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

REPLY COMMENTS OF THE
ASSOCIATION OF COMMUNICATIONS ENTERPRISES

The Association of Communications Enterprises ("ASCENT"), through undersigned counsel, and pursuant to Section 1.415 of the Commission's Rules,[1] hereby responds to the comments of other parties filed in response to the *Further Notice of Proposed Rulemaking and Report and Order*, FCC 02-43, released in the above-referenced dockets on February 26, 2002

[1] 47 C.F.R. § 1.415.

("*FNPRM*"). As expected, the comments filed in response to the Commission's "proposal to fundamentally reform the contribution assessment system"[2] have expressed widely varying points of view, calling for, alternatively, a shift to a per-connection assessment system, a retention of the present system, and a modification of the present system to base assessments upon current or projected revenues. The comments also reflect requests for exemption from contribution obligations on behalf of entities operating within various narrowly circumscribed segments of the telecommunications industry, most frequently based upon the *de minimis* nature of the contribution amount which would be outweighed by compliance and administrative costs.

As to the implementation of a per-connection contribution mechanism, to the extent the Commission fashions a truly equitable means of assessing USF contributions on a per-connection basis, Section 254 does not preclude the Commission from doing so. However, as an essential prerequisite, the Commission remains obligated to ensure the "equitable and nondiscriminatory" nature of such a mechanism. As the comments reflect, the "tier" structure proposed by the USF Coalition[3] cannot satisfy this standard of equity and nondiscrimination in the assessment of USF contributions.

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[2] *FNPRM*, ¶ 2.

[3] Collectively, AT&T Corp., e-Commerce & Telecommunications Users Group, Level 3 Communications, WorldCom, Inc., and the Ad Hoc Telecommunications Users Committee.

As the California Public Utilities Commission notes, "the Commission's multi-line business proposal presents many difficulties."[4] Among the more glaring of these difficulties, and directly contrary to the assertions of the USF Coalition,[5] the California PUC notes that "[t]he tiered approach for multi-line business customers creates administrative problems and arbitrage decisions."[6] The commenter also deftly debunks the USF Coalition's assertion that basing USF assessments on capacity "rather than voice-grade equivalents" is necessary "so that universal service contribution charges do not materially change the 'crossover' point between different facilities."[7] The California PUC specifically criticizes the proposed tier contribution structure, observing that if the USF Coalition's proposal is adopted, "some customers may purchase a single high-capacity connection if that would minimize their universal service assessments, *even though multiple smaller capacity connections may otherwise suit their needs better*."[8]

Echoing the concerns expressed by ASCENT in its comments, the Home Telephone Company, Inc. takes on the reasonableness of the tier contribution structure, highlighting the proposal's clear inconsistency with Section 254's requirements of equity and nondiscrimination:

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[4] Comments of the California Public Utilities Commission and the People of the State of California, p. 11.

[5] *See* Comments of the USF Coalition, p. 56 (Tier contribution structure purportedly based upon joint principles of "minimizing administrative burdens and complexity" and "ensuring that the USF contribution charges do not . . . distort customer choices.")

[6] Comments of the California Public Utilities Commission and the People of the State of California, p. 12.

[7] Comments of the USF Coalition, p. 57. The totality of the USF Coalition's comments make clear, however, that the only "'crossover' point between different facilities" with which it is concerned is the crossover point between DS-1 and DS-3 service.

[8] Comments of the California Public Utilities Commission and the People of the State of California, p. 12 (emphasis added).

> The proposal, as currently outlined in this *Further Notice*, will unfairly assess smaller business users in comparison to large business users. In the example quoted in the *Further Notice*, a small business with eight lines would pay the base factor times eight or, per the example, $32.00. Yet, a larger business using a T-1 connection would only pay $20.00. The smaller business would pay 60% more than the larger business, even though the larger business would be utilizing 300% more voice grade connections. The concept of assessing all connections equally on a per-voice equivalent would fairly assess each entity for their actual connectivity to the network and eliminate the inequity of the tier approach.[9]

The Coalition attempts to fashion, but ultimately cannot provide the Commission with, a facially acceptable rationale pursuant to which the Commission might legitimize, through official regulatory action, the subsidy for large corporate users embodied in the USF Coalition proposal. This attempt to demonstrate the reasonableness of its proposed tier contribution structure takes the form of a strained and unconvincing analogy of the Tier 2 USF contribution to "the price cap LECs' current practice of assessing a PRI ISDN USF charge that is five times higher than the base USF charge [and] the 5:1 ratio that the Commission has established as the PRI ISDN multiline business PICC charges and switched multiline business PICC charges, and also between the PRI ISDN multiline business end user common line charges ('EUCL') and switched multiline business EUCL charges."[10]

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[9] Joint Comments of Home Telephone Company, Inc., et al., pp. 12-13.

