

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

In the Matter of)	
)	
Federal-State Joint Board on)	CC Docket No. 96-45
Universal Service)	
)	
1998 Biennial Regulatory Review -)	CC Docket No. 98-171
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)	CC Docket No. 90-571
with Hearing and Speech Disabilities, and the)	
Americans with Disabilities Act of 1990)	
)	
Administration of the North American)	CC Docket No. 92-237
Numbering Plan and North American)	NSD File No. L-00-72
Numbering Plan Cost Recovery Contribution)	
Factor and Fund Size)	
)	
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 NRTA AND OPASTCO

NATIONAL RURAL TELECOM ASSOCIATION

ORGANIZATION FOR THE
PROMOTION AND ADVANCEMENT OF
SMALL TELECOMMUNICATIONS
COMPANIES

Margot Smiley Humphrey
Holland & Knight LLP
2099 Pennsylvania Avenue, Suite 100
Washington, D.C. 20006
(202) 955-3000

Stuart Polikoff
21 Dupont Circle, NW, Suite 700
Washington, D.C. 20036
(202) 659-5990

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SUMMARY

Numerous comments provide compelling legal and policy reasons why the Commission must not adopt the FNPRM's end-user connection-based proposal in its current form. Some seek to retain the status quo of basing universal service contributions on interstate revenues. Others agree with the NRTA and OPASTCO that the Commission should consider a flat-rated contribution method because of the need to restore stability and sustainability to the funding mechanism, but that significant changes are required to develop a flat-rate system that can pass legal and policy muster.

The Coalition for Sustainable Universal Service tries unsuccessfully to justify the end-user connection proposal by misstating the plain language of the statute, setting up straw man arguments, and other contorted efforts to wrench a different meaning from the simple and precise words of the statute. It does not matter that most IXC's provide end-user access, that under the law's narrow, permissive de minimis exception authority, "every single carrier" need not "pay something," or that the current system puts an unsustainable burden on some IXC's' dwindling traffic. The Act's mandate is that "every carrier that provides interstate telecommunications services shall contribute," unless its telecommunications activities are limited to a specified extent. The law cannot be twisted into the bare requirement that carriers must "be subject to an equitable and nondiscriminatory formula" that is also "specific, predictable, and sufficient." The words of Congress mean what they say: The class made up of the only carriers that provide the defining, physically interstate part of any interstate telecommunications service cannot be exempt or covered only if they also have some other role in end-to-end interstate calling. A plan cannot lawfully shift most of the burden to LECs, whose access service cannot even become interstate without a customer relationship with an

IXC that provides the essential connection to the interstate network. To fashion a legal flat-rate contribution assessment plan, the Commission must restore the IXCs to the list of required contributors and find a contribution metric logically connected to the provision of state-to-state telecommunications.

Most parties also agree that the Commission must expand the contribution requirement to all interstate telecommunications providers, including facilities-based broadband Internet access providers over all platforms. Parties explain that only the widest possible coverage can make the fund sustainable, sufficient, and competitively neutral. Wireless and cable broadband use have grown explosively in recent years. Cable modem service is leading the field in broadband Internet access. There is no time to wait and allow arbitrage to skew the competitive market and technology decisions in this time of rapid broadband growth. Anticipation of growing bypass based on differing classifications and service configurations was the very reason Congress gave the Commission the power to broaden the base of contributors.

Contrary to the proponents for capacity-based contribution assessments for multi-line business connections, a capacity-based metric will neither minimize administrative burdens and complexity nor ensure that USF contributions do not distort customer choices. The multi-line business category is a catch-all category that will grow increasingly difficult to maintain under a capacity scheme as new technologies and service offerings emerge. Still worse, potential rate increases from higher contributions could undermine broadband demand and thus deployment for businesses in rural areas. And multi-line business contribution burdens may be inequitable and unpredictable under a capacity-based system, especially coming on top of recent SLC increases from \$6.00 to \$9.20. Comments also correctly warn that capacity-based assessments

may skew marketplace behavior, as customers attempt to minimize the contribution assessed for their connections.

Several comments, like NRTA and OPASTCO, suggest bifurcating the assessments to reflect fundamental differences between high-cost rural support and subsidies for school, library, and health care facilities. As the record establishes, customers should know what support is going for what purpose.

Finally, NRTA and OPASTCO agree with the United States Cellular Corporation in opposing collect and remit proposals because "...it is hard to imagine a proposal better calculated to destroy the USF than making it, in essence, dependent on the voluntary contributions of end users." In the interest of statutorily mandated predictability and sufficiency, complying with the Act's requirement for carrier (not customer) contributions, and not exposing the fund to much-increased risks of non-recovery, the FCC should reject a collect and remit scheme. The most responsible customers and the most efficient carriers should not face higher universal service assessments to make up for carriers with more uncollectibles, higher collection costs or customers that refuse to pay. The instability of the IXCs, the driving force behind these proposals, should not compromise the predictability and sufficiency of support.

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REPLY COMMENTS OF NRTA AND OPASTCO

I. INTRODUCTION

The National Rural Telecom Association (NRTA) and the Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO) (the Associations) submit these reply comments in response to comments filed in the above-captioned proceeding. The Commission is considering proposals to substitute a flat-rate end-user “connection” based plan for assessing carrier universal service contributions pursuant to

§254(d) for the current system based on interstate end-user revenues. In its opening comments, the Associations pointed to the legal flaws in the proposal currently under consideration and explained that, as drafted, it would not meet the Commission's objectives for a sustainable, competitively neutral and sufficient funding mechanism. The Associations suggested what changes would be necessary to craft a flat-rate contribution assessment mechanism that will be lawful, sustainable, sufficient, equitable, non-discriminatory, and competitively neutral.

Comments in the proceeding overwhelmingly confirm the Associations' conclusions that the proposal in the Further Notice of Proposed Rulemaking (FNPRM) cannot be adopted as drafted. The proponents fail to show that exempting the quintessential interstate carriers and telecommunications services from contributing is lawful or sound public policy. They also fail to show that the contribution base they propose is broad enough to ensure sufficient support without skewing the competitive marketplace and arbitrarily discriminating among customers, platforms, and service configurations when identical functions are involved.

