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

SEP - 3 1997

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

REPLY OF THE PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION ON PETITIONS FOR RECONSIDERATION

The Personal Communications Industry Association ("PCIA") hereby submits its reply to comments on the petitions for reconsideration of the Commission's *Report and Order* in the above-captioned proceeding.[1] The comments fail to rebut the demonstration made by PCIA in its petition for reconsideration[2] that the *Report and Order* should be revised to provide paging providers with an equitable reduction in their contribution obligations. The record further confirms that Section 332(c)(3) is properly interpreted to preempt states, at least at the present time, from requiring commercial mobile radio service ("CMRS") providers from contributing to their universal service funds. The Commission should clarify that any carriers that choose to pass through the costs of contribution to their customers should not include the recovery of such costs in their end user telecommunications revenues for purposes of calculating their contribution

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[1] FCC 97-157 (May 8, 1997) ("*Report and Order*"), *Errata*, FCC 97-157 (June 4, 1997), *Order on Reconsideration*, FCC 87-246 (July 10, 1997), *Erratum*, FCC 97-246 (July 15, 1997). The *Report and Order* was summarized in the Federal Register on June 17, 1997, 62 Fed. Reg. 32862. The petitions for reconsideration were listed in the Federal Register on August 1, 1997, 62 Fed. Reg. 41386. Comments on the petitions were filed on August 18, 1997.

[2] PCIA Petition for Partial Reconsideration and Clarification, CC Dkt. No. 96-45 (filed July 17, 1997) ("PCIA Petition").

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obligations. Finally, the Commission should clarify its Form 457 and the associated instructions, and should be lenient in taking any enforcement action involving the initial submissions in light of the short period of time permitted to prepare the form and the numerous outstanding questions concerning the nature of the responses.

I. CONTRARY TO THE COMMENTS OF A NUMBER OF LANDLINE CARRIERS, THE LANGUAGE OF SECTION 254 *DOES* REQUIRE AN EQUITABLE REDUCTION IN CONTRIBUTIONS FOR PAGING PROVIDERS

In its petition for reconsideration, PCIA demonstrated that, by requiring all telecommunications carriers to contribute *to* the universal service fund, but only allowing "eligible" carriers to draw *from* the fund, the Commission had violated Section 254(d)'s command that contributions be assessed on an "equitable" and "non-discriminatory" basis.[3] The Commission simply ignored the plain meaning of the statute. In fact, the Commission's action is inequitable because it requires paging carriers, which are ineligible to receive universal service funding, to contribute as much, on a percentage basis, as those carriers that are eligible to receive these monies. Further, the proposal is discriminatory because it will force paging operators to subsidize competitors that are able to bundle messaging services with qualifying landline or broadband services. Because this inequitable and discriminatory treatment of paging providers violates both the statutory language and legislative history[4] of Section 254, PCIA recommended that paging providers' contributions be reduced by 50 percent.

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[3] 47 U.S.C. § 254(d).

[4] *See* S. Rep. No. 104-23, at 27-28 (1995) (the purpose of the equitable and non-discriminatory requirement is to "prevent distortion of competitive forces").

A number of landline carriers (both interexchange and local exchange) took issue with PCIA's petition, and claimed that paging providers were not entitled to any reduction in their required contribution level for several erroneous reasons. None of the IXC or LEC arguments, however, withstands close scrutiny. Indeed, in most cases, the arguments are not well-supported and consist only of cursory claims made by the commenting party. Accordingly, none of these claims undercuts the need for and appropriateness of the Commission reducing the amount to be contributed by paging carriers to the universal service fund.

The landline carriers first claim that, because Section 254(d) requires "every telecommunications carrier that provides interstate telecommunications services to contribute" to the universal service fund, paging providers — as "telecommunications carriers" — must contribute.[5] This argument does not read Section 254 in its entirety, contrary to well settled canons of statutory construction.[6] While it is true that Section 254(d) requires "every telecommunications carrier" that provides interstate service to contribute to the universal service fund, the same statutory section *also* requires that these contributions be made on an "equitable and non-discriminatory" basis. Thus, as demonstrated in the PCIA Petition, a reduced contribution rate for paging providers — which are ineligible to receive universal service funds — is completely consistent with the *entirety* of Section 254(d).

Second, the landline carriers erroneously assert that, because "most telecommunications providers are able to pass through their contributions to their customers," there is no need to

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[5] Sprint Corporation Comments at 8-9; United States Telephone Ass'n ("USTA") Opposition at 4-5; MCI Opposition at 17.

[6] Courts "are to construe statutes, where possible, so that no provision is rendered inoperative or superfluous, void or insignificant." *Mail Order Ass'n of America v. United States Postal Service*, 986 F.2d 509, 515 (D.C. Cir. 1993) (citations omitted).

reduce the contribution requirement for any one type of provider.[7] This argument is factually incorrect and fails to recognize the characteristics of the paging marketplace. Paging providers do not enjoy a particularly inelastic demand curve. An increase in service rates, even if reflected in a separate surcharge, will lead some customers to discontinue service.[8] For many customers, the increase will raise the cost of paging beyond a reasonable level of affordability. In this regard, paging carriers face pricing considerations very distinct from those affecting landline carriers.