[10] Comments of the USF Coalition, p. 66.

The 5:1 price cap LEC recovery mechanism is a relatively recent and limited exception to the Commission's "per-derived channel" end user common line charge methodology. Section 69.104 of the Commission's Rules otherwise requires price cap LECs to "assess one multiline business EUCL charge, more commonly known as a Subscriber Line Charge (SLC), for each channel used for local exchange service that is derived from a T1 facility, whether a single T1 is used to provide one customer with the same service on all channels, one customer with different services on the channels, or multiple customers with one or more services on their share of the T1 facility's channels."[11] Hence, "when a LEC provides local exchange service to one customer over a single T1 facility, . . . one SLC must be assessed for each T1 derived channel provided by the LEC."[12]

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[11] NYNEX Telephone Companies Revision to Tariff F.C.C. No. 1, Transmittal No. 116 (Memorandum Opinion and Order), 7 FCC Rcd. 7938 (1992), ¶ 2. The Commission has specifically rejected the contention "that assessing one SLC per T1 facility used to provide one customer with a single local exchange service is permissible under Part 69 of the Commission's Rules." Id., ¶ 4. In so doing, the Commission noted that "[i]n Part 36 of the Commission's Rules, a 'subscriber line' is defined as a 'communications *channel* . . . [a] 'channel' is defined as an 'electrical path suitable for the transmission of communications between two or more points' [and] a channel derived from a T1 facility is an "electrical path suitable for the transmission of communications. Thus, when a LEC provides local exchange service to one customer over a single T1 facility, the LEC is providing the equivalent of up to 24 voice-grade channels or subscriber lines to that customer. Although these channels are provided to one customer of a single, physical line (*e.g.*, a twisted copper pair), the fact remains that the LEC is providing not one, but up to 24, electrical paths for the transmission of communications. Thus, a more reasonable reading of the rule than that advanced by NYNEX is that one SLC must be assessed for each T-1 derived channel provided by the LEC." Id., ¶ 5.

[12] Id.

Following passage of the 1996 Act, in recognition of the unusual non-traffic-sensitive costs of providing PRI ISDN service, the Commission modified its per derived channel methodology with respect to ISDN SLCs, amending its rules "to establish, effective July 1, 1997, a SLC rate for PRI ISDN service equal to five times the incumbent LEC's average per-line interstate-allocated common line costs, subject to a ceiling of five times $9.00."[13] Noting clearly that "[w]e have amended our rules regarding the application of SLCs to ISDN service"[14] only, the Commission specified that "the rules we adopt in this order govern only the manner in which LECs recover interstate-allocated common line costs associated with providing ISDN service."[15] This limited carve-out from the generally applicable "per derived channel" rule was appropriate, the Commission reasoned, because it was consistent with the Commission's policy to "realign[] cost recovery in a manner that more closely reflects the manner in which those costs are incurred." The Commission continued that it was "establish[ing] separate SLC rates for ISDN service based on the NTS loop costs of BRI and PRI ISDN service. . . [because] a SLC for single-channel analog service multiplied by the number of derived channels exceeds the NTS costs of the ISDN service."[16]

The Commission's entire focus when adopting a 5:1 cost recovery ratio for PRI ISDN service was the non-traffic sensitive costs associated specifically with PRI ISDN service –

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[13] Access Charge Reform (First Report and Order), 12 FCC Rcd. 15982 (1997), ¶ 115. The Commission also modified its rules with respect to the provision of BRI ISDN service by price cap LECs, modifying the "per derived channel" assessment methodology "to provide for a SLC rate for BRI ISDN service equal to the incumbent LEC's average per-line interstate-allocated common line costs, subject to the same ceilings otherwise applicable to non-primary residential lines. Thus, beginning January 1, 1998, the SLC ceiling for BRI ISDN service will be set at the lesser of the incumbent LEC's average per-line interstate-allocated costs, or $5.00". Id.

[14] Id., ¶ 122.

[15] Id., ¶ 121.

