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Before the
Federal Communications Commission
Washington, D.C. 20554

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APR 22 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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 CONSUMERS UNION, TEXAS OFFICE OF PUBLIC UTILITY COUNSEL, CONSUMER FEDERATION OF AMERICA, APPALACHIAN PEOPLE'S ACTION COALITION, CENTER FOR DIGITAL DEMOCRACY, EDGEMONT NEIGHBORHOOD COALITION AND MIGRANT LEGAL ACTION PROGRAM

Dated: April 22, 2002

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SUMMARY

Consumers Union, Texas Office of Public Utility Counsel, Consumer Federation of America, Appalachian People's Action Coalition, Center for Digital Democracy, Edgemont Neighborhood Coalition and Migrant Legal Action Program ("CU *et al.*") oppose the Commission's plan to shift USF assessment from a non-discriminatory revenue-based method to a connection-based method. Such a change would shift much of the responsibility for USF funding from business users to residential users, and would increase USF rates for many average-use and low-use residential customers.

As a preliminary matter, CU *et al.* note two major procedural defects in the Further Notice. First, the Further Notice almost completely fails to take into account the extensive comments filed by parties supporting some version of the current revenue-based assessment system, and instead focuses almost entirely on a specific connection-based assessment proposal delineated in an ex parte letter submitted almost four months after the comment period expired. Second, the Commission relies on a "staff analysis" and a study provided by Verizon to support the connection-based proposal. Neither study, however, has been made available to the public for comment, in violation of the Administrative Procedure Act. Moreover, the publicly available summary of the Verizon study appears to contradict the Commission's position. Accordingly, as a preliminary matter, CU *et al.* request that the Commission either change the proceeding to a Notice of Inquiry, or revise the Further Notice to solicit comment on specific issues proposed by the bulk of commenters, and to make public the two "studies" cited by the Commission as the sole economic support for the connection-based proposal.

Based on CU *et al.*'s best assessment of the publicly available data, CU *et al.* strongly oppose the adoption of a connection-based USF fee assessment. CU *et al.* analyzed 13 carrier

calling plans to determine what customers of those carriers pay under the current system, and what customers would pay under a connection-based system, assuming that the connection-based fee is levied with no further mark-up. The CU *et al.* analysis revealed that average-use and low-use customers on any of the studied plans would pay more under the Commission's connection-based plan than they currently do, even with the USF recovery "mark-ups" that exist in the current system.

In addition, the connection-based proposal also violates Section 254(d) of the Telecommunications Act of 1996 for three reasons. First, a connection-based assessment represents a de facto shift in the assessment of the USF fee from the "telecommunications carrier" to the actual end user. Second, a connection-based system would essentially exempt many interexchange providers from the USF contribution requirement, violating Section 254(d)'s mandate that "every" interstate telecommunications provider contribute to universal service efforts. Third, a connection-based fee is not "equitable and nondiscriminatory," as required by Section 254(d). Accordingly, due to the impact on the average residential customer and its failure to comport with the requirements of Section 254(d), the Commission should reject the proposed connection-based assessment proposal.

Finally, with regard to abusive carrier USF "recovery" practices, CU *et al.* urge the Commission to finally put an end to exorbitant carrier USF surcharges by prohibiting carrier "pass-through" of USF assessments. Such a prohibition would end the abusive carrier surcharges noted throughout the course of the proceeding, and would make it much easier for consumers to shop for the lowest rate carrier. In the alternative, should the Commission decline to prohibit separate carrier USF recovery, the Commission should, at the very least, require a uniform-line

billing description for any USF recovery, and limit carrier recovery to the actual USF assessment factor.

TABLE OF CONTENTS

I. The Specific Connection-Based USF Proposal Delineated In the *Further Notice* Appears to Be Based Solely on the "USF Coalition" *Ex Parte* and Ignores the Majority of Comments Filed Pursuant to the 2001 Notice 3

II. The Further Notice Violates the Administrative Procedure Act By Failing to Detail the Studies Used By the Commission to Support the Connection Based Proposal 5

III. CU/CFA Analysis Indicates That a Connection-Based Assessment Would Harm Most Residential Customers 9

IV. Connection Based USF Assessment Violates Section 254(b)(4) 12

A. A Connection-Based Fee Represents a De Facto Assessment on End Users . . . 13

B. The Proposed Connection-Based Fee Essentially Eliminates Contribution Requirements for Many Interexchange Carriers 14

C. A Connection-Based Fee Is Not "Equitable and Nondiscriminatory" 15

V. The Commission Should Retain Some Version of the Revenue-Based USF Assessment System 16

VI. The Commission Should Prohibit Pass-Through of the USF Assessment 17

VII. In the Alternative, Any Line-Item Recovery Should Be Limited to Exact USF Assessment Factor and Contain a Uniform Billing Requirement 20

A. A Prohibition on Carrier Recovery Beyond the Actual USF Assessment Is the Only Way to Eliminate Customer Confusion 20

B. A USF "Truth-in-Billing" Disclosure Requirement Raises No First Amendment Concerns 21

1. Disclosure Requirements Are Not Subject to Central Hudson 22

2. A USF Disclosure Requirement Also Easily Meets the Central Hudson Test 23

a. There Is Ample Evidence That Most Current "USF Line-Items" Mislead Consumers 23

b. The Commission Has a Substantial Interest In Ensuring That Consumers Understand Carrier-Imposed Surcharges 24

c. A Uniform Line-Item Directly and Materially Advances The Commission's Interests 25

d. A Uniform Line-Item Is Narrowly Tailored to Serve the Commission's Goal 26

CONCLUSION 27

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COMMENTS OF CONSUMERS UNION, TEXAS OFFICE OF PUBLIC UTILITY COUNSEL, CONSUMER FEDERATION OF AMERICA, APPALACHIAN PEOPLE'S ACTION COALITION, CENTER FOR DIGITAL DEMOCRACY, EDGEMONT NEIGHBORHOOD COALITION AND MIGRANT LEGAL ACTION PROGRAM

Consumers Union, Texas Office of Public Utility Counsel, Consumer Federation of America, Appalachian People's Action Coalition, Center for Digital Democracy, Edgemont Neighborhood Coalition and the Migrant Legal Action Program ("CU *et al.*"), through undersigned counsel, hereby submit the following comments in response to the Commission's

