customers as a pass through of a carrier's required universal service support contribution are not to be included in the amount of end user telecommunications revenues used to calculate the carrier's required contribution. To reach a contrary conclusion would result in an unacceptable double recovery and would be inconsistent with the Commission's treatment of universal service support payments received by a carrier. Grant of the requested clarification instead would promote achievement of the Section 254 equitable and non-discriminatory funding mechanism requirements.

⁵ See, e.g., Letter from Senator Trent Lott to Reed Hundt, Chairman of the Federal Communications Commission (April 25, 1997); Letter from Congressman Billy Tauzin to Reed Hundt, Chairman of the Federal Communications Commission (April 30, 1997); Letter from Senator John McCain and Senator Conrad Burns to Reed Hundt, Chairman of the Federal Communications Commission (May 1, 1997).

II. CONTRARY TO THE COMMISSION'S ACTION, IT IS NEITHER “EQUITABLE” NOR “NON-DISCRIMINATORY” TO REQUIRE MESSAGING PROVIDERS TO CONTRIBUTE IN FULL TO THE UNIVERSAL SERVICE FUND

The Commission determined that “all telecommunications carriers that provide interstate telecommunications services ... must contribute to universal service support.”⁶ In coming to this conclusion, the Commission rejected the argument that contributions to the universal service fund should only be assessed against telecommunications carriers that are eligible to receive universal service funding. The Commission stated that “Congress required all telecommunications carriers to contribute to universal service support mechanisms but provided that only 'eligible' carriers should receive support, and gave no discretion to the Commission to establish preferential treatment for carriers that are ineligible for support.”⁷

The Commission's determination ignores the plain meaning of Section 254(d) of the Communications Act of 1934, as amended, which states that “[e]very telecommunications carrier that provides interstate telecommunications services shall contribute, on an *equitable and non-discriminatory* basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service.”⁸ Because courts have made clear that “[t]he plain meaning of legislation should be conclusive, except ‘in the rare cases [in which] the literal application of the statute will produce a result demonstrably at odds with the intention of

⁶ *Report and Order*, ¶ 772.

⁷ *Id.*, ¶ 804.

⁸ 47 U.S.C. § 254(d) (emphasis added).

its drafters,”⁹ the Commission must reconsider its decision. The “equitable and non-discriminatory” clause of Section 254(d) on its face provides the Commission with the discretion to take into account unique factors — such as eligibility to receive universal service support funds — when determining the contribution levels of particular classes of telecommunications carriers. The Commission has provided no explanation why this interpretation is not clearly proper.

Applying the statutory standard to paging carriers makes clear that such service providers should be granted at least partial relief from contributing to the universal service fund at the same rate as entities potentially capable of receiving support funds. An appropriate place to begin in interpreting the statutory test is with the plain meaning of the terms “equitable and non-discriminatory.” The dictionary defines “equitable” as “just and fair,”¹⁰ and the Commission has recognized “[e]quitable’ does not mean ‘equal.’”¹¹ “Non-discriminatory” is defined as neither “displaying [n]or marked by prejudice,” and not “biased.”¹² As discussed below, the Commission's contribution scheme is not consistent with either of these criteria.

First, the Commission's proposal is not equitable. Under the Commission's plan, paging carriers will be required to contribute an equal amount — on a percentage basis — of their retail revenues to the universal service fund as all other categories of telecommunications carriers.

⁹ *United States v. Ron Pair Enterprises, Inc.*, 109 S. Ct. 1026, 1031 (1989) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)).

¹⁰ *Webster's II New Riverside University Dictionary* 440 (1988) (“*Webster's*”).

¹¹ *Report and Order*, ¶ 839.

¹² *Webster's* at 385.