II. SECTION 254(d) CANNOT BE SQUARED WITH AN EXEMPTION FROM EQUITABLE AND NONDISCRIMINATORY CONTRIBUTIONS FOR THE QUINTESSENTIAL INTERSTATE CARRIERS AND THEIR CORE INTERSTATE SERVICES

Except for the proponents – principally the Coalition for Sustainable Universal Service (Coalition) and its individual members – most parties oppose the end-user-connections-based contribution plan as it is currently proposed.¹ Many comments explain (*e.g.*, BellSouth, pp. 5-

¹ Sprint supports the Coalition plan, but with a transition for mobile wireless connections, as a fallback in the event that its arbitrary and self-serving effort to maintain the current proportionate contributions of industry segments is not adopted. However, the interim wireless “safe harbor” has been challenged by commenters (*see, e.g.*, NTCA, p. 5-8) as inequitable and discriminatory.

7; VoiceStream Wireless, pp. 12-15; Verizon, pp. 20-22; Beacon, pp. 1-2), as did the Associations, that exempting interexchange carriers (IXCs) except to the extent they also provide residential or business end-user access services conflicts with §254(d). Notably, the oppositions come not only from parties that urge continuation of the current interstate revenue-based system such as NTCA (pp. 2-5) and NECA (pp. 5-9), but also from parties such as the Associations, and SBC (p. 6, 18-21), that urge changes to conform any flat-rate assessment system to the legal mandate for all providers of interstate telecommunications service to contribute. Opponents of restricting interstate carrier contributors to carriers that deal directly with end-users explain that §254(d) expressly requires the Commission to adopt a system that results in contributions “on an equitable and nondiscriminatory basis” from “every carrier” that provides “interstate telecommunications services.” As SBC correctly concludes (p. 18), the law cannot condone a plan that eliminates or virtually eliminates contributions from whole classes of carriers, including the largest interstate telecommunications service providers.

The Coalition, taking the lead for the proponents of the end-user-connections-based proposal, tries to rewrite the plain language of the statute, by setting up a series of straw man arguments and by contorted efforts to wrench a different meaning from the simple and precise words Congress used. The Coalition’s efforts must fail because its arguments are not even aimed at the real conflict between its plan and the statute.

Section 254(d) is clear, unambiguous, and straightforward on its face, so there is no need to twist the words and look for tangential legislative history. Indeed, just to read the statute and then the Coalition’s heading on page 83 shows how far off course the Coalition wants to steer the Commission. The two simple sentences in §254(d) establishing the

obligations of telecommunications carriers and the Commission's narrow exemption authority state:

Every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service. The Commission may exempt a carrier or class of carriers from this requirement if the carrier's telecommunications activities are limited to such an extent that the level of such carrier's contribution to the preservation and advancement of universal service would be de minimis.²

The Coalition's version (p. 83) is that the provision "Requires Only that Every Carrier Be Subject to an Equitable and Nondiscriminatory Formula that Is Specific, Predictable, and Sufficient." That is simply not what the law says. The subject of the sentence is "[e]very telecommunications carrier that provides interstate telecommunications services." No one has questioned that the IXCs are "telecommunications carriers" under the Act (47 U.S.C. (49)).³ Nor can anyone question that the IXCs provide "interstate telecommunications services," since they provide the state-to-state transmissions by which the term "'interstate communication' or 'interstate transmission'" is defined in the Act.⁴

² 47 U.S.C. §254(d).

³ They provide "telecommunications services," defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used" (*id.* at (50)). "Telecommunications," in turn, is "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."

⁴ 47 U.S.C. §153(22). The definition reads:

The term "interstate communication" or "interstate transmission" means communication or transmission (A) from any State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia, to any other State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia, (B) from or to the United States to or from the Canal Zone, insofar as such communication or transmission takes place within the United States, or (C) between points within the United States but through a foreign country; but shall not, with respect to the provisions of Title II of this Act (other than Section 223 thereof), include wire or radio communication between points in the same State, Territory, or possession of the United States, or the District of Columbia, through any place outside thereof, if such communication is regulated by a State commission.

In contrast, the local exchange carriers (LECs) to which the Coalition's plan would shift the lion's share of the contribution requirement do not, as local exchange carriers, provide state-to-state services to their end-users at all. They are within the regulatory authority of this Commission because their facilities form a part of the end-to-end path. If, and only if, the service they provide is linked with the interstate IXCs' interstate transmissions can the end-user complete an interstate call. A share of the LECs' costs used to provide access to local and both interstate and intrastate long distance services is allocated to the interstate jurisdiction for recovery in interstate rates.⁵ They provide "'exchange access," which is defined as "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services."⁶ Undeniably, exchange access service is only interstate to the extent that it connects to the interstate network provided by an IXC. The transaction necessary to provide entry to the interstate network is choosing a presubscribed interstate carrier, using a dial-around number to reach an interstate provider, obtaining interstate private line service, using an IXC calling card or prepaid card, or the like.

The LECs do not contest the Commission's current requirement that they, too, contribute to federal universal service funding, on the basis of their interstate end-user access role and revenues. Indeed, the Associations do not even argue that a flat-rate assessment is barred by §254(d). The statutory point is simple: A lawful means to determine contribution assessments must reflect the language and meaning of §254(d); hence, an "end-user

⁵ See, *Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corporation, Memorandum Opinion and Order*, 7 FCC Rcd 1619 (1992) (BellSouth MemoryCall), *aff'd*, *Georgia Pub. Serv. Comm'n v. FCC*, 5 F.3d 1499 (11th Cir. 1993)(table); *Teleconnect Co. v. Bell Telephone Co. of Penn.*, E-88-83, 10 FCC Rcd 1626 (1995) (Teleconnect), *aff'd sub nom. Southwestern Bell Tel. Co. v. FCC*, 116 F.3d 593 (D.C. Cir. 1997); see also, *National Ass'n of Regulatory Util. Comm'ners v. FCC*, 737 F.2d 1095, 1101-1108, 1130-34 (D.C. Cir. 1984), cert. denied, 469 U.S. 1227 (1985)(NARUC v. FCC).

⁶ 47 U.S.C. §153(40).

connection-based” assessment must fail unless it includes the link or connection into the interstate network uniquely furnished by the only class of carriers that actually provide services across state lines, the IXCs. Congress has defined the contributor class by the fact of providing “interstate telecommunications services.” The Commission must not exclude the defining link upon which Congress bases the duty to contribute in implementing the law. In short, the Commission’s determination of what carriers are within the statutory contributor class Congress established with the words “[e]very carrier that provides interstate telecommunications services” must be founded on the interstate services using the interstate network facilities provided by the IXCs, not the adjunct access services provided by other carriers.