Further Notice of Proposed Rulemaking and Report and Order.[1]

At the outset, CU *et al.* note two significant problems with the Further Notice. First, it fails to take into account any of the extensive comments filed pursuant to the 2001 Notice[2] addressing various ways to reform the existing revenue-based system. Instead, the Further Notice focuses almost exclusively on the connection-based assessment method proposed almost solely in the "USF Coalition" *ex parte* letter. Second, the Commission relies on a "staff analysis" and a seemingly contradictory Verizon analysis to gauge the impact of the proposed connection-based system. The Commission, however, has not made any details of these "studies" available to the public for comment. Therefore, as a preliminary matter, CU *et al.* request that the Commission either convert the Further Notice to a Notice of Inquiry or revise the Further Notice to solicit comment on the alternatives presented in the 2001 Notice comments, and make the two

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[1]*See Federal-State Joint Board on Universal Service, 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, Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990, Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size, Number Resource Optimization, Telephone Number Portability*, Truth-in-Billing and Billing Format, Further Notice of Proposed Rulemaking and Report and Order, CC Docket Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, 98-170, FCC 02-43 (rel. Feb. 26, 2002) (hereinafter "Further Notice").

[2]*See Federal-State Joint Board on Universal Service, 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, Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990, Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size, Number Resource Optimization, Telephone Number Portability*, CC Docket Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, *Notice of Proposed Rulemaking*, 16 FCC Rcd 9892 (2001) (hereinafter "2001 Notice").

above-referenced studies available for public comment.

Based on the information that is available, CU *et al.* strongly oppose any effort by the Commission to shift from a non-discriminatory, percentage-based universal service fee ("USF") assessment to a "connection-based" fee assessment. This change in USF fee assessment would impose a disproportionate USF fee burden on residential users, especially low-income households and the elderly. Accordingly, CU *et al.* urge the Commission to reject the connection-based USF fee option, and instead retain the current percentage-based USF assessment. Finally, CU *et al.* urge the Commission to prohibit carrier "pass-through" of USF assessments or, in the alternative, require a uniform line-item billing description for any USF fee pass-through, and limit carrier recovery the actual USF percentage assessed by the Universal Service Administrative Company ("USAC").

I. The Specific Connection-Based USF Proposal Delineated In the *Further Notice* Appears to Be Based Solely on the "USF Coalition" *Ex Parte* and Ignores the Majority of Comments Filed Pursuant to the 2001 Notice

The Further Notice states that the Commission seeks comment "on a proposal to fundamentally reform the [USF] contribution assessment system by assessing contributions based on the number and capacity of connection provided to a public network." The Further Notice then goes on to state that this proposal "incorporates major features of a proposal submitted by commenters during the course of this proceeding. . . ." CU *et al.* note, however, that the "connection-based" framework that forms the basis of almost all of the preliminary conclusions stated in the Further Notice was specifically supported by only two commenters

providing comments in the 2000 Notice proceeding -- AT&T and WorldCom.[3] In addition, the specific "connection based" USF collection system proposed in the Further Notice appears to have been derived solely from an *ex parte* letter submitted by AT&T on November 14, 2001,[4] nearly four months after initial and reply comments were due in this proceeding's 2001 Notice.[5]

Basic principles of due process and administrative law require that an agency at least consider all obvious proposals in the course of a rulemaking proceeding. Yet, the Further Notice, focuses almost solely on the "USF Coalition" proposal, and ignores the bulk of the comments filed by numerous parties that supported retention of a revenue-based USF collection system.[6]

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[3]*See* Comments of WorldCom, Inc. at 4-6 (hereinafter "WorldCom Comments"); Reply Comments of AT&T Corp. at 3-4 (hereinafter "AT&T Reply Comments"). CU *et al.* note that certain other commenters also supported the general concept of a "flat-rate" or "network connection" based assessment system. See, e.g. Reply Comments of Telstar International, Inc. at 10 (supporting the adoption of a "flat-fee based assessment method") (hereinafter "Telstar Reply Comments"); Reply Comments of Level 3 Communications, LLC at 4 (supporting the adoption of "a methodology that is based on the capacity of network connections provided to customers who are not carriers or other entities contributing to universal service") (hereinafter Level 3 Reply").

[4]*See* Letter from Patrick H. Merrick to Magalie Roman Salas, Secretary, Federal Communications Commission (filed Nov. 14, 2001) (noting that representatives from AT&T, WorldCom and the e-commerce Telecommunications Users Group met with Common Carrier Bureau staff to discuss "the operational aspects of implementing a per line assessment mechanism").

[5]*See* 2001 Notice.

[6]For example, the Further Notice has 44 paragraphs discussing its proposal to implement a connection-based system, while spending only 5 paragraphs discussing possible revisions to the current revenue-based system, even though the Commission notes that the 2001 Notice "generated a significant record on this issue." In fact, the majority of commenters in the 2001 Notice specifically opposed adoption of a connection-based collection system. *See* Reply Comments of BellSouth Corporation at 6 (stating that "the Commission must reject the flat-rate/per-line schemes offered in the comments in this proceeding"); Reply Comments of the National Exchange Carrier Association, Inc. at 7 ("The Commission should continue to use billed interstate end-user data to assess universal service fund contributions."); Comments of the Office of Advocacy, U.S. Small Business Administration at 2 ("Advocacy agrees with

Moreover, the mere five paragraphs devoted to possible revisions to the revenue-based system list none of the specific changes advocated by numerous commenters pursuant to the 2001 Notice, and generally only provides a critique of the current revenue-based assessment system.[7] The lack of specific revenue-based assessment proposals makes it nearly impossible for parties to comment on possible revisions to the system supported by the majority of commenters in the 2001 Notice proceeding.

Therefore, as a preliminary matter, CU *et al.* urge the Commission to either convert the Further Notice to a Notice of Inquiry to allow further development of a balanced record, or to reissue a revised Further Notice of Proposed Rulemaking that details specific alternatives under either a connection-based USF collection system or possible revisions to the current revenue-based collection system.

