

**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 – Streamlined	)	CC Docket No. 98-171
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	)	CC Docket No. 90-571
Hearing and Speech Disabilities, and the	)	
Americans with Disabilities Act of 1990	)	
	)	
Administration of the North American Numbering	)	CC Docket No. 92-237
Plan and North American Numbering Plan Cost	)	NSD File No. L-00-72
Recovery Contribution Factor and Fund Size	)	
	)	
Number Resource Optimization	)	CC Docket No. 99-200
	)	
Telephone Number Portability	)	CC Docket No. 95-116

To: The Commission

**REPLY COMMENTS OF ARCH WIRELESS, INC.**

Arch Wireless, Inc. (“Arch”), a national provider of paging and messaging services, hereby hereby submits its reply comments in the above-captioned proceeding.<sup>1</sup>

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<sup>1</sup> *Federal State Joint Board on Universal Service; 1998 Biennial Regulatory Review; Telecommunications Services for Individuals with Hearing and Speech Disabilities; Administration of the North American Numbering Plan; Number Resource Optimization; Telephone Number Portability; Truth-in-Billing and Billing Format, Further Notice of Proposed Rulemaking, CC Docket Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, 98-170, FCC 02-43 (rel. Feb. 26, 2002)(“FNPRM”).* For the sake of brevity, these reply

## I. **ADOPTING A FLAT-FEE OR PER-CONNECTION ASSESSMENT METHODOLOGY WOULD BE ARBITRARY AND CAPRICIOUS**

For the last five years, both the Commission and the Federal-State Joint Board on Universal Service (“Joint Board”) have repeatedly and consistently declined to adopt non-revenue-based universal service assessment methodologies, explaining that such methodologies are administratively burdensome, discriminatory and not competitively neutral.<sup>2</sup> Arch agrees with the numerous commenters in this proceeding who emphasize that there is insufficient evidence in the record for the Commission to depart from its determination, and that of the Joint Board, that a flat-fee assessment methodology should not be adopted.<sup>3</sup> As the Rural Cellular Association points out, there is no evidence in the record that the rationale underlying the

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comments touch on just a few of the issues Arch raised in its initial comments; however, Arch maintains its position on each of the issues it raised in those initial comments.

<sup>2</sup> See *Federal-State Joint Board on Universal Service*, Notice of Proposed Rulemaking and Order Establishing Joint Board, 11 FCC Rcd 18092, 18147-48, at ¶ 124 (1996) (the Commission stated that a flat-fee approach would require the FCC to develop “equivalency ratios” for “calculating contributions owed by providers of services that were not sold on a per-line or per-minute basis into their respective per-line or per-minute units. In addition, these [non-revenue-based] approaches may favor certain services or service providers over others.”). The Joint Board agreed, stating that flat-fee mechanisms “would require the Commission to adopt and administer difficult ‘equivalency ratios’ . . . In addition, these approaches may favor certain services or providers over others.” *Federal-State Joint Board on Universal Service*, Recommended Decision, 12 FCC Rcd 87, 496, at ¶ 812 (1996). When it adopted the current revenue-based assessment in 1997, the Commission again rejected proposals that contributions be calculated on a per-minute or per-line basis, citing the administrative difficulty of establishing equivalency ratios, and the lack of “competitive neutrality” of these systems. *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCCR 8776, 9210, at ¶ 852 (1997).

<sup>3</sup> Comments of Arch, dated April 22, 2002, at 3; *see, e.g.*, Comments of Verizon Wireless, dated April 22, 2002, at 10; 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 OPUC”), dated April 22, 2002, at 16; Comments of Teletouch Communications, Inc., (“Teletouch”), dated April 22, 2002, at 5; Comments of Allied Personal Communications Industry Association of California (“Allied”), dated April 22, 2002, at 8.