Because, however, paging carriers are technically incapable of offering the complete package of core services defined as universal service, they are ineligible to receive any universal service fund disbursements.¹³ Such a situation can hardly be defined as “just and fair.” As the Commission acknowledged in the *Report and Order*, parties must be treated “alike when they participate in the same event.”¹⁴ By their exclusion from universal service support payments, paging carriers do not participate in the same event.

Second, the Commission's proposal is discriminatory. The proposed contribution methodology discriminates against paging carriers by forcing them to subsidize their direct competitors. As more and more telecommunications carriers begin to bundle local, long distance, and other services with wireless voice and messaging services, paging carriers will find themselves in direct competition with these “one stop shopping” packages. These integrated service providers will enjoy an advantage over their paging-only competitors because the paging carriers will be paying into a fund from which only those offering landline or broadband services can draw. Paging companies will not receive fund disbursements, which become available for an eligible recipient's operations. Conversely, carriers receiving support payments will not include such funds when calculating their own contribution obligations.¹⁵ Consequently, paging carriers will pay a higher percentage of the revenue available for operations than carriers who are the recipients of disbursement funds. By forcing paging carriers to subsidize the operations of other

¹³ See 47 U.S.C. §§ 254(e), 214(e)(1).

¹⁴ *Report and Order*, ¶ 839 n.2119, quoting *New Orleans Channel 20, Inc. v. FCC*,

telecommunications carriers, the Commission has designed a cost recovery scheme that is biased against the messaging industry.

The legislative history of Section 254(d) confirms that it is inappropriate to require paging carriers to contribute to a fund from which they cannot recover. According to the Senate Report, the underlying rationale for the “equitable and non-discriminatory” requirement is that “[r]equiring all telecommunications carriers to contribute to universal service will spread the cost over all customers for any telecommunications service and *prevent distortion of competitive forces*.”¹⁶ Should the Commission implement its proposed cost recovery plan, it will in fact distort competitive forces by providing certain categories of direct competitors with a distinct advantage over the messaging industry.

This fact was recognized by two of the Senate conferees on the Telecommunications Act, Senator McCain and Senator Burns. After the Joint Board had issued its recommendations, they wrote a letter to Chairman Hundt taking issue with the manner in which paging carriers were treated by the Joint Board recommendations.¹⁷ Specifically, Senator McCain and Senator Burns informed the Commission that “the fact that paging companies are ineligible to draw from the universal service fund only emphasizes that they are not being treated in an equitable and nondiscriminatory manner.”¹⁸ Another conferee, Senator Lott, added that a “fairness and equity

¹⁶ S. Rep. No. 104-23, at 27-28 (1995) (emphasis added).

¹⁷ See *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 87 (1996) (Recommended Decision).

¹⁸ Letter from Senator John McCain and Senator Conrad Burns to Reed Hundt, Chairman of the Federal Communications Commission (May 1, 1997) at 2.

issue exists,” because “[p]aging providers are ineligible to receive universal service funding despite their annual payment of approximately \$300 million to the fund.”¹⁹

Not only is it inequitable to require paging carriers to contribute to the universal service fund without allowing them to draw on it, but the Commission's actions will have the effect of raising the price of paging services, which currently represent the lowest-priced form of telecommunications. Thus, the Commission's decision might well raise the cost of messaging services beyond a reasonable level of affordability, thereby defeating the Congressionally-mandated purpose of ensuring that services are available at “just, reasonable and affordable rates.”²⁰

Accordingly, in light of the foregoing, the Commission should reduce the percentage amount contributed by paging carriers as compared to other telecommunications providers. In recognition of the fact that *all* telecommunications carriers, including paging companies, receive some benefit from the increased access to telecommunications services fostered by the universal service program, PCIA recommends that the contribution of paging companies be reduced by 50 percent. This would reflect an appropriate balance under the statutory standard.

¹⁹ Letter from Senator Trent Lott to Reed Hundt, Chairman of the Federal Communications Commission (Apr. 25, 1997). *See also* Letter from Congressman Billy Tauzin to Reed Hundt, Chairman of the Federal communications Commission (Apr. 30, 1997).