The Coalition’s major straw man argument (pp. 82-91) is that the statute does not require that “every” single carrier” must “pay *something*.” The Coalition fills page after page combating this false issue, rather than addressing the real issue: its plan does not embody the right contributor class definition – “[e]very carrier that provides interstate telecommunications services.” As a result, the Coalition’s assertions, for example (pp. 83-84), that “[v]ery few telecommunications carriers provide no connections to end users” and that most IXCs also have some end-user connections (via providing special access and private line or their local exchange carrier activities) do not respond to the fatal flaw in the current version of their plan. The plan as currently proposed is illegal because it exempts the very carriers and services Congress included and exceeds the Commission’s very limited exemption authority.

The statute requires contributions from “every carrier” that “provides interstate telecommunications services.” Consequently, the indispensable first steps in fashioning a flat-rate contribution assessment plan consistent with §254(d) are (1) to add the IXCs back to the

list of required contributors and (2) to use a touchstone for contributions that has a logical connection to the “telecommunications activities” that bring a carrier within the mandatory contribution class. Examples of such a touchstone would be interstate customer accounts or a simple count of the very same interstate telecommunications service retail customers who generate the interstate revenues counted by the current formula. The “metric” must not exclude the carriers without which there simply can be no “interstate telecommunications.”

The Coalition trots out the feeble claim (pp. 82-83, 87-91) that the Commission can relieve the core contributor class and the class-defining services from their statutory obligation to contribute under its carefully circumscribed exemption power. The statute confers narrow permissive authority to exempt “a carrier or class of carriers” when its “telecommunications activities are limited to such an extent” that its “contribution ... would be de minimis.” The argument that providers of “interstate telecommunications services” may be exempted has no legal legs. The Commission cannot apply the de minimis exemption for “limited telecommunications activities” to remove the contribution requirement from providers of the very “telecommunications activity” that identifies contributors – that is, all “carriers that provide interstate telecommunications services.” It can include providers of other parts of the service, but it cannot modify the definition of the contributor class to cover only providers of different activities – exchange access or special access customer connections. The law says that every carrier that is not legitimately within the narrow exemption “shall contribute,” not “be subject to” a mechanism based on a different standard chosen by the Commission to replace the basic interstate carrier responsibility for contribution enacted by Congress. In fact, the Senate Report even stressed that state authority under its bill excluded “any action inconsistent with the obligation for all telecommunications carriers to

contribute to the preservation and advancement of universal service under new section 253(c).”

Nor can the Coalition (pp. 86-87) excuse the quintessential interstate carriers and interstate services from contributions on the grounds that §254(d) calls for “equitable and nondiscriminatory contributions.” The argument is that, given the declining revenues some interstate services are experiencing, the current formula is neither “equitable and nondiscriminatory” nor “specific, predictable, and sufficient.” The phrase “to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service” is not a criterion for the contribution requirement. It has no hortatory language in this section, but rather simply describes the federal support and federal mechanism standards established by the §254(b) principles and §254(e). Moreover, even if the phrase were, as is the phrase “shall contribute on an equitable and nondiscriminatory basis,” a standard for the contribution system, it would not avail the Coalition. The issue is not whether the current program is satisfactory, but whether the Coalition proposal satisfies §254(d). The Associations have not disputed that the current system raises compelling concerns about sustainability and sufficiency. However, a contribution system required to apply to the entire class of carriers that provide “interstate telecommunications services” cannot be “equitable and nondiscriminatory,” let alone “specific and predictable” if it forsakes the statutory language and shifts most of the support to access providers.

All the problems with the current system can be solved lawfully in the context of a flat-rate assessment method, but not by persuading the Commission to rewrite the statute to exempt the core interstate carriers and services from the contribution obligation imposed by Congress. The proper cure for a contribution mechanism that is not sufficient, stable, and

sustainable is to broaden the base of contributors significantly, not to narrow the base by excusing interstate long distance providers except to the extent they also provide end-user origination and termination services.⁷

III. ALL CARRIERS AND OTHER PROVIDERS OF INTERSTATE “TELECOMMUNICATIONS” MUST CONTRIBUTE TO ACHIEVE SUFFICIENT AND SUSTAINABLE SUPPORT, AS WELL AS COMPETITIVE NEUTRALITY FOR ALL PLATFORMS AND PROVIDERS

The Associations, as well as many other parties (*e.g.*, SBC, p. 5; ATA, p. 3; NTCA, pp. 8-10; ASCENT, p. 5; Home Telephone, p. 11), urge the Commission to broaden the base of contributors. For example, Verizon Wireless urges (pp. 13-16) a broad base to ensure that similar services and activities carry the same universal service consequences. SBC (pp. 13-14) agrees that a broader base would be more equitable among competitors and emphasizes that expanding contributors to include cable, wireless, and satellite broadband Internet access providers would also increase the sustainability of funding. The comments advocating a broader base include, once again, both parties that favor a modified flat-rate method and parties that oppose abandonment of the existing end-user revenue-based system.

The future need and Commission ability to spread the costs of universal service over providers that might avoid it, such as private systems and competitive providers, was of demonstrated concern to Congress. The Senate Report provides the rationale:

The FCC or a State may require any other telecommunications provider, such as private telecommunications providers, to contribute to the preservation and advancement of universal service, if the public interest so requires. The purpose of this provision is to allow the FCC or a State to require contributions, for instance, from those who bypass the public

⁷ Arguments about the difficulty of collecting from more than one carrier (*e.g.*, Worldcom, pp. 11-12) or recovering contributions from low-volume or non-toll users (Coalition, pp. 45-47) are ill-founded. The same concerns are presented when LECs bill end-users and, if having multiple carriers is a problem, the statutory language suggests that only the end-users of the core interstate providers should be counted and used as the basis for assessment. The Associations, however, urge that including the widest possible contribution base is the only way to design a flat-rate system that will satisfy the statute and add significant stability and sustainability to maintain a sufficient support mechanism.

switched telephone network through their own or leased facilities. The Committee intends to preserve the FCC's authority over all telecommunications providers. In the event that the use of private telecommunications services or networks becomes a significant means of bypassing networks operated by telecommunications carriers, the bill retains the FCC's authority to preserve and advance universal service by requiring all telecommunications providers to contribute.

