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October 10, 2002

Mr. William Maher, Chief  
Wireline Competition Bureau  
Federal Communications Commission  
The Portals  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

Re: CC Dockets No. 96-45, 98-171, 90-571, 92-237, 99-200,  
95-116, 98-170, and NSD File No. L-00-72

Dear Mr. Maher:

The Coalition for Sustainable Universal Service, consisting of e-Commerce & Telecommunications Users Group, AT&T, Level 3 and WorldCom, hereby responds to suggestions in several recent *ex parte* filings that maintaining a revenue-based universal service mechanism, perhaps under a “collect-and-remit” regime, with a modest increase in the wireless “safe harbor” would be sufficient to cure the deficiencies in the current contribution mechanism.<sup>1</sup> These assertions are not correct, because the wireless “safe harbor” is inherently discriminatory and cannot be maintained consistent with Section 254(d)’s express requirement that assessments be made on a “nondiscriminatory basis,” and because such half-measures would fail to address the fundamental challenge posed by bundled offerings, which will render such half-measures unsustainable. These proposals for a modified revenue-based contribution mechanism amount to little more than trying to fix a flat tire by adding more air.

#### **A. The Wireless Safe Harbor is Discriminatory in the Current Market.**

Proposals to retain a revenue-based assessment mechanism with an increased wireless “safe harbor” ignore the fact that the wireless “safe harbor” itself has proved to be discriminatory in the marketplace as it has evolved. As such, the wireless “safe harbor” today violates Section

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<sup>1</sup> See Letter from Michael Altschul to Marlene H. Dortch, CC Dockets Nos. 96-45, 98-171, 90-571, 92-237, 99-200, & 95-116, & NSD File No. L-00-72 (filed Oct. 3, 2002), at 1 (expressing CTIA’s support for “re-examin[ation]” of the wireless “safe harbor”); Letter from L. Charles Keller to Marlene H. Dortch, CC Dockets Nos. 96-45, 98-171, 90-571, 92-237, 99-200, & 95-116, & NSD File No. L-00-72 (filed Oct. 3, 2002), at 3 (expressing Verizon Wireless’ view that the Commission should increase the wireless “safe harbor”); Letter from W. Scott Randolph to Marlene H. Dortch, CC Dockets Nos. 96-45, 98-171, 90-571, 92-237, 99-200, & 95-116, & NSD File No. L-00-72 (filed Oct. 3, 2002), at 6 (expressing Verizon’s opinion that the Commission should “revisit” the wireless “safe harbor”).

254(d)'s requirement that contributions to universal service be made on a "nondiscriminatory basis," and any Commission decision to continue the wireless "safe harbor," even at a higher level, would continue to violate Section 254(d).

As CoSUS pointed out in its comments, the discriminatory impact of the wireless "safe harbor" is highlighted when you look at the effect on the incremental price of wireline long distance as opposed to wireless long distance service.<sup>2</sup> Suppose, for example, that a consumer with 100 minutes of interstate long distance usage, for which she pays 5 cents per minute, is considering shifting her interstate long distance calling to her wireless plan. Suppose that she can add 100 minutes to her wireless plan for \$5.00 (an equivalent 5 cents per minute). Without universal service, she pays the same amount to either the wireless or the wireline carrier. However, the wireline carrier today will be assessed 7.28% of \$5.00 for that incremental traffic for universal service, while the wireless carrier will be assessed 7.28% of \$0.75 (15% of \$5.00) for universal service. When both carriers pass these assessments through to the customer, universal service contributions alone give the wireless carrier a competitive advantage because universal service alone increases the marginal price of wireline service as compared with wireless service. Notably, this discriminatory impact and artificial competitive advantage for wireless exists whether the "safe harbor" is 15%, 25% or 50%. Thus, the wireless "safe harbor" cannot now be a part of a nondiscriminatory permanent contribution mechanism.

Moreover, this discriminatory impact is heightened by the un rebutted fact that, as CoSUS pointed out in its comments, the wireless "safe harbor" in reality functions as a cap on wireless contributions, because a wireless carrier with a lower percentage of interstate traffic than the safe harbor can always elect not to use the "safe harbor" and to report interstate revenues based on its own traffic studies, while a carrier with a higher percentage of interstate traffic than the safe harbor will always report the safe harbor.<sup>3</sup> Thus, today a wireless carrier that has, for example, 28.5% interstate traffic has a financial incentive to use the wireless safe harbor to report only 15% of its revenue as interstate and therefore contributes less to universal service than a wireline carrier that derives 28.5% of its revenues from interstate traffic and reports all interstate revenues. Unless any "safe harbor" is set at or above the high end of reported percentages of interstate traffic by wireless carriers, the "safe harbor" will systematically under-report wireless interstate revenues, and thus lead to a discriminatory under-assessment. Thus, proposals to set the wireless safe harbor at 20% would violate Section 254(d), based on CTIA's own reported survey results.