[16] Id., ¶ 115.

costs differences which had not been demonstrated for other derived channel services. Thus, the Commission, after first noting that "the record does not contain sufficient information to enable us to determine the relative NTS costs of derived channel services other than ISDN," specifically chose to "limit our decision to BRI and PRI ISDN service."[17] So as to leave absolutely no doubt concerning the limited nature of the modification, and to remain "consistent with our prior treatment in other contexts, of derived channel technology,"[18] the Commission continued,

> We agree . . . that we should not apply the rules we adopt here regarding SLCs when the LEC uses derived channel technology but the end user has not requested derived channel service. Unless a subscriber orders ISDN or another service that requires

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[17] Id., ¶ 120.

[18] Id., footnote 149.

> derived channel technology, we see no reason to vary from our general rule that the incumbent LEC should charge one SLC for each channel regardless of how it is provisioned.[19]

Clearly, this cost recovery limitation has no nexus to the USF contribution of carriers serving large multi-line business users. The Commission's very modest carveout of BRI ISDN service from the generally applicable "per derived channel" methodology was a rational response to the particular NTS costs experienced by local exchange carriers in the provision of PRI ISDN service. Consideration of LEC NTS costs is totally irrelevant to the issue of what level of compensation USF Coalition members should make toward the funding of USF programs, the purpose of which is to to ensure that low-income and rural consumers have access to local phone service at reasonable prices."[20] And absolutely no justification could be found for not only grafting this limited carveout to a universe of network connections vastly more expansive than simply the PRI ISDN service the Commission was addressing. Under the USF Coalition's tier contribution structure, however, all network connections at the DS-1 and DS-3 level *(i.e.*, 24 and 672 derived channels, respectively), would receive this highly beneficial treatment.

The Commission's universal service goals would be much better served, and consistency with the Commission's prior decisions maintained, through application of the Commission's "derived channel" methodology to DS-1 and DS-3 facilities. While ASCENT is not convinced that the assessment of a USF contribution on DS-1 and/or DS-3 facilities on a per-derived channel basis would render such services unprofitable for the USF Coalition's large IXC and corporate user members, one conclusion is inescapable. The DS-1 and DS-3 USF assessments

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[19] Id., ¶ 120.

[20] Indeed, the USF Coalition is particularly disingenuous in even advancing such a purported connection since none of its members is now, or has been in the past, governed by price cap LEC rules and none is now, or has experience the NTS local loop costs which moved the Commission to establish the 5:1 SLC carveout.

proposed by the USF Coalition can certainly come a tremendous amount closer to proportionality with the burden to be borne by the residential and small multi-line business users without any realistic risk that the USF assessment would "exceed the cost of the service." There is thus no justification for the Commission to sanction the massive subsidy set by the USF Coalition with respect to Tiers 2 and 3 under the proposal.

Indeed, even those commenters which support the adoption of the USF Coalition's tier contribution structure cannot provide a plausible basis for the subsidy. Ironically, while voicing its opposition to the possibility that multi-line business users will be required to fund all future USF increases, Ad Hoc actually succeeds in soundly defeating the tier structure advanced by the Coalition. According to Ad Hoc, "[a]n economic classification such as the one at bar (*i.e.*, distinguishing between residential and multi-line business subscribers) is Constitutional only "if the distinction it makes rationally furthers a legitimate state purpose."[21] The Commission and the states have long held the widespread availability of basic telephone services to residential consumers to be a strong society goal deserving of regulatory support. Indeed, citing to Section 254(d) and (e), the Commission has stated that

> [t]he universal service system is designed primarily to ensure that low-income and rural consumers have access to local phone service at reasonable prices.. . . In general, universal service funding ensures that rural telephone customers do not pay the actual cost of phone service, which could be hundreds of dollars more than the subsidized rate that the Universal Service fund makes possible. In large measure,

[21] Comments of Ad Hoc, p. 18, citing Zobel v. Williams, 457 U.S. 55, 60 (1982).