Wireless and broadband use have grown explosively in recent years. Cable modem service is leading the field in broadband Internet access. The Commission recently reported that “cable modem service has been the most widely subscribed to technology, with industry analysts estimating that approximately 68% of residential broadband subscribers today use cable modem service.”⁸ This is more than twice the “29% of residential broadband subscribers [that] use DSL service.”⁹ A recent study by Forrester Research found that the next five years will see 5.5 million more consumers giving up their second lines and 2.3 million more consumers dropping their primary wireline lines to substitute wireless service.¹⁰ The same study also predicted that by 2006, broadband voice over IP services will displace 4.26 million traditional lines.¹¹ Plainly, interstate revenues and interstate telecommunications provision and use are changing dramatically and rapidly.

The Senate Committee intended, as interstate telecommunications markets developed and changed, that the Commission would retain sufficient authority to require contributions from “other providers of telecommunications” whenever the public interest requires. Clearly,

⁸ *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, *Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, CS Docket No. 02-52, 17 FCC Rcd 4798, 4802-4804, para. 9 (2002).

⁹ *Ibid.*

¹⁰ Telecommunications Reports, “Analysts: Wireless Displacement of Wireline Services Will Rise,” pp. W-2-3, (May 6, 2002). *See also*, Forrester Research Press Release, “Consumers Make the Shift to Wireless at Home, According to New Research From Forrester,” p. 1 (January 29, 2002). (www.forrester.com) (Forrester Study Press Release)

¹¹ Forrester Study Press Release, p. 1.

a stable, sustainable, and sufficient fund in today's evolving marketplace will require expansion of the contribution base. Expansion of the base is also necessary to prevent some providers from offering the same services and functions as current contributors without the same responsibility.

Curiously, the main proponents of the proposed end-user connections plan, whose rationale is the need to spare declining IXC revenues from bearing their current share of universal service contributions, do not advocate expanding the customer base in this proceeding. For example, the Coalition urges the Commission to relieve the IXCs immediately, but wait for its separate proceeding to consider extending the base to facilities based broadband Internet access providers (Coalition, pp. 39-41). Their concern with competitive neutrality, sufficiency, and fairness is plainly parochial, although telecommunications carriers providing wireline broadband Internet access are now required to contribute to universal service funding, while competitors' platforms enjoy the competitive advantage of remaining exempt. As shown above, both statutory and public policy considerations dictate a decision by the Commission to retain the IXCs as contributors if a flat-rate contribution method is adopted. The same grounds also justify Commission use of its authority, as Congress intended, to require all providers of "telecommunications" to contribute to ensure stable, competitively neutral, and sufficient support.

The comments that seek to exclude particular "telecommunications service" and "telecommunications" providers from contributing a fair share towards the national policy of universal service do not provide meritorious justifications for their exclusion. For example, the American Public Communications Council seeks exemption from contributions on the grounds that payphones provide "lifeline" service for the poor without telephones (pp. 6-11)

and that the number of payphones is declining (pp. 11-13). Congress, however, has provided in §276 for public interest payphones to meet these needs. There is no reason to exempt payphones that are not eligible for the statutory public interest payphone remedy – such as phones in airports and hotel lobbies – from contributing to universal service along with all other telecommunications service providers. Moreover, a properly designed flat-rate assessment that includes IXCs and all providers of telecommunications to themselves or other users will place wireless and all other carriers on the same basis and obviate the need to distinguish what revenues are interstate.¹² ePhone Telecom’s argument that prepaid service providers should be exempt amounts to an argument against assessing a flat fee on prepaid providers. Similarly, paging interests, such American Association of Paging Carriers (pp. 2-3) are mainly concerned with controlling the size and growth in the level of their contributions. There is no reason that a lawful, all-inclusive flat-rate system cannot be designed that is fair to all carriers and customers.

The Information Technology Association of America (ITAA) (pp. 2-3) supports the flawed proposal to assess contributions based on “end user connections” excluding interstate carrier’s end-user customers. However, the bulk of its comments consist of a litany of arguments for excluding information service providers (ISPs) from any universal service contributions or responsibilities. A disqualifying infirmity of its analysis, as well as of the proposal under consideration, is the failure to recognize that access to the Internet involves a connection to a distinct, primarily interstate, packet-switched “network of networks.” The Internet network of networks is every bit as much a public network as the public switched telecommunications network. Thus, contrary to ITAA’s view that upgrading from dial-up service to a DSL line must not be counted as a new “connection,” a logical connection-based

¹² See, Ad Hoc Telecommunications Users Committee comments at 3.

system would have to recognize that digital broadband service optimized for Internet access is precisely the kind of connection to a separate network that should be assessed for a contribution. Accordingly, to be competitively neutral among customers and platforms, as well as to broaden the contribution base to provide a sustainable, stable, and sufficient support mechanism, if the Commission adopts a flat-fee system, it must find an assessment touchstone that treats each interstate public network identically.

LEC dial-up lines provide an interstate telecommunications service that carries a contribution obligation, now and under a flat-rate assessment approach. Thus, an ISP that provides its own facilities-based telecommunications link to the Internet for its customers provides interstate telecommunications that should bring into play the Commission's authority to assess "other providers of telecommunications." The highly desirable result would be that each interstate path to a distinct interstate public network would impose identical universal service contribution consequences.

The Senate Report leaves no room for doubt that Congress gave the FCC the authority to require contributions from any or all "other telecommunications provider[s], such as private telecommunications providers," to ensure that it could "require contributions . . . from those who bypass the public switched telephone network through their own or leased facilities." That is exactly what the Commission should do when ISPs use their own facilities to provide Internet access. The Commission should also apply the same logic and the same requirement to broadband Internet access providers over all platforms before or in conjunction with any decision to move to a flat-rate assessment method. No system will be sufficient or sustainable, as the Senate Report presciently recognized, if customers and providers can

arbitrage the contribution mechanism by selecting another provider, platform, or service to perform the same function without contribution obligations.

Moreover, the Associations have shown in Part I that the IXC's must be assessed under any legally valid flat-rate assessment method. Thus, for all the same reasons of competitive and platform neutrality, sustainability, and sufficiency, and to avoid the ultimate danger of arbitrage, the Commission must require any provider of Internet- or cable-based telephony, no matter how the service is classified, to contribute on the same basis as wireline and wireless carriers. Only this scrupulously even-handed system can solve the problems of competitive distortion ITAA claims, as only this broad application of commensurate assessments can ensure that all information services and providers secure their telecommunications or telecommunications input on a fair and non-market distorting basis.

