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

In the Matter of	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
1998 Biennial Regulatory Review - Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms	)	CC Docket No. 98-171
	)	
Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990	)	CC Docket No. 90-571
	)	
Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size	)	CC Docket No. 92-237 NSD File No. L-00-72
	)	
Number Resource Optimization	)	CC Docket No. 99-200
	)	
Telephone Number Portability	)	CC Docket No. 95-116

REPLY COMMENTS OF AOL TIME WARNER, INC.

Steven N. Teplitz
Vice President, Communications Policy
& Regulatory Affairs
AOL Time Warner, Inc.
1101 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20036

Donna N. Lampert
Mark J. O'Connor
Lampert & O'Connor, P.C.
1750 K Street, N.W.
Suite 600
Washington, D.C. 20006

Date: July 9, 2001

Introduction and Summary

In this Reply, AOL Time Warner Inc., by its attorneys, files these reply comments in the above-captioned rulemaking proceeding designed to reform the current universal service fund ("USF") collection mechanism and carrier practices regarding pass-through of the costs of USF onto the carrier's customers.[1] AOL Time Warner applauds the FCC for undertaking the difficult but necessary review of proposals that may be needed to effectuate better the statutory goals of a USF that is "equitable and nondiscriminatory" as well as "specific" and "predictable."

AOL Time Warner addresses the following three points:

- Carrier pass-through of USF obligations must be nondiscriminatory, and not used to force the carrier's competitors to pay an unreasonable share of the USF burden. Toward this end, carriers choosing to pass-through their USF costs onto end-user customers should be permitted to charge a rate no higher than the FCC's current USF carrier contribution rate.

- Any USF reforms must avoid the potential pitfall of USF "rate shock." While reform may be in the public interest, dramatic, flash-cut changes in the USF could impact a myriad of business and consumer expectations. Any FCC's transition process must allow for affected parties to understand and plan for proposed changes to their telecommunications costs brought on by USF reform.

- The statutory classification of cable modem and IP telephony service providers are beyond the scope of this already complex proceeding. Further, the FCC has already designated a process for resolution of those difficult issues of first impression, with due regard for the public interest considerations relevant and unique to each. It is unnecessary and inappropriate to consider them here.

[1] *See In the Matter of Federal-State Joint Board on Universal Service*, Notice of Proposed Rulemaking, CC Docket No. 96-45, FCC 01-145 (rel. May 8, 2001) ("NPRM").

Discussion

I. Pass-Through Rates Should Be No Higher Than The Current USF Contribution Factor and Assessed in a Nondiscriminatory Manner

AOL Time Warner believes that the Commission should ensure that USF "pass-throughs" are not used as a ruse to charge customers effectively higher rates or to discriminate against certain services, customers, or class of customers. As the Commission and many commenters have pointed out, the USF pass-through practices of some carriers have raised considerable concerns of overcharging consumers and businesses. While the Commission has made clear that the Communications Act ("Act") permits carriers to pass-through reasonable, nondiscriminatory and equitable charges reflecting carrier costs,[2] and that carrier bills must accurately describe the USF pass-through,[3] some carriers are charging a pass-through rate that is significantly more than the actual FCC USF contribution factor for the same time period.[4] AOL Time Warner acknowledges that some carriers may have a legitimate justification, under the FCC's current collection scheme, to assess above-factor pass-through rates. However, the fact is that today, it is nearly impossible for end users to know whether carriers with high pass-through rates are simply engaging in price gauging.

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[2] *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd. 8776, 9199, 9211 (1997) ("USF Report and Order").

[3] *Truth-In-Billing and Billing Format*, First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd. 7492, ¶ 50 (1999).

[4] As the FCC noted, at least one long-distance carrier has set a pass-through rate of 12%, at a time when the USF contribution factor was approximately 6.9%. NPRM, ¶ 5. Thus, the carrier charges an additional 74% above the USF contribution factor (.74 = 12-6.9 / 6.9).

Further exacerbating this problem is the fact that carrier pass-through rates can vary on a month to month basis, independent of changes in the FCC contribution factor, causing additional end user confusion and making it harder for business customers to anticipate fluctuations in their telecommunications costs. Moreover, the FCC does not currently scrutinize these pass-through rates, except through an expensive and time-consuming formal complaint process, which is impractical for most end users. As the FCC strives to ensure that the USF mechanism advances the goals of ensuring equitable, predictable and nondiscriminatory carrier contributions, it should also be mindful of the way in which USF pass-throughs are charged by carriers.

The FCC should clarify that, as a general rule, carriers may only charge a pass-through that is no higher than the FCC's USF current contribution factor in effect at the time of billing. For carriers choosing to obtain full recovery of the carrier's USF obligation from customer pass-throughs, the FCC should adopt a process whereby the burden would be on the carrier to demonstrate that any attempt to charge an above-factor pass-through rate recovers only the additional and proven costs related to USF. And carriers should be required to make such a showing before being permitted to pass-through USF charges in excess of the current contribution factor. To the extent that reform of the USF contribution mechanism also alleviates the legitimate need for carriers to assess USF pass-through rates in excess of the current contribution factor,[5] then AOL Time Warner supports that aspect of such reforms so long as they are otherwise fair and equitable to carriers and end users.

