

**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
)	
Truth-in-Billing and Billing Format)	CC Docket No. 98-170

COMMENTS OF AT&T WIRELESS SERVICES, INC.

AT&T Wireless Services, Inc. (“AWS”) hereby submits its comments on the Commission’s Further Notice of Proposed Rulemaking in the above-captioned proceeding.^{1/}

^{1/} *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; Truth-in-Billing and Billing Format, CC Docket No. 98-170, Further Notice of Proposed Rulemaking and Report and Order (rel. Feb. 26, 2002) (“Further Notice”).*

INTRODUCTION AND SUMMARY

The *Further Notice* seeks comment on a proposal to reform fundamentally the universal service contribution system by assessing contributions based on the number and capacity of connections provided to a public network instead of on a per revenue basis. Under this proposal, residential, single-line business, and mobile wireless connections (excluding pagers) would be assessed a flat amount of \$1.00 per connection, paging connections would be assessed \$0.25 per connection, and the remaining universal service funding needs would be recovered through capacity-based assessments on multi-line business connections. The Commission also seeks comment on a proposal to implement a “collect and remit” system.

As AWS has previously noted, the current universal service contribution system needs to be revised to address the severe burden it places on carriers. Assessing universal service contributions based on past revenues with a six-month interval between revenue accrual and assessment of contributions is no longer consistent with Section 254’s mandate that providers of interstate telecommunications services “contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service.”

In reforming the contribution assessment system however, the Commission cannot ignore each class of carriers’ proportion of interstate revenues when it adopts an assessment methodology. Whether the Commission ultimately adopts a connection or a revenue-based regime, it must remain consistent with the U.S. Court of Appeals’ directive not to include intrastate components in the calculation of contributions. The Commission’s proposal to assess payments into the fund according to the number of connections provided to the public network, as it is currently formulated, is flatly inconsistent with the court’s clear requirement. Accordingly, if the Commission decides to adopt a connection-based methodology, it must establish a method of measuring the amount of interstate service provided by carriers. In the

context of revenue-based universal service assessment, AWS previously expressed its support for maintaining a “safe harbor” that identifies wireless carriers’ interstate revenues. If the Commission decides to move to a flat-rated assessment, AWS believes that Sprint’s proposal to use interstate allocators to determine the amount of interstate services provided by wireless carriers is the most legally sustainable.

In AWS’s view, the most efficient and effective way, by far, to meet the needs of carriers, consumers, and regulators would be to adopt a collect and remit methodology. Such a regime would simplify the contribution process immeasurably by removing the interval between the reporting of revenues or connections and the recovery of carrier contributions. As such, it would eliminate the risk of over or under-collection of universal service payments and the requirement for carriers to perform true-ups. Instead of hundreds of companies attempting to “back into” a recovery figure each month, only one entity – the administrator of the USF – would set the amount to be recovered and remitted, and periodically correct for shortfalls or overages in the amounts collected. Moreover, this methodology would meet the Commission’s goals of reducing the degree of fluctuation in end user charges both among carriers and on a month-to-month basis.

I. ANY USF ASSESSMENT METHODOLOGY MAY NOT BE BASED ON INTRASTATE SERVICES

In *Texas Office of Pub. Util. Counsel v. FCC*, the U.S. Court of Appeals for the Fifth Circuit held that the Commission may not include intrastate revenues in the calculation of universal service contributions because it would violate Section 2(b) of the Communications Act and is not otherwise authorized by Section 254(d).^{2/} Notwithstanding the *Further Notice’s*

^{2/} *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 447 (5th Cir. 1999) (“*TOPUC*”). While Section 2(b)’s limitation on FCC jurisdiction does not apply “as provided in section 332,” 47 U.S.C. § 152(b), the latter section has been held not to prevent the states as well as the Commission from imposing universal service contribution obligations on wireless carriers. *Id.*, 183 F.3d at 430-433; *Cellular Telecommunications Industry Assoc. v. FCC*, 168 F.3d 1332 (D.C.

failure even to address the Commission’s jurisdiction under Section 2(b), its proposal to shift virtually the entire USF burden to LECs and wireless carriers would be in direct conflict with the court’s ruling. Whether the Commission adopts a connection-based methodology or retains its existing revenue-based assessment regime, it must take into account the Fifth Circuit’s directive that it refrain from regulating intrastate services.