In short, the “use of private telecommunications services or networks [is] becom[ing] a significant means of bypassing networks operated by telecommunications carriers,” as the Senate Committee anticipated. That carefully “preserve[d] the FCC's authority over all telecommunications providers...[and enable it to] preserve and advance universal service by requiring all telecommunications providers to contribute.” The Commission should use that authority now to broaden the base of contributors to include all providers of either “telecommunications services” or “telecommunications.”

IV. THE RECORD DEMONSTRATES THAT CAPACITY-BASED ASSESSMENTS ARE ADMINISTRATIVELY UNWORKABLE, POTENTIALLY DETRIMENTAL TO END-USER CUSTOMERS, AND CREATE OPPORTUNITIES FOR GAMING

The Coalition asserts (p. 56) that contribution assessments on higher capacity connections should be set according to two criteria: (1) minimizing administrative burdens and complexity and (2) ensuring that the USF contribution charges do not distort customer

choices. The Associations agree that these are both important considerations in the development of any contribution assessment methodology. Unfortunately, the Coalition's proposal to calculate multi-line business assessments based on tiers of capacity does not satisfy either criterion and raises other troubling issues as well. Numerous commenters agree.

One of the biggest concerns regarding a capacity-based scheme is its administrative feasibility. NECA astutely notes (p. 10) that the multi-line business category is a catch-all for a broad array of services, from traditional business to special access services and including even new broadband technologies. Thus, "the challenge of maintaining such a capacity-based system as technologies and services evolve is very problematic at best." (*Id.*)

Even assuming that a capacity-based system could incorporate a variety of new technologies and service offerings with relative ease, there still remains the troubling question of what impact it would have on broadband deployment to businesses in rural areas.¹³ As Fred Williamson and Associates states (p. 17):

If a consistent approach is followed and the multi-line business approach proposed by the Commission is expanded to DSL connections, adverse impacts may result...The significant additive imposed by the proposed capacity-based assessment, if passed on to subscribers, could be a major deterrent to customers subscribing to advanced high capacity DSL services. Without adequate customer demand, LECs would have less incentive to expand the offering of broadband services.

In addition, like the Associations, the General Services Administration (GSA, p. 7) is concerned about the inequitable and unpredictable contribution burden a capacity-based system would place on multi-line businesses. This is especially problematic given the significant increase in subscriber line charges (SLCs) these customers have incurred as a

¹³ This is yet another demonstration of how the choice of a contribution assessment methodology and the issue of whether to include all facilities-based broadband Internet access providers as contributors to the fund are interdependent issues that must be addressed concurrently.

result of Commission mandated access charge reform. In particular, the most acute impact would be felt by the small business customers of small and mid-sized rate-of-return carriers, where the multi-line business SLC cap has recently jumped from \$6.00 to \$9.20 without any transition.

Commenters also address the potential for “skewed marketplace behavior” as customers attempt to minimize the contribution assessed with regard to their connections. For instance, Verizon raises the possibility (p. 12, fn. 13) discussed in the FNPRM (para. 54) that some businesses may order services that approach the maximum capacity of a particular tier, but do not go over, in order to avoid the much higher universal service assessment of the next tier. Alternatively, the California PUC (p. 12) states that “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.” If this were to occur, it could have the effect of shifting contribution burdens to subscribers with lower-capacity connections, as suggested in the FNPRM (para. 53). The California PUC (p. 12) also raises the potential for a capacity-based assessment to suppress the usage of capacity-on-demand alternatives. It is not efficient for customers to make service decisions on the basis of universal service results rather than their communications needs and the price and quality of service offerings.

In short, the Coalition fails to adequately address the numerous concerns and unanswered questions regarding the administrative complexity, inequities, and regulatory arbitrage opportunities created by a capacity-based system that are raised in the FNPRM and by commenters. The Associations agree with GSA (p. 6) that the variety of measures for determining the capacity of connections demonstrates the complexity of such a system and

also signals that intractable-controversies can be anticipated if such a plan is employed.

Therefore, the Commission should abandon its consideration of capacity-based contribution assessments for multi-line business customers.

V. BIFURCATING THE CONTRIBUTION ASSESSMENTS FOR THE HIGH-COST PROGRAM FROM THE SCHOOLS AND LIBRARIES AND RURAL HEALTH CARE PROGRAMS HAS SUPPORT IN THE RECORD

In its initial comments, the Associations stated that the high-cost program has an entirely different purpose than the schools and libraries and rural health care programs and, therefore, the assessments for each should be separated. Doing so would provide carriers and customers with the knowledge of how much they are contributing to each of the programs, which would fulfill the Act's requirements for explicit support in §254(e). It would also be consistent with the Commission's own truth-in-billing principle of providing customers with "full and non-misleading descriptions."

Other commenters also support the concept of bifurcating the assessments. The Alaska Telephone Association (pp. 2-3), like the Associations, recognizes the need to separate high cost support from other universal service programs in order to distinguish the entirely different programs to the public. ATA states that:

there should be some clear bifurcation between support for the high-cost recovery of the telecommunications network in rural areas and the societal benefits achieved through subsidizing national social programs. The terminology, "universal service," is virtually the only commonality of the programs brought together under the universal service fund.

ATA believes customers should know whether increases in support are for high cost rural service or for school, library and health care facilities deployment and discounts. Similarly, the joint comments of Home Telephone Company and 13 other rural ILECs state (p. 3) that

“bifurcation would allow for the separation of network cost recovery from true subsidy related funding.”

In the interests of fully informing the public, the Associations urge the Commission to give serious consideration to separating the contribution assessments for the high-cost program from the schools and libraries and rural health care programs as it evaluates proposals for modifications to the contribution methodology.