II. The Further Notice Violates the Administrative Procedure Act By Failing to Detail the Studies Used By the Commission to Support the Connection Based Proposal

Not only is the Further Notice defective for its failure to take into account proposals made by the bulk of parties filing comments pursuant to the 2001 Notice, it also fails to disclose key data needed by parties in order to make meaningful comment on the connection-based proposal. The Administrative Procedure Act requires the Commission "to make available to the public, in a form that allows for meaningful comment, the data the agency used to develop the proposed

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commenters that the Commission should continue to assess contributions on a percentage of historical interstate gross-billed revenues."); Reply Comments of Verizon at 6 (stating that the "Commission should reject the self-serving requests of the interexchange carriers for a per-line assessment"); Reply Comments of SBC Communications, Inc. at 13 (advocating retention of a revenue-based collection system) (hereinafter "SBC Reply Comments").

[7] *See* Further Notice at 38-40, ¶¶84-88.

rule."[8] In general, the courts have taken a very dim view of agency efforts to conceal private studies that form the nucleus of a proposed rule.[9] This is especially true in cases where non-public information contained in a study is critical to provide meaningful comment to an agency.[10] The Further Notice cites to two "studies" as evidence as support for the Commission's tentative conclusion that the total recovery fees paid under a connection-based USF collection system "would be approximately the same under a connection-based assessment system as under the existing system."[11]

The first study cited is a "[p]reliminary staff analysis" that estimates that the "average household pays approximately $1.93 per month in total contribution fees under the current system."[12] Thus, the study appears to infer that the average household would save $0.93 per month under the Commission's proposed connection-based fee. CU *et al.* note, however, that the

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[8]*See Engine Mfrs. Ass'n v. U.S. E.P.A.*, 88 F.3d 1075, 1181 (D.C. Cir. 1996); *see also* 5 U.S.C. §553(b) (requiring Commission to give notice of proposed rulemaking).

[9]*See Connecticut Light and Power Co. v. Nuclear Regulatory Commission*, 673 F.2d 525, 530 (D.C. Cir. 1982) ("In order to allow for useful criticism, it is especially important for the agency to identify and make available technical studies and data it has employed in reaching the decisions to propose particular rules.").

[10]*See id.*

> To allow an agency to play hunt the peanut with technical information, hiding or disguising the information it employs, is to condone a practice in which the agency treats what should be a genuine interchange as mere bureaucratic sport. An agency commits *serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful comment.*

Id. (emphasis added).

[11]Further Notice at 20, ¶46.

[12]*See id.*

staff analysis is not attached to the Further Notice for review, has not been placed in the docket and is not publicly available from the Commission.[13] Furthermore, most of the data upon which the study was based is not available to the public, making it impossible to determine the methodology used to complete the study. The "Bill Harvesting Data" cited as used in the staff analysis, for example, provides the basis for the Commission's statistics regarding the "average pre-tax long-distance bill."[14] This information, however, is not available to the public.[15] In addition, it is also impossible how the Commission determined the number of wireline and/or wireless telephones utilized in the "average" household.[16] Accordingly, it is impossible for CU et al. to determine how Commission staff arrived at the conclusion that the average household pays $1.93 under the current system, and "that the average household likewise would pay approximately $1.93 in total contribution recovery fees under the proposed connection-based assessment system,"[17] or provide any specific critique of "whether this analysis reasonably

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[13]CU *et al.* contacted Wireline Competition Bureau staff in an attempt to obtain a copy of the staff analysis, and were told that the staff analysis was not available for public review. In an attempt to obtain a copy of the staff analysis and provide comment on it, a Freedom of Information Act ("FOIA") request was filed with the Commission on April 17, 2002, requesting production of the staff analysis.

[14]Further Notice at 21, ¶46, n.112.

[15]*See* TNS Telecoms Website, available at http://www.tnstelecoms.com/billharvesting.html (noting that TNS Telecom's "Bill Harvesting" database is a for purchase "stand alone analytical product in combination with our suite of market management tools that includes a flat file database and Miriad, our exclusive desktop analytical delivery tool").

[16]*See* Further Notice at 21, ¶46, n.112 (noting that Commission staff "relied" on data showing the national residential lines and national wireless units). Such analysis, however, does not provide potential commenters with any information as to how the Commission calculated the "average" number of household connections.

[17]Under the Commission's proposed connection-based assessment system, each residential wireline connection would be assessed a $1.00 USF fee, along with a $1.00 USF fee

approximates average household contributions under the existing assessment and the potential impact on the average household of adopting a connection-based assessment."[18]

The second "study" cited by the Commission as support for the connection-based proposal is a Verizon "study estimating the impact of a connection-based assessment system on different percentiles of residential customers based on residential usage."[19] The Further Notice notes, however, that much of the data submitted as part of that study is subject to a Protective Order, and therefore "it is unclear from the publically-available data what assumptions Verizon has made about how a connection-based assessment system would operate."[20] The Commission then, however, inexplicably concludes that the Verizon study supports the contention that a connection-base fee "would not significantly shift the burden of supporting universal service to or from contributors serving residential customers, although certain percentiles of residential customers would have increased contribution obligations."[21] However, the *only* citation provided in the Further Notice for the "Verizon study" points to a Verizon ex parte notice summarizing the study, which concludes that under a connection-based system

> the consumer segments representing low and moderate [long-distance] spending (80% of total US households) would unfairly bear an increased

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for each wireless connections in a household. Under this scenario, therefore, a household with one wireline connection and one wireless connection would be assessed a USF fee of $2.00. An "average" fee of $1.93, however, would be impossible to assess, however, unless a household had one connection and only a portion of another connection, which would appear to be a physical and regulatory impossibility.

[18]Further Notice at 21, ¶47.

[19]*Id.* at 21, ¶48.