In addition, fixing the wireless "safe harbor" at a specific level will be discriminatory and lead to under-reporting if, as is likely, wireless interstate traffic is continuing to grow as a percentage of wireless traffic overall. CTIA's reported snapshot percentages of interstate usage for a handful of unidentified companies do not provide the Commission with any basis to evaluate whether the percentage of interstate wireless traffic is increasing over time. However, with the wireless industry's

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<sup>2</sup> See Comments of the Coalition for Sustainable Universal Service, CC Dockets Nos. 96-45, 98-171, 90-571, 92-237, 99-200, & 95-116, & NSD File No. L-00-72 (filed Apr. 22, 2002), at 31-34 & Attachment 4 ¶¶ 17-18 (Declaration of Daniel Kelley & David Nugent).

<sup>3</sup> See Reply Comments of the Coalition for Sustainable Universal Service, CC Dockets Nos. 96-45, 98-171, 90-571, 92-237, 99-200, & 95-116, & NSD File No. L-00-72 (filed May 13, 2002), at 17.

continued marketing of “free long distance” and the growth of nationwide plans that eliminate roaming charges, it is likely that wireless interstate usage is, in fact, growing. Accordingly, it is highly likely that a wireless “safe harbor” level picked now, even considering customers on average and ignoring marginal effects, will be too low and will therefore be discriminatory.

Finally, we note that even if it were possible to select a nondiscriminatory wireless “safe harbor,” the paltry survey results submitted by CTIA are a wholly inadequate basis on which to do so. CTIA should be required to identify the companies in the survey, and to place the complete surveys in the record – subject to protective order if necessary. Unless CTIA does so, CoSUS and other interested commentators cannot evaluate whether these results are representative or are skewed, whether they ignore critical industry trends such as continued substitution of wireless for wireline long distance service, whether the time periods covered by the survey are representative or are skewed, and whether the methodology used was valid.

Finally, the wireless “safe harbor” would, in addition, be discriminatory under a revenue-based “collect and remit” regime because it allows one set of competitors (wireless carriers providing long distance service) to calculate and recover their universal service contributions based on an average customer's percentage of interstate usage, while other carriers (wireline long distance providers) would be required to calculate and recover universal service contribution through amounts that vary according to an individual customer's interstate usage. Moreover, the wireless carrier could be permitted to have a rate structure that would be different than that required for other competing long distance providers.

Accordingly, the Commission cannot, consistent with the record, continue the wireless “safe harbor” in any form, and doing so would be discriminatory and violate the express requirements of Section 254(d).

### **B. A Revised Revenues-Based Mechanism Cannot Adequately Address “Bundling” or the Decline in Interstate Long Distance Revenues.**

Proponents of a revised revenue-based mechanism also continue to ignore the substantial difficulties in adequately addressing bundling of interstate telecommunications services with other interstate, intrastate and non-regulated services. No proponent of a revised revenues-based mechanism has ever demonstrated that the current bundling “safe harbors” actually work in a sustainable and non-discriminatory manner. As Qwest pointed out in its comments, short of imposing an accounting and separations regime on all contributors, there is no effective way to address bundling under a contribution mechanism based on interstate telecommunications revenues.<sup>4</sup> As such, as bundling continues to grow, and as large telecommunications users in particular renegotiate their contracts, it is predictable that a lower and lower percentage of overall telecommunications-related expenditures will be allocated specifically to interstate telecommunications. This is especially true because it appears that all revenue-based scenarios, even with wireless safe harbors at 50%, appear to

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<sup>4</sup> See Reply Comments of Qwest Communications Int'l, Inc., CC Dockets Nos. 96-45, 98-171, 90-571, 92-237, 99-200, & 95-116, & NSD File No. L-00-72 (filed May 13, 2002), at 7, 9-10.

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yield higher contribution factors than the 7.28% in effect today. This means that the incentive to structure offerings or contracts to avoid interstate universal service assessments will only increase under any revenue-based scenario.

Moreover, an increase in the wireless "safe harbor" will only serve temporarily to reduce the contribution factor, and it will not halt the decline in interstate wireline toll revenues. As these revenues continue to fall, the contribution factor will resume its upward march. If the Commission then makes policy changes that increase the amount of universal service funding, the growth in the contribution factor will further accelerate. The one-time fix of increasing the wireless safe harbor will not put the universal service fund on a sustainable footing.

Accordingly, although increasing the wireless safe harbor would temporarily reduce the contribution factor below the levels it will otherwise reach in April 2003, increasing the wireless safe harbor and maintaining an interstate telecommunications revenue-based assessment mechanism will not be a sustainable solution. A more fundamental change is necessary in order to create a sustainable source of universal service funding.

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In accordance with the Commission's rules, a copy of this letter is being filed electronically in the above-captioned dockets.

Sincerely,



John T. Nakahata

*Counsel to the Coalition for Sustainable Universal Service*