VI. COMMENTERS ADVOCATING A COLLECT AND REMIT SYSTEM FAIL TO EXPLAIN HOW IT WOULD COMPORT WITH THE ACT'S REQUIREMENT THAT SUPPORT BE PREDICTABLE AND SUFFICIENT

Commenters advocating a collect and remit system conveniently ignore the Commission's concerns (FNPRM, para. 102) regarding the risk such a system would place on the statutorily mandated predictability and sufficiency of the fund and the need it would create to establish a significant reserve fund to account for potential shortfalls. Advocates also fail to reconcile the obvious conflict with §254(d), which places the contribution obligation on every interstate telecommunications carrier and other providers of interstate telecommunications, not end users. In fact, the best the Coalition (pp. 59-60) can offer to allay the Commission's concerns is that “collect and remit” does not mean that carriers can avoid USF contributions by refusing to collect USF recovery fees. However, this does not negate the fact that under “collect and remit,” carriers are not responsible for fees that they are unable to collect from customers. Indeed, AT&T (p. 9) states that a primary component of a collect and remit system is that it “makes the *fund*, rather than individual carriers, account for any nonrecovery of those charges by requiring carriers to remit to the fund only what they collect.” Clearly, such a system places the stability, predictability, and sufficiency of the fund at significant risk, contrary to §254(d) and the Commission's stated goals (FNPRM, para. 15).

Some of the supposed benefits of a collect and remit system that advocates put forth (Sprint, p. 16; AT&T, p. 5) are that it removes the risk of non-recovery of contribution assessments and that it allows all carriers to charge the same fee so there is no competitive disadvantage to any carrier.¹⁴ Certainly, the competitive neutrality of all aspects of the universal service mechanism is an important principle that should be adhered to. However, there is nothing biased about a system that assesses all interstate carriers and providers equitably and in the same manner and then leaves it to each provider to recover that assessment from its own customers. In fact, it would be patently *unfair* to the most responsible customers and the most efficient carriers if they were assessed a higher universal service fee in order to compensate for carriers that have higher levels of uncollectibles or higher administrative costs and customers that refuse to pay. The Commission must not jeopardize the predictability and sufficiency of universal service in order to accommodate concerns about uncollectibles and administrative costs, which are normal costs of doing business and not the responsibility of the government.

Time Warner Telecom, XO Communications, and Allegiance Telecom (p. 20) accurately and succinctly portray the motives behind the collect and remit proposal and its pitfalls:

A collect and remit system is again tailored for one objective – to relieve IXCs of their contribution obligations because of the volatility of their customer base. The Commission is charged under the Act with a separate, more important goal – ensuring the continued stability and funding of federal universal service programs. A collect and remit system fails to adequately accomplish this objective. Rather, it impermissibly shifts responsibility for universal service funding from

¹⁴ Proponents of a collect and remit system also argue that it would eliminate the inequity and discrimination from reporting lags. *See, for example*, Coalition at 47-48. This is a red herring. The issue of reporting lags could be substantially eliminated through the adoption of a flat-fee methodology as proposed by the Associations without using a collect and remit system. Moreover, the Coalition fails to address the inequity a collect and remit system would impose on the carriers who have the best track record minimizing their uncollectibles.

carriers to end users, and it substantially reduces the incentives carriers may have to collect universal service fees. In all likelihood, such a system will lead to inadequate funding of the federal programs.

The Associations agree with the United States Cellular Corporation (p. 13) that "...it is hard to imagine a proposal better calculated to destroy the USF than making it, in essence, dependent on the voluntary contributions of end users." The Commission should therefore abandon its consideration of a collect and remit system.

VII. CONCLUSION

The record in this proceeding clearly demonstrates that the FNPRM's proposal to substitute a flat-rate end-user "connection" based plan for assessing carrier universal service contributions is unworkable as currently constructed. Furthermore, numerous commenters note that the plan's exemption of IXC's, except to the extent that they also provide residential or business end-user access services, is in conflict with the §254(d) mandate for equitable and nondiscriminatory contributions. Further, other commenters note that the plan's proposal for a capacity-based assessment for multi-line businesses would be administratively unworkable and could prove harmful to small business customers, particularly those served by rate-of-return ILECs. Additionally, other parties agree with the Associations that, rather than attempting to contort the Act to accommodate the IXCs' complaints, the Commission could best ensure sufficient and sustainable universal service support by broadening the base of contributors to include broadband Internet access providers over all platforms.

The record in this proceeding also demonstrates that there is support for the bifurcation of the high-cost program from the schools, libraries, and rural health care programs. Finally, the record fails to demonstrate how a “collect and remit” system would be in compliance with the Act’s requirement for predictable and sufficient universal service support.

Respectfully submitted,

THE NATIONAL RURAL TELECOM ASSOCIATION

By: \s\ Margot Smiley Humphrey

HOLLAND & KNIGHT
2100 Pennsylvania Ave. NW
Suite 400
Washington, DC 20006
(202) 955-3000

**THE ORGANIZATION FOR THE
PROMOTION AND ADVANCEMENT OF
SMALL TELECOMMUNICATIONS COMPANIES**

By: \s\ Stuart E. Polikoff
Stuart E. Polikoff

21 Dupont Circle NW
Suite 700
Washington, DC 20036
(202) 659-5990

May 13, 2002

CERTIFICATE OF SERVICE

I, Jeffrey W. Smith, hereby certify that a copy of the joint reply comments by the National Rural Telecom Association and the Organization for the Promotion and Advancement of Small Telecommunications Companies was sent on this, the 13th day of May, 2002 by first class United States mail, postage prepaid, to those listed on the attached sheet.

By: /s/ Jeffrey W. Smith
Jeffrey W. Smith

SERVICE LIST

**CC Docket Nos. 96-45, 98-171, 90-571, 92-237,
99-200, 95-116, and 98-179**

Kathleen Q. Abernathy,
Commissioner and Chair
Joint Board on Universal Service
Federal Communications Commission
445 12th Street, S.W., Room 8-A204
Washington, D.C. 20554

Lila A. Jaber,
Commissioner
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399

Kevin J. Martin,
Commissioner
Federal Communications Commission
445 12th Street, S.W., Room 8-C302
Washington, D.C. 20554

J. Thomas Dunleavy,
Commissioner
New York Public Service Commission
One Penn Plaza, 8th Floor
New York, NY 10119

Michael J. Copps,
Commissioner
Federal Communications Commission
445 12th Street, S.W., Room 8-A302
Washington, D.C. 20554

Greg Fogleman,
Economic Analyst
Florida Public Service Commission
2540 Shumard Oak Boulevard
Gerald Gunter Building
Tallahassee, FL 32399

Bob Rowe,
Commissioner
Montana Public Service Commission
1701 Prospect Avenue
P.O. Box 202601
Helena, MT 59620-2601