[20]*Id.*

[21]*Id.*

> USF burden while the 20% of households with high [long distance] spend would be responsible for a lower contribution.[22]

Thus, based on the evidence on the record, it appears that the Verizon study contradicts rather than supports the Commission's contention that a connection-based USF fee collection system "would not significantly shift the burden of supporting universal service to or from contributors serving residential customers. . . ."[23]

In sum, the Commission has pointed to two studies – one which it has refused to make available for public comment and the other, based on non-public proprietary information that appears to directly contradict the Commission's conclusions– as support for a connection-based assessment system. The Commission's mere reference to studies that are not publicly available does not provide an adequate basis to support the Commission's apparent preliminary conclusion that the existing revenue-based USF assessment system should be replaced with a connection-based system. Accordingly, the Further Notice violates Section 553(b) of the Administrative Procedure Act.

III. CU/CFA Analysis Indicates That a Connection-Based Assessment Would Harm Most Residential Customers

As detailed above, it is impossible for CU *et al.* to analyze the Commission's "preliminary staff analysis" of the impact of a connection-based system on residential customers since the Further Notice fails to provide the methodology used by the Commission to determine "average" residential interstate and international long-distance usage. However, the Further

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[22]*See* Letter from W. Scott Randolph, Verizon Communications, to Magalie Roman Salas, Secretary, Federal Communications Commission at (filed Oct. 17, 2001)

[23]Further Notice at 21, ¶48.

Notice also sought "comment on other ways to measure consumer impact"[24] and specifically requested comment on "the impact of this proposal on low-volume and low-income consumers."[25] Accordingly, to determine the effect of a connection-based assessment system on residential telephone users, CU *et al.* conducted an analysis detailing the average USF contribution recovery paid by low-use residential household and average-use residential households under the current system by households utilizing 13 commonly available carrier calling plans.[26] CU *et al.* then contrasted the USF recovery assessed on those carrier plans under the current system with the Commission's proposed connection-based recovery system.

In order to calculate these average number of minutes used by residential households, CU *et al.* used statistics from the Commission's August 2001 Trends in Telephone Service Report, which reported that a average residential household made 58 minutes of interstate and/or international calls per month in 2000.[27] This figure was then cut in half to estimate that the average low-use household made 29 minutes of interstate and/or international calls per month.[28] For each calling plan analyzed, CU *et al.* took any "monthly fee" assessed by a carrier, where applicable, and averaged it into the carrier's advertised per-minute rate to come up with an actual

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[24]*Id.* at 21, ¶47.

[25]*Id.* at 22, ¶49.

[26]See Attachment 1, "Current USF Costs for Low-Use and Average-Use Residential Long Distance Customers."

[27]*See* Trends in Telephone Service, Industry Analysis Division, Common Carrier Bureau, Table 15.2 (rel. Aug. 2001) (noting that the average residential household made 1 minute of IntraLATA Interstate calls, 55 minutes of InterLATA Interstate calls and 2 minutes of International calls per month in 2000, for a total of 58 minutes).

[28]CU *et al.* note, however, that many low-income households make few or no interstate calls a month.

per-minute rate for the average-use residential household and low-use households. The 29 minute rate and the 58 minute rate were then multiplied by the actual USF recovery percentage assessed by a carrier to come up with the per-plan USF recovery cost for both average-use and low-use households. For the contribution-based system, CU *et al.* assumed that the $1.00 per connection fee would be passed on to consumers with no further mark-up.

The CU *et al.* analysis indicates that both average-use and low-use residential customers utilizing any of the 13 calling plans of carriers studied would pay more per month under the Commission's proposed connection-based fee system than they do under the current revenue-based system. For example, average-use customers utilizing MCI's "Anytime Advantage Savings Option, " which advertises rates of $0.07 a minute anytime with a $2.95 monthly fee and a 9.9% USF surcharge, pay $0.69 under the current system.[29] Low-use customers utilizing this MCI plan pay $0.49 a month in USF recovery.[30] Under the Commission's connection-based assessment system, both low-use and average-use consumers would pay $1.00 per month, resulting in a annual net "USF assessment" increase of $3.72 for average-use households, and $6.12 for low-use households.

For customers using small, low-rate long-distance providers, the impact would be far greater. Customers of Zone LD Telecom, Inc., for example, pay $0.045 per minute anytime for interstate interexchange service with no monthly fee and a 8.5% USF surcharge.[31] Under the

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[29]*See* Attachment 1.

[30]*See id.* CU *et al* note that if the USF fee were limited to the actual current USF contribution factor of 7.2805%, the average-use customer would pay only $0.55 a month in USF recovery fees under the MCI plan, and the low-use customer would pay $0.40 a month.

[31]*See* Attachment 1.

current system, the average-use Zone LD subscriber pays $0.22 in USF recovery surcharges, while the average low-use customer pays only $0.11.[32] Under a connection-based system, both customer categories would pay $1.00. Accordingly, on an annualized basis, an average-use Zone LD customer would pay $9.36 more under the Commission's proposal, while the low-use consumer would pay $10 68.

The CU *et al.* study illustrates the financial impact that the Commission's proposed shift to a connection-based recovery fee would have on both average and low-volume telecommunications consumers.[33] In effect, the connection-based fee would result in shifting much of the responsibility for funding USF obligation from the largest users of interstate telecommunications services, which are usually business customers, to low-volume residential customers who are also often low-income customers as well. This, in turn, could have the perverse effect of leading even more low-income consumers who do not meet current Lifeline eligibility requirements to discontinue local telephone service as a result of increased USF assessments.

IV. Connection Based USF Assessment Violates Section 254(b)(4)

The Further Notice requests also requests comment on "whether a connection-based assessment satisfies each element" of Section 254(d).[34] CU *et al.* strongly believes that a connection-based assessment system violates both the letter and spirit of Section 254(d). First, a

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[32]*See id.*

[33]CU *et al.* note that the savings to low-use and average-use consumers under the current revenue-based assessment system would be even greater if the Commission limited USF line-item assessments to the actual quarterly USF assessment factor, or prohibited the use of USF line-item assessments outright.