Commission's decision to adopt a revenue-based assessment methodology, and reject a flat-fee/per-connection methodology, has changed in the past five years.<sup>4</sup> To the contrary, the record developed in this proceeding reflects that a majority of commenters support retaining a revenue-based assessment methodology and that a flat-fee/per-connection assessment would be administratively burdensome, not competitively neutral, inequitable and discriminatory.<sup>5</sup> Consequently, as Verizon Wireless notes, the Commission "cannot now reverse course without a reasoned basis."<sup>6</sup>

The D.C. Circuit reiterated this central principal of administrative law in the recent *Fox Television, Inc. v. FCC* decision wherein the court found an FCC decision inconsistent with recent Commission decisions to be arbitrary and capricious because it did not provide a reasoned

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<sup>4</sup> Comments of the Rural Cellular Association ("RCA"), dated April 22, 2002, at 2-3. RCA points out that after evaluating numerous assessment methodologies, the Commission determined that "the methodology which best satisfies [its statutory mandate] was one which assessed contributions based on interstate telecommunications revenues derived from end users. The Commission further determined that this methodology eliminated potential economic distortions." *citing In the Matter of Federal-State Joint Board on Universal Service*, Report and Order, 12 FCCR 8776, 9206 (1997).

<sup>5</sup> Comments of Arch, at 3-4; Verizon Wireless, at 5-7; Comments of Western Wireless Corporation ("Western Wireless"), dated April 22, 2002, at 3-4; Allied, at 7-8; *see also* Comments of General Services Administration ("GSA"), dated 22, 2002, at 5; Comments of California Public Utilities Commission and the People of the State of California ("CPUC"), dated April 22, 2002, at 12; Consumers Union/Texas OPUC, at 3-9 (noting that the Commission has ignored the majority of comments filed thus far in the proceeding which support of a revenue based assessment methodology).

<sup>6</sup> Comments of Verizon Wireless, at 10. It is an established principle of jurisprudence that "an agency acts arbitrarily and capriciously when it abruptly departs from a position it previously held without satisfactorily explaining its reasons for doing so. Indeed, where an agency departs from established precedent without a reasoned explanation, its decision will be vacated as arbitrary and capricious." *Wisconsin Valley Improvement Co. v. FERC*, 236 F.3d 738, 748 (D.C. Cir. 2001). Moreover, the U.S. Supreme Court clearly stated that "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view." *INS v. Cardozo-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)).

basis for the change.<sup>7</sup> Thus, it would be unlawful if the Commission adopted a flat-fee or per-connection assessment methodology at this time, contrary to the overwhelming support in the record for a revenue-based assessment, without providing reasoned explanation as to why a flat-fee approach, previously rejected, should be adopted.

## **II. A FLAT FEE OR PER-CONNECTION ASSESSMENT METHODOLOGY VIOLATES SECTION 254 OF THE ACT**

Section 254(d) of the Act requires that “[e]very 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.”<sup>8</sup> The paging carrier commenters that participated in this proceeding (as well as many other commenting parties) clearly explain that a flat-fee or per-connection assessment methodology violates Section 254(d) in one of three ways --- such a methodology exempts certain IXCs from having to contribute, it imposes an egregiously inequitable and discriminatory financial burden on paging carriers and it impermissibly assesses intrastate revenues.<sup>9</sup>

### **A. A Per-connection Assessment Methodology Would Enable IXCs to Escape Their Obligation to Contribute to the Federal Universal Service Fund**

As the Consumers Union/Texas OPUC points out, IXCs that do not connect directly to end users could escape federal universal service contribution responsibility entirely under a per-

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<sup>7</sup> 280 F.3d 1027 (D.C. Cir. 2002).

<sup>8</sup> 47 U.S.C. § 254(d).

<sup>9</sup> Comments of Arch, at 2-6; Comments of TracFone Wireless, Inc. (“TracFone”), dated April 22, 2002, at 5; Comments of The Concerned Paging Carriers (“CPC”), dated April 22, 2002, at 5-12; Comments of American Association of Paging Carriers (“AAPC”), dated April 22, 2002, at 3-9; Western Wireless, at 4-5; Verizon Wireless, at 4-9; Allied, at 3-6; Teletouch, at 2-8; CPUC, at 5-10; Consumers Union/Texas OPUC, at 12-16.

connection assessment methodology.<sup>10</sup> Arch agrees that such a result would directly contravene Section 254(d)'s mandate that *every* telecommunications carrier contribute to the universal service fund.<sup>11</sup> For this reason, Arch concurs that a per-connection assessment methodology would be unlawful.