As the court noted in *TOPUC*, Section 2(b) “directs courts to consider FCC jurisdiction over a very broad swathe of intrastate services.”^{3/} The plain language of the statute denies Commission “jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service. . . .”^{4/} According to the court, “the inclusion of intrastate revenues in the calculation of universal service contributions easily constitutes a ‘charge . . . in connection with intrastate communication service.’”^{5/}

Pursuant to the Fifth Circuit’s analysis in *TOPUC*, there is no escaping Section 2(b)’s restrictions simply through adoption of a connection-based assessment. Such assessment still is a “charge” and to the extent the services provided over those connections are intrastate, the charge is “in connection with intrastate communication service.” It is irrelevant whether USF contributions are calculated based on the number of lines or customers a carrier has, as opposed to its revenue. The standard to measure the lawfulness of a universal service assessment still depends on the extent to which it touches on intrastate services. The Commission’s proposal to

Cir. 1999); *Sprint Spectrum, L.P. v. State Corp. Com’n of State of Kan.*, 149 F.3d 1058 (10th Cir. 1998). *TOPUC*’s analysis of the limits on the Commission’s authority to require federal universal service contributions is therefore relevant and applicable to wireless carriers. AWS notes that Section 332 otherwise prohibits state regulation of wireless rates “notwithstanding section[] 2(b).” 47 U.S.C. § 332(c)(3).

^{3/} *TOPUC*, 183 F.3d at 447

^{4/} *Id.*

^{5/} *Id.*

assess contributions on “any entity that provides an end user with a connection to a public network”^{6/} without regard to whether the services provided are interstate or intrastate requires the Commission to assume “jurisdiction over intrastate matters stemming from the agency’s plenary powers.”^{7/} As such, it violates Section 2(b) and *TOPUC*.

Under its existing revenue-based assessment regime, the Commission’s “safe harbor” for wireless carriers ensures that it does not take jurisdiction over intrastate services in violation of Section 2(b). The need to revise the current regime stems not from questions about its legality under *TOPUC*, but from the uncertainties caused by the use of past revenues to establish contribution factors. As discussed below, these problems can easily be resolved through a collect and remit system and do not require a wholesale change in the assessment criteria. The sole motivation for proposing a connection-based methodology appears to be a desire to shift more of the the universal service contribution burden from providers of interstate services to wireless carriers and other providers of intrastate services.^{8/} Indeed, as the Commission itself notes, a connection-based assessment could “be overly regressive and discriminatory to low-volume users,” and could “increase the contribution burden on low-income customers.”^{9/}

If the Commission nonetheless adopts a connection-based mechanism, the most legally sustainable plan under *TOPUC* is that proposed by Sprint. Sprint’s proposal would maintain the relative contribution burdens on different industry segments based on interstate allocators. For wireless carriers, Sprint’s plan would effectively carry forward the current safe harbor. Like the

^{6/} *Further Notice* ¶ 71.

^{7/} *TOPUC*, 183 F.3d at 448.

^{8/} While the Commission’s primary goal in this proceeding appears to be to broaden the USF contribution base, the Fifth Circuit’s ruling made clear that such a policy objective, however laudable, does not give the Commission the authority to regulate intrastate services. *See Further Notice* ¶ 86. Rather than issue an order that is legally suspect from day one, the Commission should adopt policies aimed at controlling the size of the fund and thereby alleviating some of the pressure to find more and more sources of contributions.

^{9/} *Further Notice* ¶ 49.

safe harbor, moreover, adoption of interstate allocators would ease administrative burdens for carriers – especially wireless providers – that have difficulty identifying accurately their services as interstate or intrastate.