[34]Further Notice at 30, ¶65.

connection-based system represents a *de facto* shift in the assessment of the USF fee from the "telecommunications carrier" to the end user.[35] Second, a connection-based system would essentially exempt many interexchange providers from the USF contribution requirement, violating Section 254(d)'s mandate that "every" interstate telecommunications provider contribute to universal service efforts.[36] Third, a connection-based fee is not "equitable and nondiscriminatory," as required by Section 254(d).[37]

A. A Connection-Based Fee Represents a De Facto Assessment on End Users

Section 254(d) specifically states that "[e]very telecommunications carrier" providing interstate services shall contribute to the USF fund.[38] Accordingly, Section 254(d) mandates that universal service fees be recovered directly from the carrier and its overall revenues, rather than from any assessment directly on end users. However, under the Commission's proposed connection-based assessment system, a set per-line fee will be assessed against all residential lines on a monthly basis. This fee will then apparently be directly remitted from the end user, through a carrier, to the Universal Service Fund.[39]

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[35]*See* 47 U.S.C. §254(d).

[36]*Id.*

[37]*Id.*

[38]*Id.*

[39]This is in contrast to the current revenue-based system where monthly assessments are made on a carrier's overall revenues. Under the current revenue-based assessment system, carriers are assessed once a month based on the applicable contribution factor for that quarter. Under the current system, most, but not all, carriers then seek to recover these contributions from providers through a variety of means. The current system, therefore, allows consumers to shop around for plans that include the carrier USF assessment in the carrier's per minute rates, rather than through a separate assessment.

CU *et al.* submit that such a system violates Section 254(d) because it shifts USF recovery from a system where carriers pay the USF assessment from total revenue to a system where the carrier essentially becomes a mere billing agent for the direct assessment of a connection-based fee on the end user. In formulating the Telecommunications Act of 1996, Congress was quite explicit in requiring that universal service fee come out of telecommunications carriers' revenues, as opposed to directly from consumers. Accordingly, the Commission's proposed system, which essentially assesses a flat per-line charge on a consumers' bills, violates Section 254(d) because it imposes a direct fee on every household line, rather than imposing a fee on carrier revenue.

B. The Proposed Connection-Based Fee Essentially Eliminates Contribution Requirements for Many Interexchange Carriers

The Further Notice requests comment on "whether the connection-based assessment methodology described in this Further Notice would be consistent with the Act's requirement that 'every telecommunications carrier that provides interstate telecommunications service shall contribute[.]"'[40] A connection-based assessment violates this provision of Section 254(d) as well.

Under the Commission's proposal, the collection of a connection-based fee for residential lines will be the exclusive responsibility of local exchange carriers, which generally provide intrastate, IntraLATA services. This, in turn, would allow many interexchange carriers that do not connect directly to end users to completely escape any contribution responsibility. In the Further Notice, the Commission attempts to finesse this issue by stating that interexchange

[40]Further Notice at 31, ¶66.

carrier would contribute "to the extent that they provide connections to a public network."[41] However, it is critical to note that many interexchange carriers do not provide direct connections to the public network. Furthermore, even for those carriers that do provide direct connections to the public network, the amount of traffic is often very minimal, and would not result in any significant contribution to the USF. The net result is that many interexchange carriers will escape any contribution responsibility, in direct contravention of the plain language of Section 254(d).[42]

C. A Connection-Based Fee Is Not "Equitable and Nondiscriminatory"

The Further Notice also requests comment on the issue of whether a connection-based assessment would be "equitable and nondiscriminatory" as required by Section 254(d).[43] CU *et al.* strongly believe that neither the Commission's proposed connection-based assessment system, nor any other per-line assessment system would comply with Section 254(d) nondiscrimination requirement.

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[41] *Id.*

[42] In fact, the 1996 Act Conference Report strongly suggests that the only permissible carrier contribution exception intended by Congress was the "de minimis" exception. *See* S. Conf. Rep. 104-230, 104th Cong., 2nd Sess. 133 (1996).

> The conferees intend that this authority would only be used in cases where the administrative cost of collecting contributions from a carrier or carriers would exceed the contribution that carrier otherwise would have to make under the formula for contributions selected by the Commission.

Id.

[43] Further Notice at 31, ¶67.

Under the Commission's proposal, USF contribution would be based not on actual revenue or usage of services, but merely on the existence of a residential or business line. Accordingly, a carrier that provides access to a high-end single-line business customer would be assessed the same amount as would a carrier that provides access to a low-use residential customer. Furthermore, when the connection-based fee is "recovered" from the end user, the discriminatory treatment would also flow directly to the consumer in the form of higher rates for low-end users. Such a scenario is clearly not contemplated under the language of Section 254(d).

Furthermore, it is important to note that the Joint Board and the Commission both rejected a per-line or connection-based fee when they first considered this issue in 1997. In the Universal Service Order, the Commission found that per-line fees "are not competitively neutral because they may inadvertently favor certain services or providers," and specifically rejected the use of a "per-line" fee.[44] The logic of this statement has not changed in the five intervening years. Accordingly, based on the plain language of Section 254(d), the Commission must reject the connection-based fee proposal.

V. The Commission Should Retain Some Version of the Revenue-Based USF Assessment System

The Further Notice notes that the 2001 Notice "generated a significant record" regarding the retention or modification of the current revenue-based system.[45] CU *et al.*, along with the majority of parties commenting pursuant to the 2001 Notice, strongly urge the Commission to

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[44]Federal-State Board on Universal Service, Report and Order, 12 FCC Rcd 8776, 9210 (1997) (hereinafter "Universal Service Order").

[45]Further Notice at 38, ¶84.

retain the current revenue-based system, with certain modifications, rather than adopting any connection-based alternative.

CU *et al.* acknowledge, as do many other commenters in the 2001 Notice proceeding, that certain problems with the current revenue-based system should be addressed, including the current "time lag." These problems, however, could be rectified by changing the current system, which relies on historical estimates of carrier revenues, to a system that bases the assessment on current billed carrier revenues. Such a change would resolve many of the carrier concerns about the "time lag," and eliminate much of the rationale for the current "marked-up" USF line-items that only serve to confuse consumers. In addition, and perhaps most significantly, this system would ensure continued compliance with Section 254(d) of the Act, which requires that the USF assessment be levied on carriers in a nondiscriminatory and competitively neutral manner.