B. A Per-Connection Assessment Methodology Would Impose an Egregiously Inequitable and Discriminatory Financial Burden on Paging Carriers

Among those commenters addressing the issue, there was unanimous agreement that a per-connection assessment methodology would impose an inequitable and discriminatory financial burden on paging carriers. Allied points out that a per-connection assessment would result in a 257% increase in contributions for paging carriers.<sup>12</sup> This 257% increase would be tantamount to increasing paging carriers' current safe harbor to 43% of total revenues, an almost fourfold increase of the current 12% safe harbor. By comparison, cellular carriers will experience a 117% increase in contributions and the ILECs/IXCs will experience a decrease of 22%.

The paging carrier commenters note that the entire industry is experiencing a sharp decline in revenues, has no elasticity in its pricing (and would therefore be limited in its ability to pass through such charges) but yet has not experienced the increase in interstate minutes of use or the corresponding increase in interstate revenues that other segments of the CMRS industry may be experiencing and which the Commission has cited as one of the reasons for departing

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<sup>10</sup> Comments of Consumers Union/Texas OPUC, at 14-15.; *see also* Verizon Wireless, at 5; Arch, at 4-5; Western Wireless, at 4-5; Allied, at 3.

<sup>11</sup> Comments of CPUC at 7; Consumer Union/Texas OPUC, at 13; Allied, at 3; Comments of BellSouth Corporation ("BellSouth"), dated April 22, 2002, at 5-6; Comments of National Association of State Utility Consumer Advocates ("NASUCA"), dated April 22, 2002, at 11-12.

<sup>12</sup> Comments of Allied, at 4.

from a revenue-based regime.<sup>13</sup> As Verizon Wireless notes, given the Commission’s objective in moving to a flat-fee or per-connection assessment methodology is to relieve pressure on an industry segment, the IXC’s, that is being affected by intermodal competition and declining revenues, “it would be especially discriminatory to place a significant share of the burden the IXC’s formerly bore on the paging industry, which is also struggling in the face of intermodal competition.”<sup>14</sup>

In addition, because the unit of measurement under the per-connection methodology, *i.e.*, the connection, bears no relation to interstate revenues, it requires carriers that provide little or no interstate telecommunications services to their end-users to contribute disproportionately with carriers that provide substantial interstate service to their end-users.<sup>15</sup> This clearly places paging carriers, many of which are local or regional carriers that provide little if any interstate service, at a competitive disadvantage.<sup>16</sup> For these reasons, Arch concurs that adopting a per-connection assessment methodology, as it pertains to paging carriers, would be inequitable and discriminatory and would therefore contravene Section 254 of the Act.

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<sup>13</sup> *FNPRM*, at ¶¶ 10-14; Comments of Allied, at 3-4; Teletouch, at 3-4; CPC, at 5-7; AAPC, at 6-7.

<sup>14</sup> Comments of Verizon Wireless, at 7. Thus, it seems an absurd result that paging carriers would be asked to contribute more to federal universal service under both the flat-fee and per-connection approach than they are contributing under the current revenue-based approach, at a time when their interstate minutes of use and related interstate revenues have either remained the same, or have declined, since the adoption of the revenue based regime and the 12% safe harbor.

<sup>15</sup> Comments of Allied, at 5.

<sup>16</sup> Comments of Teletouch, at 5-6; CPC, at 8; Allied, at 6-7.

### C. A Per-connection Assessment Methodology Would Impermissibly Assess Intrastate Revenues

Arch agrees with Verizon Wireless, AT&T Wireless, the CPUC, Allied, Teletouch Communications, Inc., and The Concerned Paging Carriers that the proposed connection-based assessment would amount to an illegal assessment on intrastate revenues.<sup>17</sup> As the CPUC correctly points out, although a per-connection approach is not directly tied to intrastate revenues, it is based directly on intrastate usage because it would assess all connections to the network, including those that have no interstate usage.<sup>18</sup> This approach would indirectly and improperly lead to intrastate services funding federal universal service. Such a result is unlawful.