[5] AOL Time Warner recognizes that either a revenue-based or flat rate reform approach may achieve the goal of more predictable pass-through charges to end users.

At the same time, the Commission must be vigilant to ensure that carriers do not use USF pass-throughs as a means of *de facto* discrimination or anticompetitive abuse.[6] For example, the FCC should clarify that carriers allocating more than a pro-rata share of the carrier's USF obligation onto those services relied upon by the carrier's competitors (such as heavy weighting on DSL services) is anticompetitive, and contrary to the carrier's Section 201 duties for fair and equitable USF pass-through practices.[7]

II. The Transition of USF Mechanisms -- USF Contribution and Pass-Through Reforms -- Must Avoid "Rate Shock" to End Users

AOL Time Warner underscores the importance of a smooth and careful transition as the FCC undertakes USF reform. Clearly, the alternatives suggested in the NPRM and the various proposals of commenters could significantly impact the costs of telecommunications carriers and end users.

It is critically important for the FCC to ensure that USF reform itself does not cause pricing changes for telecommunications services in ways that are unanticipated by the public or by carriers. It is surely contrary to the public interest for USF reform to cause, for example, a "rate shock" on customers using certain telecommunications services. AOL Time Warner, therefore, urges the FCC to carefully assess any changes in USF pass-through costs procedures and any changes in the contribution methodology to

[6] USF Report and Order, 12 FCC Rcd. at 9199 ("Carriers may not shift more than an equitable share of their contributions to any customer or group of customers").

[7] See *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended, 1988 Biennial Regulatory Review – Review of Customer Premises Equipment and Enhanced Services Unbundling Rules In the Interexchange, Exchange Access and Local Exchange Markets,* Report and Order, CC Dkt. Nos. 96-61, 98-183, at ¶ 46 (rel. Mar. 30, 2001) ("we would view any such discrimination in pricing, terms, or conditions that favor one competitive enhanced service provider over another or the carrier, itself, to be an unreasonable practice under section 201(b) of the Act.").

determine its impact not only on the USF itself, but also the impact of any changes on both business and residential end users.

III. The Imposition of USF Contribution Obligations on Cable Modem and IP Telephony Services Is Beyond The Scope of This Proceeding

Some commenters have requested that the FCC expand the scope of this proceeding, by suggesting that providers of cable modem and IP telephony service should be obligated to pay directly into the universal service fund ("USF").[8] These issues are plainly not appropriate for this proceeding, which is designed to reform: (1) the contribution mechanism for allocation of the USF obligations among recognized "telecommunications service" providers and "other providers of telecommunications;" and (2) the practices of carrier pass-through of the carriers' USF obligations to customers. As shown by the depth and variety of the comments already submitted, these two topics are challenging and complex. To add now new and novel issues regarding the possible expansion of the pool of mandatory contributors is counterproductive and unnecessary. Indeed, nothing in the NPRM suggests that the FCC intended in this proceeding to revisit the fundamental issues of what entities are obligated contributors under Section 254(d) of the Telecommunications Act of 1996 ("Act"), 47 U.S.C. § 254(d).

Significantly, the FCC has already designated separate processes to address the question of whether providers of cable modem and IP telephony services have USF obligations under the Act. As noted by the NPRM (n. 44 and 45), the High-Speed Access NOI [9] proceeding has been undertaken to evaluate the proper regulatory classification of

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[8] Comments of United States Telecom Association, at i, 7(filed June 25, 2001); Comments of SBC Communications Inc., at 11-12 (filed June 25, 2001).

[9] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Notice of Inquiry, 15 FCC Rcd. 19287 (2000).

cable modem services. Likewise, in the 1998 USF Report to Congress,[10] the FCC determined that the regulatory classification of IP telephony should be made only after a case-by-case determination. The instant proceeding on the USF contribution mechanism and the pass-through is clearly not meant for these very different regulatory classification issues.

Conclusion

AOL Time Warner urges the FCC to undertake a careful and thorough review of current USF contribution mechanisms and carrier pass-through practices to ensure better that USF money is collected and allocated in a manner that is fair and reasonable to both carriers and telecommunications users.

Steven N. Teplitz
Vice President, Communications Policy
& Regulatory Affairs
AOL Time Warner, Inc.
1101 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20036

Donna N. Lampert
Mark J. O'Connor
Lampert & O'Connor, P.C.
1750 K Street, N.W.
Suite 600
Washington, D.C. 20006

Date: July 9, 2001

[10] *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd. 11501, ¶¶ 90-91 (1998).