Mary E. Newmeyer,
Federal Affairs Advisor
Alabama Public Service Commission
100 N. Union Street, Suite 800
Montgomery, AL 36104

Nanette G. Thompson,
Chair
Regulatory Commission of Alaska
1016 West Sixth Avenue, Suite 400
Anchorage, AK 99501-1693

Joel Shifman,
Senior Advisor
Maine Public Utilities Commission
242 State Street
State House Station 18
Augusta, ME 04333-0018

Peter Bluhm,
Director of Policy Research
Vermont Public Service Board
Drawer 20
112 State Street, 4th Floor
Montpelier, VT 05620-2701

Lori Kenyon,
Common Carrier Specialist
Regulatory Commission of Alaska
1016 West Sixth Avenue, Suite 400
Anchorage, AK 99501-1693

Charlie Bolle,
Policy Advisor
Nevada Public Utilities Commission
1150 E. Williams Street
Carson City, NV 89701-3105

Nancy Zearfoss, Ph.D.,
Technical Advisor to Commissioners
Maryland Public Service Commission
6 St. Paul Street, 19th Floor
Baltimore, MD 21202-6806

Peter Pescosolido,
Chief, Telecom & Cable Division
State of Connecticut
Dept. of Public Utility Control
10 Franklin Square
New Britain, CT 06051

Jennifer Gilmore,
Principal Telecommunications Analyst
Indiana Utility Regulatory Commission
Indiana Government Center South
302 West Washington Street, Suite E306
Indianapolis, ID 46204

Jeff Pursley
Nebraska Public Service Commission
300 The Atrium, 1200 N. Street
P.O. Box 94927
Lincoln, NE 68509-4927

Michael Lee,
Technical Advisor
Montana Public Service Commission
1701 Prospect Avenue
P.O. Box 202601
Helena, MT 59620-2601

Larry Stevens,
Utility Specialist
Iowa Utilities Board
350 Maple Street
Des Moines, IA 50319

Susan Stevens Miller,
Assistant General Counsel
Maryland Public Service Commission
6 St. Paul Street, 16th Floor
Baltimore, MD 21202-6806

Carl Johnson,
Telecom Policy Analyst
New York Public Service Commission
3 Empire State Plaza
Albany, NY 12223-1350

Tom Wilson,
Economist
Washington Utilities & Transportation
Commission
1300 Evergreen Park Drive, S.W.
P.O. Box 47250
Olympia, WA 98504-7250

Billy Jack Gregg
Consumer Advocate Division
Public Service Commission of
West Virginia
723 Kanawha Boulevard, East
7th Floor, Union Building
Charleston, WV 25301

Barbara Meisenheimer,
Consumer Advocate
Missouri Office of Public Counsel
301 West High Street, Suite 250
Truman Building
P.O. Box 7800
Jefferson City, MO 65102

Earl Poucher,
Legislative Analyst
Office of the Public Counsel
State of Florida
111 West Madison, Room 812
Tallahassee, FL 32399-1400

Brad Ramsay,
General Counsel
NARUC
1101 Vermont Avenue, N.W.
Suite 200
Washington, D.C. 20005

Ann Dean,
Assistant Director
Maryland Public Service Commission
6 St. Paul Street, 16th Floor
Baltimore, MD 21202-6806

David Dowds,
Public Utilities Supervisor
Florida Public Service Commission
2540 Shumard Oak Boulevard
Gerald Gunter Building
Tallahassee, FL 32399-0850

Michele Farris,
South Dakota Public Utilities
Commission
State Capitol
500 East Capitol Street
Pierre, SD 57501-5070

Anthony Myers,
Technical Advisor
Maryland Public Service Commission
6 St. Paul Street, 19th Floor
Baltimore, MD 21202-6806

Diana Zake,
Technical Advisor,
Texas Public Utilities Commission
1701 N. Congress Avenue
Austin, TX 78711-3326

Tim Zakriski,
State of New York
Dept. of Public Service
3 Empire State Plaza
Albany, NY 12223

Matthew Brill,
Legal Advisor
Federal Communications Commission
445 12th Street, S.W., Room 8-A204
Washington, D.C. 20554

Samuel Feder,
Legal Advisor
Federal Communications Commission
445 12th Street, S.W., Room 8-C302
Washington, D.C. 20554

Jordan Goldstein,
Legal Advisor
Federal Communications Commission
445 12th Street, S.W., Room 8-A302
Washington, D.C. 20554

Carol Matthey,
Deputy Bureau Chief
Federal Communications Commission
Wireline Competition Bureau
445 12th Street, S.W., Room 5-C451
Washington, D.C. 20554

Katherine Schroder,
Division Chief
Federal Communications Commission
WCB, Telecommunications Access
Policy Division
445 12th Street, S.W., Room 5-A426
Washington, D.C. 20554

Sharon Webber,
Deputy Division Chief
Federal Communications Commission
WCB, Telecommunications Access
Policy Division
445 12th Street, S.W., Room 5-A425
Washington, D.C. 20554

Eric Einhorn,
Deputy Division Chief
Federal Communications Commission
WCB, Telecommunications Access
Policy Division
445 12th Street, S.W., Room 5-A425
Washington, D.C. 20554

Anita Cheng,
Assistant Division Chief
Federal Communications Commission
WCB, Telecommunications Access
Policy Division
445 12th Street, S.W., Room 5-A445
Washington, D.C. 20554

Gene Fullano,
Federal Staff Chair
Federal Communications Commission
WCB, Telecommunications Access
Policy Division
445 12th Street, S.W., Room 5-A623
Washington, D.C. 20554

Katie King,
Attorney
Federal Communications Commission
WCB, Telecommunications Access
Policy Division
445 12th Street, S.W., Room 5-B544
Washington, D.C. 20554

Dana Bradford,
Attorney
Federal Communications Commission
WCB, Telecommunications Access
Policy Division
445 12th Street, S.W., Room 5-A314
Washington, D.C. 20554

Paul Garnett,
Attorney
Federal Communications Commission
WCB, Telecommunications Access
Policy Division
445 12th Street, S.W., Room 5-A623
Washington, D.C. 20554

Bryan Clopton,
Mathematician
Federal Communications Commission
WCB, Telecommunications Access
Policy Division
445 12th Street, S.W., Room 5-A465
Washington, D.C. 20554

Greg Guice,
Attorney
Federal Communications Commission
WCB, Telecommunications Access
Policy Division
445 12th Street, S.W., Room 6-A232
Washington, D.C. 20554