> this funding mechanism is responsible for the very high levels of telephone subscriber rates in America.[22]

Ad Hoc's protestations that "residential consumers can afford to pay an equitable share of future increases in the universal service fund" and "residential customers can afford modest increases in their per-connection fees" notwithstanding, the Commission, and the states, have more than adequately demonstrated "a distinction rationally furthering a legitimate state purpose" in the long-established policy determination that the availability of residential service must be fostered, even if that result comes at the cost of a a relatively slight economic burden on other classes of consumers. The same cannot be said, however, for the purely economic classification the USF Coalition seeks to draw between the USF contributions to be assessed upon small multi-line business users and larger multi-line business users, especially where the only discernable motivation of the USF Coalition appears to be an unwillingness to pay the same proportionate amount as they ask the Commission assess on small multi-line business contributors. However much it would like to read "equitable and nondiscriminatory" out of Section 254's directive, the USF Coalition does not possess the ability to dictate that a more limited set of criteria will be applied to a USF assessment regime.

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[22] "The FCC and the Unregulation of the Internet", OPP Working Paper No. 31, Jaxon Oxman, Counsel for Advanced Communications Office of Plans and Policy, Federal Communications Commission, July, 1999.

The comments also reflect the absence of sufficient independent judgment by the Commission in the proposed adoption of the USF Coalition's proposal. ASCENT agrees with such commenters that it is the obligation of the Commission to ensure the full implementation of Section 254, including the directive that contributions to USF programs must be made in an *equitable* and *nondiscriminatory* manner, and that adoption of the tier structure proposed by the USF Coalition cannot satisfy this goal. As Arch Wireless, Inc. notes, "the Commission has not made *any* visible attempt to justify the USF Coalition's or Sprint's proposed assessment amounts. It is a well-established principle that, as an expert agency, the FCC must make 'informed' and 'rational' decisions. Conclusory justifications are insufficient. Therefore, the FCC cannot exercise 'near-total deference' to the USF Coalition's or Sprint's figures without impermissibly abdicating its role as the rational decision-maker – a mistake it has made previously in this difficult proceeding."[23]

Also cautioning the Commission against adoption of a USF mechanism which would impose financial burden unequally among contributing carriers, Verizon Wireless reminds the Commission that in previous action in this proceeding, the U.S. Court of Appeals for the Fifth Circuit refused to permit such a result: "The court found that application of the FCC's methodology . . . resulted in 'heavy inequity' which 'cannot simply be dismissed by the agency as a consequence of its administrative discretion.' The Court rejected the FCC's argument that its order recognized and justified the result that some providers would be treated differently than others, stating that 'this recognition of discrimination hardly saves the agency from the statutory requirement that contributions are collected on a non-discriminatory basis.'"[24] The Commission should not make the same mistake by adopting the USF Coalition's tier contribution structure as presently formulated.

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[23] Comments of Arch Wireless, Inc., pp. 8-9, citing both Qwest v. FCC, 258 F.3d 1191 (10th Cir. 1991), and Texas Office of Pub. Util. Council v. FCC, 265 F.3d 313 (5th Cir. 2001).

[24] Comments of Verizon Wireless, pp. 5-6, citing Texas Office of Pub. Util. Council v. FCC, 18d F.3d 393 (5th Cir. 1999).

Ultimately, to the extent carriers serving large multi-line business customers choose to confer an economic benefit upon such customers by voluntarily agreeing not to pass through USF contributions, such a market driven decision is certainly permissible. As ASCENT noted in its comments, it is not unusual in the telecommunications industry for large corporate users to specifically negotiation contractual arrangements binding carriers to do just that. However, a carrier's voluntary foregoing of its ability to collect a USF contribution from its large corporate end user does not in any way limit its obligation to contribute to the funding of USF programs on the same equitable and nondiscriminatory basis as all other contributing carriers. The Commission should not be in the business of protecting certain entities from the competitive consequences of their own market driven policies. In light of the Congressional directive of Section 254 that the funding of USF programs in an equitable and nondiscriminatory manner, the Commission cannot place its stamp of official approval on such an outcome.

In light of the above, ASCENT repeats its request that the Commission to modify the per-assessment contribution mechanism propounded by the USF Coalition to eliminate the present conflicts with Section 254's mandate that contributions to USF programs must be "equitable and nondiscriminatory" among all carriers. The Commission must act to, minimize to the extent possible (with an eye toward ultimately eliminating) the subsidization of the USF contributions of large corporate users by small multi-line business contributors and more ratably spread USF funding obligations over the contributing carrier universe. Until such a contribution mechanism can be established, however, ASCENT also urges the Commission to remedy the anticompetitive effect of the present revenue-based assessment regime on carriers with decreasing revenue bases by moving

to a current or projected revenue assessment basis until a per-connection contribution regime ultimately becomes effective.

Respectfully submitted,

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