Third, landline carriers claim that "the Commission's rules are fair in that the same measure is used to assess the contributions of all contributors."[9] This argument examines "fairness" through a very narrow prism. In fact, it is not "fair" to assess the same percentage of each carrier's retail revenues to support universal service, and then give eligible landline carriers a rebate in the form of universal service subsidies, while foreclosing the ability of paging providers to receive such subsidies. To the contrary, such a scheme is extremely unfair in that it discriminates against paging providers while effectively forcing them to subsidize the operations of eligible landline carriers.

Fourth, one local exchange carrier alleges that exempting paging providers from universal service contribution requirements would skew the competitive marketplace because the exemption would permit contribution obligations to affect business decisions.[10] This claim

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7 USTA Opposition at 5.

8 *See* Arch Comments at 2 ("paging companies do not have the unfettered ability to assess what amounts to a rate increase on customers without creating the potential for a down-turn in demand").

9 Rural Telephone Coalition Opposition at 7.

10 Bell Atlantic Opposition at 9.

ignores PCIA's showing that *failure* to grant a reduction will produce competitive imbalances that are not consistent with congressional intent. This party provides no evidence to demonstrate how granting the requested reduction for paging carriers would distort competitive forces.

Finally, according to one interexchange carrier, if paging providers receive a reduction in their contribution levels based on their ineligibility to receive universal service subsidies, then so too should interexchange carriers that "choose not to enter the local service market."[11] There is no merit to this argument, which attempts to equate paging providers with interexchange carriers for the purposes of universal service contributions. This analogy is fundamentally flawed because paging carriers, by virtue of the services they offer and the Commission's definition of supported services, are technologically incapable of offering the "core" services required of eligible carriers. The services provided by interexchange carriers do not face the same inherent limitations, so interexchange carriers may readily render themselves the recipients of universal service support funds. In contrast, paging providers, unlike interexchange carriers, will never be eligible to receive universal service funding under the existing Commission definitions.

II. MANY COMMENTERS CORRECTLY NOTED THAT SECTION 332(c)(3) BARS THE STATES FROM REQUIRING CMRS PROVIDERS TO CONTRIBUTE TO THEIR UNIVERSAL SERVICE FUNDS EXCEPT UNDER NARROW CIRCUMSTANCES

In its comments on the petitions for reconsideration in this proceeding, PCIA concurred with those petitioners that argued that requiring CMRS providers to contribute to state universal service funds is inconsistent with the statutory language of Section 332(c)(3), which exempts CMRS providers from such assessments until CMRS is "a substitute for land line telephone

[11] AT&T Opposition at 21.

exchange service for a substantial portion of the communications within such state."[12] At present, CMRS is not such a landline substitute in any state, and thus cannot be subject to mandatory state universal service contribution requirements. PCIA noted that, because neither Section 254 nor any other portion of the 1996 Act expressed any intent to repeal Section 332(c)(3), this section remains in full force. This principle was endorsed by a Connecticut state court, which determined, based on Section 332(c)(3), that cellular providers are currently exempt from contributing to Connecticut's universal service fund.[13] Thus, states are preempted from requiring CMRS providers to contribute to their universal service funds at this time and the Commission must exercise its discretion to clarify this preemption.

Several other commenting parties also agreed with PCIA and the petitioners regarding the lack of state authority. As pointed out by 360° Communications Company, allowing states to impose contribution requirements is inconsistent with Section 332(c)(3)(A), which creates a federal regulatory framework for CMRS, and therefore envisions CMRS operators being required to contribute only through a unitary federal support system.[14] Similarly, AMSC Subsidiary Corporation echoed PCIA's argument that, under the statute, a state can only impose universal service contribution requirements on CMRS providers if CMRS has become "'a substitute for land line telephone exchange service for a substantial portion of the communications within such state.'"[15] Finally, American Mobile Telecommunications

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12 47 U.S.C. § 332(c)(3)(A).

13 Metro Mobile CTS of Fairfield County v. Connecticut Department of Public Utility Control, No. CV-95-0551275S (Conn. Super. Ct. Dec. 9, 1996) ("Metro Mobile CTS").

14 360° Communications Company Comments at 3-7.