VI. The Commission Should Prohibit Pass-Through of the USF Assessment

The Further Notice requests comment on "recovery reforms" that would make the assessment of the USF fee "reasonable, fair and understandable for consumers."[46] In separate comments submitted pursuant to the 2001 Notice, both Texas OPC *et al.* and CDD *et al.* urged the Commission to prohibit the recovery of the USF outside of either per-minute or per-plan rates, and again urge the Commission to take this action in the instant proceeding.[47] As

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[46]*Id.* at 40, ¶89.

[47]*See* Comments of the Texas Office of Public Utility Counsel, Consumer Federation of America and Consumers Union at 4-5; (hereinafter "Texas OPC *et al* Comments"); Comments of the Center for Digital Democracy, Edgemont Neighborhood Coalition and Migrant Legal Action Program at 7 (hereinafter "CDD et al. Comments") (stating that separate "USF" fees should be banned for dial-around and prepaid card providers).

illustrated in CDD *et al.*'s 2001 Notice comments, numerous carriers have taken advantage of separate "USF fee" line items as a means to inflate profits improperly and confuse consumers by imposing "USF" line-item charges of up to 18% of a customer's per-minute or per-plan charges. In addition, inflated USF fee recovery is by no means limited to the smallest carriers. Recently, AT&T raised its "USF fee" to 11.5% of a customer's total interstate and international charges,[48] even though the most recent quarterly USF assessment factor was only 7.2805%.[49]

A prohibition on recovery would lead to far greater transparency for consumers shopping for the most economical telecommunications services. Under the current system, many consumers look only at a carriers' per-minute rate when comparing calling plans, and do not look at additional charges, such as the "USF fee" included in the "fine print" of many plans. A prohibition on separate carrier recovery of "USF fees" would make it much easier for consumers to shop for the "true" lowest rate by clearly displaying all charges in the per-minute or per-plan rate.

The Commission has the clear statutory authority to prohibit the use of separate line-items for USF recovery. Section 201(b) of the Communications Act of 1934, as amended, states that any "charge" that "is unjust or unreasonable is hereby declared to be unlawful."[50] The

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[48]*See* AT&T Service Guide, AT&T Universal Connectivity Charge UID: MCT01001MC, effective Jan. 1, 2002, available at http://www.att.com (noting that the "AT&T Universal Connectivity Charge is a monthly charge to Customers to recover amounts AT&T must pay into a federal program called the Universal Service Fund (USF)").

[49]*See* Proposed Second Quarter 2002 Universal Service Contribution Factor, Public Notice, DA 02-562 (rel. Mar. 8, 2002).

[50]47 U.S.C. §201(b).

Commission has recognized this authority in the past and has unequivocally stated that the Commission "has jurisdiction under Title II to regulate the manner in which a carrier bills and collects for its own interstate offerings, because such billing is an integral part of that carrier's communications service."[51] In the case of "USF surcharges," the available evidence illustrates that many carriers are using USF line-items as a means to generate additional profit or to "subsidize" per-minute or per-plan rates that would not be competitive if all surcharges were factored in to the overall rate. Such practices inherently lead to customer confusion and are unlawful.

Furthermore, a prohibition on the use of separate line-items does not raise any concerns about the "implicit" subsidization of other services, as some carriers have claimed. In its 2001 Notice reply comments, for example, SBC claimed that "proposals to ban universal service line-item charges effectively would mandate a universal service recovery mechanism that relies exclusively on implicit support in violation of Section 254(e)."[52] Such a reading of Section 254(e) is in error. A prohibition on line-item charges would require affect all carriers uniformly, because under the revenue-based assessment system, the USF contribution factor would be revenue neutral among all carriers. This is in contrast to access charges, which allow certain local exchange carriers to cross-subsidize local services. Accordingly, CU *et al.* again urge the Commission to use its existing legal authority to end these unlawful practices.

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[51]Truth-in-Billing and Billing Format, First Report and Order and Further Notice of Proposed Rulemaking,

[52]SBC Reply Comments at 11.

VII. In the Alternative, Any Line-Item Recovery Should Be Limited to Exact USF Assessment Factor and Contain a Uniform Billing Requirement

Should the Commission fail to adopt a ban on separate line-item charges, CU *et al.* urge the Commission, at a very minimum, to prohibit the assessment of any "USF fee" beyond the actual USF assessment factor, and require that carriers clearly label this amount on customer bills as "Carrier Recovery of Universal Service Assessment." As detailed below, the prohibition on excess recovery combined with clear labeling would help customers identify the true cost of their telecommunications services, and prohibit "padding" of bills by telecommunications providers. Furthermore, as a disclosure requirement, this plan is narrowly tailored, and does not trigger any First Amendment concerns.

A. A Prohibition on Carrier Recovery Beyond the Actual USF Assessment Is the Only Way to Eliminate Customer Confusion

The Further Notice proposes a variety of methods to contain the consumer abuse that has occurred as a result of excessive carrier recovery of USF assessments, including a proposal to require that carriers "make mark-up amounts uniform across all customers and classes of customers," "an interim percentage safe harbor" that would establish a billing safe harbor for the "average" carrier mark-up and a proposal "to prohibit carriers from recovering amounts in excess of their actual contributions."[53] Of these proposals, CU *et al.* urge the Commission, if it declines to adopt a flat prohibition on line-items, to adopt the prohibition on recovery of excess "USF fees."

A flat prohibition on excess recovery is the only method that will protect customers from

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[53]Further Notice at 44, ¶¶98-100.

overcharges resulting from inflated USF "recovery" surcharges. While the other proposals may "standardize" the mark-up across all classes of customers, they do not to resolve the underlying deceptive nature of line-items that do not correlate to actual regulatory assessments. Moreover, to the extent that these alternatives allow carriers to recover general administrative expenses, they essentially reward inefficient behavior by certain carriers, and may even have the effect of institutionalizing inefficient billing methods. Furthermore, it is likely that these alternatives may lead to additional efforts by carriers to cross-subsidize per-minute or per-plan charges by moving costs associated with the provision of service to "recovery" of regulatory fees. A flat prohibition on USF fee "mark-ups," however, allows customers to have clear information about the true amount of actual regulatory fees that are assessed on their telecommunications service. In addition, any "recovery" of administrative fees associated with collection of the USF assessment will be recovered through the per-minute or per-plan billing rate, which will likely encourage additional competition as carriers seek to keep their rates as low as possible.