The U.S. Court of Appeals for the Fifth Circuit in *Texas Office of Public Utility Counsel v. FCC*<sup>19</sup> confirms that the FCC is prohibited under Section 2(b) of the Telecommunications Act from assessing federal universal service contribution obligations based on intrastate revenues. The Court in *Texas Counsel* concluded that “inclusion of intrastate revenues in the calculation of universal service contributions constitutes a charge . . . in connection with intrastate communication service.” Therefore, the Court found that a federal USF assessment based on intrastate revenues violated Section 2(b). The Court also recognized that allowing the FCC to assess contributions based on intrastate revenues “could affect carriers’ business decisions on how much intrastate service to provide or what kind it can afford to provide” and concluded that

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<sup>17</sup> Comments of Verizon Wireless, at 4; Comments of AT&T Wireless Services, Inc. (“AT&T Wireless”), dated April 22, 2002, at 4; CPUC, at 8; Allied, at 6; Teletouch, at 7; CPC, at 10-11.

<sup>18</sup> Comments of CPUC, at 8.

<sup>19</sup> 183 F.2d 393 (5<sup>th</sup> Cir. 1999).

“this type of federal influence over intrastate services is precisely the type of intervention that [section] 2(b) [of the Act] is designed to prevent.”<sup>20</sup>

### **III BELLSOUTH AND SBC’S CONNECTION-BASED PROPOSAL IS INEQUITABLE AND DISCRIMINATORY VIS-À-VIS PAGING CARRIERS**

In their comments, SBC and BellSouth have submitted a “Joint Proposal” for a per-connection assessment that differs from the proposal that the IXC’s and large users filed earlier in this proceeding.<sup>21</sup> The Joint Proposal is an improvement over the IXC’s proposal in that it ensures that all providers of interstate telecommunications service contribute to universal service, as the statute requires.<sup>22</sup> Nevertheless, the Joint Proposal still contains significant infirmities. Arch continues to believe that the only appropriate universal service assessment mechanism is one based on revenues.

The Joint Proposal would significantly and inequitably increase the amount that paging carriers contribute relative to other providers. The Joint Proposal assigns one-half of a “capacity unit” to one-way paging services, where a standard voice-grade channel is assigned one capacity unit.<sup>23</sup> Paging carriers’ contributions currently amount to approximately \$0.07 per pager; LECs and IXC’s currently contribute approximately \$1.29 per residential voice connection.<sup>24</sup> Thus, while paging carriers currently contribute approximately 5 percent as much as wireline voice providers, the Joint Proposal would increase that proportion to 50 percent. The Joint Proposal therefore would increase paging carriers’ relative share of the USF burden *tenfold*. Similarly,

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<sup>20</sup> *Id.* at 447 n.101.

<sup>21</sup> Comments of SBC Communications, Inc. (“SBC”), dated April 22, 2002, at 7-14; BellSouth, at 8.

<sup>22</sup> 47 USC § 254(d).

<sup>23</sup> Comments of SBC, at Appendix A, p.2.

<sup>24</sup> *FNPRM*, at ¶ 59.

there is no justification for assessing paging carriers one-half of a capacity unit, while Centrex lines up to 64 Kbps are assessed only one-ninth of a capacity unit.<sup>25</sup> Centrex service provides full voice functionality and substantially greater bandwidth.

Such an increase in paging carriers' contributions would be inequitable and discriminatory. As Arch described in its comments, there is no reason to believe that paging carriers' current contribution levels are anything other than fair and reasonable. Paging carriers' safe harbor percentage was set based on actual carrier-submitted data, and there are no market trends in the paging industry that would alter paging carriers' percentage of interstate revenues.<sup>26</sup> Like IXCs, paging carriers face declining revenues and fierce intermodal competition. Other services, such as wireless telephony and Internet messaging, take business away from paging providers. Both connection-based proposals represent efforts to balance the USF budget on paging carriers' backs, and must be rejected.

The inequities in the allocation of the USF burden in both the USF Coalition proposal and the Joint Proposal demonstrate their arbitrariness and the extent to which they would unfairly disadvantage paging carriers at the expense of other providers. Indeed, it is precisely because of the likelihood of such inequities that the Commission initially rejected flat-rate assessments.<sup>27</sup>

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<sup>25</sup> Comments of SBC, at Appendix A, p.2.

<sup>26</sup> Comments of Arch, at 10. As noted above, if there has been any change, it has been a decline in interstate revenues.

<sup>27</sup> *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, 9210 ¶ 852 (1997) (“[W]e find that [per-line or per-minute assessments] may inadvertently favor certain services or providers over others if the ‘equivalency ratios’ are improperly calculated or inaccurate”). *See also* Comments of Arch, at 5.