15 AMSC Subsidiary Corporation Comments at 3-4 (quoting 47 U.S.C. § 332(c)(3)(A)).

Association, Inc. ("AMTA") agreed that Section 332(c)(3) supports a determination that wireless services should be subject only to federal universal service requirements.[16]

III. UNIVERSAL SERVICE CONTRIBUTIONS THAT ARE PASSED THROUGH TO CUSTOMERS SHOULD NOT BE COUNTED AS END USER REVENUES FOR THE PURPOSE OF CALCULATING THE CARRIER'S ASSESSMENT

In its petition for reconsideration, PCIA asked the Commission to clarify that carriers that choose to pass their universal service assessments through to their retail customers are not required to contribute to the universal service fund on the basis of these passed through assessments. For example, if a carrier is assessed a 10 percent contribution on 100 dollars of retail revenue, the "pass-through" carrier will send its customer a bill for 110 dollars — 100 dollars for the service, and 10 dollars for the universal service fund contribution. To avoid double counting, PCIA reiterates its request that the Commission assess universal service fees only on the 100 dollars, *not* the 110 dollars of retail revenue.

The avoidance of such double recovery is not only equitable, in accordance with Section 254(d), but is consistent with the policies set forth in the *Report and Order* in this proceeding. Specifically, the Commission has already avoided one such double recovery problem by determining that the universal service subsidies received by eligible carriers are not end user revenues for the purpose of calculating universal service contributions.[17] Reasoning by analogy, the Commission should allow carriers that pass through their universal service contributions to exclude such receipts in calculating their universal service assessments.

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[16] AMTA Comments at 5-6.

[17] *Report and Order*, ¶ 857.

IV. THE COMMISSION MUST CLARIFY FORM 457 AND THE ASSOCIATED INSTRUCTIONS

Recent questions from PCIA's members seeking help in preparing the Form 457 as well as discussions with the Commission's staff have confirmed PCIA's view that Form 457 and the related instructions do not adequately take into account the issues facing wireless providers (and perhaps other contributors as well). PCIA accordingly urges the Commission to be lenient, at least this first year, in reviewing compliance with the form's requirements so long as the entity submitting the form has attempted to prepare its response in good faith.

Members of the telecommunications industry saw for the first time a full draft of the Form 457 when it was released on July 18, 1997[18] — the day *after* petitions for reconsideration in this docket had to be filed. A short time later, the Commission announced that the Form 457 had been approved by the Office of Management and Budget, and that the forms were to be completed by September 1, 1997.[19] While the Commission provided a modicum of additional guidance on August 15, 1997, in indicating that, at least on an interim basis, "contributors that cannot derive interstate revenues from their books of account or cannot derive the line-by-line revenue breakdowns from their books of account may provide on the Worksheet good faith estimates of these figures,"[20] many more issues remain unresolved with any degree of certainty. This was confirmed in a meeting arranged by PCIA on August 29, 1997, with members of the

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[18] *Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, FCC 97-253, ¶ 80 & App. C (July 18, 1997) (Report and Order and Second Order on Reconsideration).

[19] FCC Public Notice, *FCC Announces Release of Universal Service Worksheet, FCC Form 457* (Aug. 4, 1997).

[20] *Changes to the Board of Directors of the National Exchange Carriers Association, Inc.*, FCC 97-292, ¶ 21 (Aug. 15, 1997) (Order on Reconsideration, Second Report and Order, and Further Notice of Proposed Rulemaking).

Common Carrier and Wireless Telecommunications Bureaus, where numerous questions concerning the preparation of the Form 457 were raised.[21]

While the staff members participating in the meeting provided the best guidance they could, even they admitted that their interpretations were not binding on the Commission. In addition, it was apparent that some of the concerns raised by representatives of the wireless industry had not necessarily been taken into account in formulating the Form 457. As a result, many industry members who had hoped to achieve a better understanding of the form left with even less confidence after the meeting that they or the FCC had a full and complete understanding of individual licensees' legal obligations in preparing and filing the form.

Despite the numerous questions and concerns voiced throughout the telecommunications industry, the Commission declined to grant any extensions of the September filing date that would permit the Commission to provide greater guidance in preparing the Form 457.[22] The Commission staff also made clear at the August 29, 1997 meeting that the filing deadline was firm and would not be extended. The Commission's statements and actions thus deterred other parties from even requesting an extension of time.

In light of the remarkably short time frame available for entities to review, understand, and prepare the Form 457 for the first time, as well as the scope of questions that remain outstanding, PCIA urges the Commission to recognize the good faith efforts of entities in

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[21] At this meeting, the staff indicated that the filing would be the appropriate vehicle for commenting on Form 457.

[22] *See Changes to the Board of Directors of the National Exchange Carriers Association, Inc.*, FCC 97-292, ¶ 32; *see also Federal State Joint Board on Universal Service*, DA 97-1847, ¶ 2 (Aug. 27, 1997) ("In order to meet the tight implementation schedule, Worksheets must be filed in a timely manner.").

preparing the form in the event that the Commission subsequently determines that forms have been incorrectly completed. The circumstances surrounding this initial filing of the form should be treated with some leniency by the Commission.

V. CONCLUSION

Consistent with the record in this proceeding and its statutory mandate, the Commission should modify its universal service program in the aforementioned manner. Such action will result in a program that better serves the public interest and more effectively meets the statutory objectives.

Respectfully submitted,

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September 3, 1997

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