B. A USF "Truth-in-Billing" Disclosure Requirement Raises No First Amendment Concerns

The Further Notice seeks comment on whether carrier freedom to label USF fees "is protected by the First Amendment."[54] Specifically, the Commission also requests comment on whether a uniform line-item description for USF fee recovery satisfies the four-part "commercial speech" test laid out by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.[55] As detailed below, CU *et al.* believes that a uniform line-item

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[54] *Id.* at 47, ¶105.

[55] 447 U.S. 557 (1980). *See* Further Notice at 47, ¶104.

requirement constitutes a disclosure requirement and, as such, is not subject to the *Central Hudson* test. However, even if *Central Hudson* applies, a line-item USF disclosure easily satisfies the four-part *Central Hudson* test.

1. Disclosure Requirements Are Not Subject to Central Hudson

In the case of uniform disclosure requirements, the courts have held that Central Hudson is not the appropriate test. Instead, the courts have generally applied a "reasonableness test," as delineated in *Zauderer v. Office of Disciplinary Counsel.*[56] In *Zauderer*, the Supreme Court upheld an Ohio law requiring attorneys who advertised their services on a contingency fee basis to disclose that clients would be liable for costs if their claims provided unsuccessful.[57] The Court found that disclosure requirements meet First Amendment scrutiny if they "are reasonably related to the State's interest in preventing deception of consumers."[58]

In this case, a rule requiring carriers to disclose the true amount of the USF assessment allocated to a customer's bill certainly furthers the interest of the Commission because it ensures that consumers know the true amount of regulatory fees imposed on telecommunications services. Furthermore, such a disclosure requirement is very narrowly tailored to only require disclosure of the USF assessment amount, and would not affect a carrier's ability to "speak" to any other issues on its billing statement. Accordingly, a uniform USF disclosure requirement easily satisfies the requirements of *Zauderer*.

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[56]471 U.S. 626 (1985).

[57]*Id.* at 650-51.

[58]*Id.* at 651.

2. A USF Disclosure Requirement Also Easily Meets the Central Hudson Test

Even assuming, *arguendo*, that a USF labeling requirement is not a disclosure requirement, it still satisfies the four-part test enunciated by the Supreme Court in *Central Hudson*.[59] Under this test, a court first determines whether the speech is entitled to First Amendment protection.[60] Commercial speech that does not concern lawful activity or is misleading is not afforded First Amendment protection.[61] Second, to regulate otherwise lawful, non-misleading speech, the government must have a "substantial" interest in support of the restriction.[62] Third, the restriction must "directly advance" that interest.[63] Finally, the regulation must be no more "extensive than is necessary to serve that interest."[64]

a. There Is Ample Evidence That Most Current "USF Line-Items" Mislead Consumers

Both the 2001 Notice and comments submitted pursuant to that notice indicate that there is a serious and pervasive problem with misleading and abusive consumer recovery of carrier USF assessments. As CDD *et al.* noted in their 2001 Notice initial comments, certain prepaid card and dial-around providers charge USF "surcharges" of up to 18%, even though the latest

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[59]See 447 U.S. at 566.

[60]*See id.*

[61]*See id.* ("At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, *it at least must concern lawful activity and not be misleading*.") (emphasis added).

[62]*Id.*

[63]*Id.*

[64]*Id.*

quarterly USF contribution factor was only slightly over 7%.[65] Furthermore, this conduct is not limited to smaller telecommunications providers. On January 1, 2002, the nations's largest long-distance provider, AT&T, raised their "Universal Connectivity Charge" to 11.5%.[66]

None of these carriers have made any sort of compelling arguments explaining why "surcharges" of approximately 4% to 11% are required to recoup the administrative costs associated with "recoupment" of the carrier universal service assessment. Most carriers do not "mark up" other fees and taxes, such as state or federal gross revenue or excise taxes. Accordingly, the only reason for doing so with the universal service assessment is to cross-subsidize other services or "recoup" other administrative expenses. Such conduct is inherently misleading, and is not entitled to First Amendment protection. Accordingly, under Central Hudson, the analysis of a uniform USF disclosure requirement should stop here.

b. The Commission Has a Substantial Interest In Ensuring That Consumers Understand Carrier-Imposed Surcharges

Even assuming, *arguendo*, that certain carrier "surcharges" cannot be classified as misleading, a uniform USF line-item also survives the other three-prongs of the *Central Hudson* test. With regard to the second prong, the Commission has a substantial interest and, in fact, a mandate that consumers are charged "fair and reasonable" rates for telecommunications

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[65]*See* CDD *et al.* Comments at 5, Exhibit D (noting that the Vocall Communications, Inc. charges a surcharge of 7-18% on interstate and international calls made with its "Metrocall Phone Card").

[66]*See* AT&T Service Guide, AT&T Universal Connectivity Charge UID: MCT01001MC, effective Jan. 1, 2002, available at http://www.att.com.

services.[67] To the extent that certain carrier impose inflated "USF recovery" fees, it undermines consumer confidence in the deregulated telecommunications market. In addition, the imposition of inflated charges ascribed to the universal service program could have the impact of undermining overall confidence in the Commission's universal service programs. Accordingly, to the extent that misleading USF "surcharges" undermine confidence in the universal service program, unfairly overcharge consumers and violate the Commission's mandate under Section 201(b) to prohibit billing practices that are not "fair and reasonable,"[68] the Commission has a substantial interest in prohibiting the practice.

c. A Uniform Line-Item Directly and Materially Advances The Commission's Interests

A uniform USF line-item directly and materially advances the Commission's interest in this area because it directly attacks the pervasive problem of customer overbilling for recovery of USF contributions. The vast amount of consumer concern over universal service fee recovery by carriers revolves directly around the fact that many carriers charge far more than is necessary to recover actual USF contributions. A uniform line-item listing the exact amount of carrier contribution that is attributable to a specific subscriber directly and materially advances the Commission's interest in ensuring that consumers have accurate information concerning the fees that are detailed on customer billing statements.

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[67] *See* 47 U.S.C. §201(b) (specifically stating that any "charge" or "practice" that is "unjust or unreasonable is hereby declared to be unlawful").