Geff Waldau,
Economist
Federal Communications Commission
WCB, Telecommunications Access
Policy Division
445 12th Street, S.W., Room 5-B524
Washington, D.C. 20554

William Scher,
Assistant Division Chief
Federal Communications Commission
WCB, Telecommunications Access
Policy Division
445 12th Street, S.W., Room 5-B550
Washington, D.C. 20554

Thomas Jones
David M. Don
Stephanie Poday
Willkie Farr & Gallagher
Counsel for Time Warner Telecom, XO
Communications, and Allegiance
Telecom
3 Lafayette Centre
1155 21st St, NW
Washington, D.C. 20036

Mark C. Rosenblum
Judy Sello
AT&T Corporation
295 North Maple Avenue
Room 1135L2
Basking Ridge, NJ 07920

Marybeth Banks
Richard Juhnke
Jay C. Keithley
Sprint Corporation
401 9th Street, NW, #400
Washington, DC 20004

Keith Oliver
Home Telephone Company, Inc.
P.O. Box 1194
Moncks Corner, SC 29461

William Barrett
Bluffton & Hargray Telephone
Companies
856 William Hilton Parkway
P.O. Box 5519
Hilton Head, SC 29938

Hannah Lancaster
Chesnee Telephone Company
208 South Alabama Avenue
P.O. Box 430
Chesnee, SC 29323

James Hicklin
Chester Telephone Company
Lockhart Telephone Company
Ridgeway Telephone Company
112 York Street
P.O. Box 160
Chester, SC 29706

Ronald Nesmith
Farmers Telephone Cooperative
P.O. Box 588
Kingstree, SC 29556

H. J. Dandridge
Palmetto Rural Telephone Cooperative
2471 Jefferies Highway
P.O. Drawer 1577
Walterboro, SC 29488

Ben Spearman
PBT Telecom
1660 Juniper Spring Road
Gilbert, SC 29054

James Wilder
Piedmont Rural Telephone Cooperative
201 Anderson Drive
Laurens, SC 29360

Irvin Williams
Sandhill Telephone Cooperative
122 South Main Street
P.O. Box 519
Jefferson, SC 29718

Alan Pedersen
Sandwich Isles Communications
Pauahi Tower, Suite 2750
Honolulu, HI 96813

Paula Eller
Yukon Telephone Company
P.O. Box 873809
Wasilla, AK 99687

Richard A. Askoff
Martha West
National Exchange Carrier Association
80 South Jefferson Road
Whippany, NJ 07981

Gary M. Cohen
Lionel B. Wilson
Jonady Hom Sun
Stacie Castro
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

L. Marie Guillory
Daniel Mitchell
National Telephone Cooperative
Association
4121 Wilson Boulevard, 10th Floor
Arlington, VA 22203

Jeffry A. Brueggman
Gary L. Phillips
Paul K. Mancini
SBC Communications
1401 Eye Street, NW
Suite 1100
Washington, D.C. 20005

Ann Rakestraw
Michael E. Glover
Edward Shakin
Counsel for Verizon
1515 North Courthouse Road
Suite 500
Arlington, VA 22201

James Rowe
Alaska Telephone Association
201 E. 56th Street, Suite 114
Anchorage, AK 99518

George N. Barclay
Michael J. Ettner
General Services Administration
1800 F Street, NW, Room 4002
Washington, D.C. 20405

Jonathan J. Nadler
Angela Simpson
Counsel for the Information Technology
Association of America
Squire, Sanders & Dempsey, LLP
1201 Pennsylvania Avenue, NW
Box 407
Washington, D.C. 20004

Richard M. Sbaratta
Counsel for BellSouth Corporation
Suite 4300
675 West Peachtree Street, N. E.
Atlanta, GA 30375-0001

John T. Nakahata
Michael G. Grable
Harris, Wiltshire & Grannis LLP
Counsel for the Coalition for Sustainable
Universal Service
1200 18th Street, N.W.
Washington, D.C. 20036

Brian T. O'Connor
Robert Calaff
Voicestream Wireless Corporation
401 9th Street, NW
Suite 550
Washington, D.C. 20004

Doug Kitch
Beacon Telecommunications Advisors
2110 Vickers Drive, Suite 2106
Colorado Springs, CO 80918

Kenneth Hardman
Moir & Hardman
Counsel for the American Association of
Paging Carriers
1015 – 18th Street, NW
Suite 800
Washington, D.C. 20036-5204

Albert Kramer
Allan Hubbard
Jeffrey Tignor
Dickstein Shapiro Morin &
Oshinski, LLP
Counsel for the American Public
Communications Council
2101 L Street, NW
Washington, D.C. 20037-1526

Chuck Goldfarb
Lori Wright
Worldcom, Inc.
1133 19th Street, NW
Washington, D.C. 20036

Richard Metzger, Jr.
A. Renee Callahan
Attorneys for Worldcom, Inc.
Lawler, Metzger & Milkman, LLC
1909 K Street, NW
Suite 820
Washington, D.C. 20006

Peter Connolly
Holland & Knight LLP
Counsel for United States Cellular Corp.
2099 Pennsylvania Avenue, NW
Washington, D.C. 20006

Cheryl L. Schneider
Telecom Legal Services International
Counsel for ePHONE Telecom
1776 I Street, NW, 9th Floor
Washington, D.C. 20006

Qualex International
Portals II
445 12th Street, S.W.
Room CY-B402
Washington, D.C. 20554

Susan Gately
Anne DePree
Economics and Technology, Inc.
Consultants for the Ad Hoc
Telecommunications Users Committee
Two Center Plaza, Suite 400
Boston, MA 02108

James Blaszk
Stephen Rosen
Levine, Blaszk, Block & Boothby, LLP
Counsel for the Ad Hoc
Telecommunications Users Committee
2001 L Street, NW, Suite 900
Washington, D.C. 20036

Charles Hunter
Catherine Hannan
Hunter Communications Law Group
Counsel for ASCENT
1424 Sixteenth Street, NW
Suite 105
Washington, D.C. 20036

Frederic Williamson
Fred Williamson & Associates
2921 East 91st street, Suite 200
Tulsa, OK 74137-3300

John T. Scott
Anne Hoskins
Verizon Wireless
1300 I Street, NW
Suite 400 West
Washington, D.C. 20005