The current wireless safe harbor, with whatever fine-tuning the record in this proceeding establishes is warranted, would be an appropriate proxy for the wireless interstate allocator in the event the Commission adopts a connection-based system. As AWS previously explained, when the 15 percent safe harbor figure was arrived at three years ago,^{10/} it was likely considerably higher than the actual interstate revenues of most wireless carriers. Based on a rough analysis of its traffic records for the past six months, AWS has determined that, contrary to some claims, new wireless carrier pricing plans that include free long distance have not radically changed calling patterns. In fact, the large buckets of minutes contained in these plans appear to have increased overall wireless usage, with the rate of interstate calls rising only slightly faster than the rate of intrastate calls. Accordingly, even if it adopts a connection-based methodology, the Commission should utilize the wireless safe harbor to exclude, on an industry-wide basis, intrastate minutes of use.

II. THE COMMISSION SHOULD ADOPT A COLLECT AND REMIT METHODOLOGY

The Commission contends that one of the advantages of a connection-based assessment system is that it could make the recovery process more efficient for carriers and more understandable to end users.^{11/} That is not necessarily true. Unless the Commission directly addresses the inextricable connection between cost recovery and universal service contributions by moving to a collect and remit system, carriers will continue to face the uncertainties of rising or falling revenues/customer bases and uncollectibles, and line items on consumer bills will

^{10/} *Federal State Board on Universal Service*, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 21252, 21258-21259 ¶ 13 (1998).

^{11/} *Further Notice* ¶ 72.

continue to fluctuate. As they do today, even with a connection-based system, carriers would have to “back into” a recovery factor months after the Commission tells them how much they owe, taking into consideration over or under-collections from the previous month. Simply because the Commission charges every carrier \$1.00 per connection would not mean that every customer would be charged \$1.00 (absent a Commission mandate to that effect).

A collect and remit methodology, in contrast, presents a far more equitable, reasonable, and efficient basis upon which to assess contributions and provide for recovery. Under such a system, carriers would contribute to the fund exactly the amount of revenues they collect from customers, eliminating their risk of over or under collection of universal service payments and the need for true-ups. Unlike an after-the-fact recovery process, collect and remit would significantly reduce the administrative burden on carriers, consumers, and the Commission. Indeed, rather than require hundreds of carriers to engage in complex and time consuming calculations each month, a collect and remit system would place the burden on the one entity best equipped to handle it – the administrator of the universal service system. Consumers, in turn, would benefit from more consistent and comprehensible line-item charges that no longer reflect mark ups for previous collection short-falls and changing customer accounts. Moreover, if the Commission adopts a collect and remit regime, the administrative costs in connection with USF compliance would be considerably lower than they are today.^{12/}

In the *Further Notice*, the Commission states that a collect and remit system could reduce incentives for carriers to recover universal service contributions from their customers since carriers would not be required to pay into the fund unless the customer paid the charge.^{13/} AWS

^{12/} Even under a collect and remit system, some expenses associated with reporting revenues or line counts and submitting payments to the administrator would remain. Accordingly, the Commission should include a small, uniform fee in the USF line item that carriers could retain to cover these costs.

^{13/} *Further Notice* ¶ 102.

does not believe this would occur on a widespread basis, but it would have no objection to a Commission requirement that carriers certify that they are billing and attempting to collect the set fee or percentage from all current customers. Such a certification also would address any concerns that desirable customers would receive preferential treatment in the recovery of universal service contributions. In addition, in response to the Commission's concern that USAC "likely would not be able to predict with complete accuracy how many assessments actually would be collected in a given period," AWS notes that the administrator easily could make up for short-falls or over-collections by increasing or decreasing the line item as necessary.^{14/} As explained above, today each carrier must perform this true-up function itself, escalating unnecessarily the costs and inefficiency of the fund.

^{14/} *Id.*

CONCLUSION

For the foregoing reasons, the Commission should continue to take into account and exclude wireless intrastate usage from its universal service calculations. In addition, to eliminate inequities and unnecessary burdens in the current universal service system, the Commission should adopt a collect and remit regime.

Respectfully submitted,

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