[68] *See id.*

d. A Uniform Line-Item Is Narrowly Tailored to Serve the Commission's Goal

A uniform line-item disclosure is very narrowly tailored to the Commission's interest because it would only require disclosure of the specific USF recovery attributable to a subscriber, and would not affect a carrier's right to "speak" in any other way. Under this proposal, carrier would still be allowed to raise or lower its overall rates in any way, add other carrier-imposed fees, or even criticize the universal service assessment or any other government-imposed fees if it wished. Accordingly, a line-item is extremely narrowly tailored, and serves only the Commission's compelling interest that consumers have correct and accurate information regarding the amount of USF recovery that is actually attributable to their account.

CONCLUSION

CU *et al.* urge the Commission to reject the connection-based assessment proposal, and retain a modified version of the current revenue-based system. Furthermore, in order to protect consumers from egregious USF recovery practices, the Commission should prohibit separate USF recovery from end users or, in the alternative, limit carrier USF recovery to the actual amount of the USF assessment factor, and require a uniform line-item disclosure for such recovery.

Respectfully submitted,

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Dated: April 22, 2002

ATTACHMENT 1

CURRENT USF COSTS FOR LOW-USE AND AVERAGE-USE RESIDENTIAL LONG DISTANCE CUSTOMERS COMPARED WITH ANNUALIZED COST FOR LOW-USE AND AVERAGE-USE RESIDENTIAL CUSTOMERS UNDER PROPOSED CONNECTIVITY CHARGE

Provider	Plan	Advertised Per-Minute Rate	Monthly Fee	USF %	Total End-User Costs For 29 Minutes	Actual Per-Minute Rate For 29 Minutes	Current USF Costs For 29 Minutes	Total End-User Costs For 58 Minutes	Actual Per-Minute Rate For 58 Minutes	Current USF Costs For 58 Minutes	Proposed USF Connectivity Cost Per Month	Annualized USF Increase for Low-Use Customers	Annualized USF Increase For Ave.-Use Customers
ATT	One Rate Plus Plan	0.07	$3.95	11.50%	$ 6.67	$ 0.23	$ 0.69	$ 8.93	$ 0.15	$ 0.92	$ 1.00	**$ 3.75**	**$ 0.95**
MCI	Anytime Advantage Savings Option	0.07	$2.95	9.90%	$ 5.47	$ 0.19	$ 0.49	$ 7.70	$ 0.13	$ 0.69	$ 1.00	**$ 6.08**	**$ 3.67**
Sprint	Anytime	0.07	$ 5.95 to $0.00	9.90%	$ 8.77 $ 2.23	$ 0.30 $ 0.08	$ 0.79 $ 0.20	$ 11.00 $ 4.46	$ 0.19 $ 0.08	$ 0.99 $ 0.40	$ 1.00	**$ 2.52** **$ 9.59**	**$ 0.11** **$ 7.18**
Everdial	Everdial1	0.049	$0.00	9.25%	$ 1.55	$ 0.05	$ 0.13	$ 3.10	$ 0.05	$ 0.26	$ 1.00	**$ 10.42**	**$ 8.85**
ZoneLD	N/A	0.045	$0.00	8.50%	$ 1.42	$ 0.05	$ 0.11	$ 2.83	$ 0.05	$ 0.22	$ 1.00	**$ 10.67**	**$ 9.34**
Total Call Int.	N/A	0.049	$0.00	6.90%	$ 1.52	$ 0.05	$ 0.10	$ 3.04	$ 0.05	$ 0.20	$ 1.00	**$ 10.82**	**$ 9.65**
isterra	N/A	0.049	$0.00	9.25%	$ 1.55	$ 0.05	$ 0.13	$ 3.10	$ 0.05	$ 0.26	$ 1.00	**$ 10.42**	**$ 8.85**
*0#	N/A	0.054	$0.00	9.90%	$ 1.72	$ 0.06	$ 0.16	$ 3.44	$ 0.06	$ 0.31	$ 1.00	**$ 10.14**	**$ 8.28**
Capsule	N/A	0.039	$ 2.00 to $0.00	9.80%	$ 3.44 $ 1.24	$ 0.12 $ 0.04	$ 0.31 $ 0.11	$ 4.68 $ 2.48	$ 0.08 $ 0.04	$ 0.42 $ 0.22	$ 1.00	**$ 8.32** **$ 10.67**	**$ 6.99** **$ 9.34**
ecg	N/A	0.049	$ 2.00 to $0.00	6.90%	$ 3.66 $ 1.52	$ 0.13 $ 0.05	$ 0.24 $ 0.10	$ 5.18 $ 3.04	$ 0.09 $ 0.05	$ 0.33 $ 0.20	$ 1.00	**$ 9.17** **$ 10.82**	**$ 7.99** **$ 9.65**
Unitel	N/A	0.045	$ 2.00 to $0.00	7.70%	$ 3.56 $ 1.41	$ 0.12 $ 0.05	$ 0.25 $ 0.10	$ 4.96 $ 2.81	$ 0.09 $ 0.05	$ 0.35 $ 0.20	$ 1.00	**$ 8.95** **$ 10.79**	**$ 7.74** **$ 9.59**
Power Net Global	N/A	0.049	$ 2.50 to $0.00	9.90%	$ 4.31 $ 1.56	$ 0.15 $ 0.05	$ 0.39 $ 0.14	$ 5.87 $ 3.12	$ 0.10 $ 0.05	$ 0.53 $ 0.28	$ 1.00	**$ 7.34** **$ 10.31**	**$ 5.65** **$ 8.62**
atn	N/A	0.069	$0.00	12%	$ 2.24	$ 0.08	$ 0.24	$ 4.48	$ 0.08	$ 0.48	$ 1.00	**$ 9.12**	**$ 6.24**

CERTIFICATE OF SERVICE

I, Raleigh Rogers, hereby certify that I have on this Twenty-Second day of April, 2002, sent by U.S. Mail, postage prepaid, copies of the "Comments of the Consumers Union, the Texas Office of Public Utility Counsel, Consumer Federation of America, Center for Digital Democracy, Edgemont Neighborhood Coalition and Migrant Legal Action Program" to the following:

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