²⁰ 47 U.S.C. § 254(b)(1).

III. THE COMMISSION SHOULD CLARIFY THAT CARRIERS THAT PASS THROUGH CONTRIBUTION AMOUNTS TO THEIR END USERS SHOULD NOT INCLUDE RECOVERY OF THE CONTRIBUTION AMOUNTS IN CALCULATING THEIR UNIVERSAL SERVICE OBLIGATIONS

In the *Report and Order*, the Commission concluded that contributions to the universal service fund would be based upon end user telecommunications revenues.²¹ The Commission explained that “contributions will be based on revenues derived from end users for telecommunications and telecommunications services, or ‘retail revenues.’”²² PCIA believes that clarification of what constitutes end user telecommunications services is necessary to ensure equitable application of the funding rules. Specifically, PCIA seeks clarification that those carriers that choose to pass through part or all of their universal service contributions to customers²³ should not include the contribution amounts in the assessment base from which their contribution obligations are calculated.

If carriers are required to include such contribution amounts as part of end user telecommunications revenues, there would in effect be a double recovery, which the Commission

²¹ *Report and Order*, ¶ 843.

²² *Id.*, ¶ 844.

²³ *See id.*, ¶ 855.

wisely sought to eliminate elsewhere in its *Report and Order*.²⁴ For example, if a carrier receives \$100 in revenues for flat-rated services from an end user over a given period, and assuming a 10 percent contribution rate, the carrier's contribution would be \$10. If the carrier passes the \$10 through to the customer, the revenues received from the customer (in the next comparable period) would increase to \$110. If the \$10 pass through is considered "end user telecommunications revenues," the contribution would increase to \$11, as an assessment would be included on the recovery of contributions from the customer. PCIA submits that this is a "double recovery" no different than that which would occur if carriers were required to include revenues received from other carriers for wholesale services.

PCIA does not believe that this is the result the Commission intended. Not only did the *Report and Order* explicitly refrain from introducing a similar double recovery by excluding revenues received from other carriers for wholesale services, but the Commission recognized that payments from universal service mechanisms are *not* to be included as end user telecommunications revenues for purposes of calculating contributions.²⁵ Certainly, if payments received by eligible carriers from the fund for providing telecommunications services are excluded, revenues received by carriers that are passing through their contribution obligations to customers, *i.e.*, revenues not for the services rendered to these end users, should not be considered "end user telecommunications revenues" or "retail revenues." Otherwise, the result would be inequitable and discriminatory, in violation of Section 254 of the Act, because the

²⁴ See *id.*, ¶ 845.

²⁵ *Id.*, ¶ 857.

result would favor those carriers that receive support payments that are not to be included in the end user revenues vis-à-vis those that do not receive such payments.

Accordingly, the Commission should clarify that those carriers that choose to pass through their contribution obligations to their customers in the manner prescribed by the *Report and Order*²⁶ should not be required to include recovery of their contribution amounts when calculating their contributions. In the alternative, should the Commission conclude that such clarification is not consistent with the intent of the *Report and Order*, PCIA seeks reconsideration of this issue for the reasons stated above.

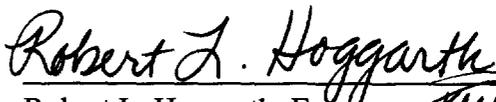
²⁶ *Id.*, ¶ 855.

IV. CONCLUSION

In order to ensure that the universal service program is consistent with the explicit terms of Section 254, the Commission must reconsider the manner in which it has chosen to fund this program. Specifically, the Commission should reduce by 50 percent the amount paging carriers otherwise would be required to contribute to the federal universal service fund. In addition, the Commission should clarify that carriers that pass through the costs of their universal service contribution to their customers should not include such payments in their end user telecommunications revenues for purposes of calculating their contribution requirements.

Respectfully submitted,

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