

**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)	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

**COMMENTS OF VERIZON WIRELESS ON SECOND FURTHER
NOTICE OF PROPOSED RULEMAKING**

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SUMMARY

The *Second Further Notice* proposes three new connections-based proposals that continue to suffer from the same legal failings as the connections-based proposals offered in the past. The proposals impermissibly shift burdens away from certain industry segments and onto others and/or effectively impose unlawful assessments on intrastate service. Verizon Wireless is not opposed to a connections-based system *per se*, but the Commission has not succeeded in fashioning such a proposal to meet the dictates of Section 254(d).

The problems presented by connections-based proposals are far more daunting than those ascribed to the revenue-based system. The revenue-based system fairly allocates the funding responsibility among providers of interstate telecommunications by keying contribution levels to interstate activity as measured by interstate revenues. While there are challenges to measuring interstate telecommunications revenues, it can be done by tracking minutes of use to develop safe-harbor calculations. Having just increased the wireless safe harbor level significantly and having sought comments on safe harbor methodologies, the Commission should give the revised revenue-based system a chance to work before adopting a drastic alternative that rests on shaky legal ground.

The connections-based proposals do not fairly allocate funding responsibilities and instead operate to exclude or dramatically reduce contributions from inter-exchange carriers (“IXCs”) by shifting a disproportionate burden onto CMRS carriers, despite the fact that most interstate activity and usage is still attributable to IXCs. Instead of contracting the base of support for USF, the Commission should expand the base of contributors to include all providers of interstate communications services.

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**COMMENTS OF VERIZON WIRELESS ON SECOND FURTHER
NOTICE OF PROPOSED RULEMAKING**

Verizon Wireless hereby submits its comments in the above-captioned proceeding regarding various contribution methodologies to support the federal Universal Service Fund (USF).¹

¹ Federal-State Joint Board on Universal Service, *Report and Order and Second Further Notice of Proposed Rulemaking*, CC Docket No. 96-45, Released December 13, 2002 (“*Second Further Notice*”) at ¶ 69. Verizon Wireless petitioned for reconsideration of the December 13,

I. THE FURTHER NOTICE IS PRE-MATURE AND OFFERS PROPOSALS THAT DO NOT COMPLY WITH SECTION 254

Congress required that the Commission allocate the amount needed to fund the Federal Universal Service Fund (“USF”) on a nondiscriminatory and equitable basis among carriers providing interstate telecommunications service. The proper way to meet Congress’ mandate is to tie carriers’ contribution obligations to actual interstate activity, which to date has been achieved by measuring interstate telecommunications revenues as the proxy for interstate activity. The Commission’s reevaluation of the revenue-based approach is driven by concerns over declining interstate service revenues and the increasing prevalence of bundled services, *not* a fundamental legal or policy concern with whether the revenue approach is consistent with Section 254’s dictate that contributions be nondiscriminatory and equitable. But again in this *Second Further Notice*, as with its earlier rulemaking, the Commission has strayed far away from that dictate.²

At the outset, Verizon Wireless questions why the Commission must move to discard the revised, revenues-based system put in place by the December 13, 2002 *Report and Order* before the ink on that system is barely dry, and before it has any experience with that revised system. It is not clear that the problems that led to the recent changes persist (and, if they do still persist, the rationale for the changes is questionable). Verizon

2002 *Report and Order* on the grounds, *inter alia*, that the Commission had violated the First Amendment by imposing specific billing requirements. By submitting these comments, Verizon Wireless does not waive any of its arguments on reconsideration. Verizon Wireless also urges the Commission to do “first things first” and act on reconsideration before it takes up this new rulemaking.

² Three days ago the Commission released a *Public Notice* seeking comments on a staff study regarding the contribution methodologies that are the subject of this *Second Further Notice*. Verizon Wireless will submit comments and reply comments to the study separately by the deadlines established in the *Public Notice*. See *Public Notice*, “Commission Seeks Comment On Staff Study Regarding Alternative Contribution Methodologies,” FCC 03-31, Released February 25, 2003.

Wireless thus urges the Commission to gain experience with the revised system before it begins to consider more radical changes.

The CMRS industry's competitive success in attracting long distance minutes of use ("MOU") justified a re-evaluation of the 15 percent CMRS revenue safe harbor level, which the FCC recently adjusted to a higher 28.5 percent safe harbor. Verizon Wireless has proposed mechanisms to ensure that wireless carriers' contributions remain consistent with their interstate activity.³ In contrast, the connections-based proposals before the Commission would unlawfully shift a significant share of the burden for funding USF away from IXC's and place a disproportionate burden on CMRS carriers, among others.

To be equitable and nondiscriminatory as required by Section 254, any USF methodology should mirror or closely reflect actual interstate activity. While connections or unit based methodologies may not be *per se* invalid, such proposals must closely reflect actual interstate activity for all classes of providers. Thus, a connections-based alternative should reflect *actual* usage of the network for interstate calls, not capacity. Network capacity measures only the *potential* for interstate activity. Now that the revenue-based methodology has been adjusted to reflect current interstate activity, it should serve as a baseline for determining whether contribution levels yielded by connections-based proposals before the Commission fairly reflect actual interstate activity.

In the *First Further Notice*⁴ proceeding, Verizon Wireless opposed the proposed connection-based options as unlawful and ill-considered public policy because they were developed to eliminate or significantly reduce contributions from different sectors of the

³ See *infra* Section II.

telecom industry. A USF contribution mechanism must fulfill the requirements of Section 254. The proposals before the Commission in the *First Further Notice* were unlawful because: (1) they did not include every provider of interstate telecommunications; specifically, IXCs would be relieved of making contributions based on their proportionate share of interstate traffic; (2) contributions were not assessed on an equitable and nondiscriminatory basis, especially *vis a vis* wireless carriers; and (3) they impermissibly assessed intrastate revenues.⁵ The FCC had rejected such approaches in the past for sound reasons.⁶

Nonetheless, and despite earlier decisions, the *Second Further Notice* continues to signal the Commission's shift away from a pure revenue-based methodology in favor of a connections-based method or some modified hybrid.⁷ The Commission again proposes several far-reaching alternatives to the current revenue-based system for contributions to the federal Universal Service Fund. While Verizon Wireless opposes connections-based contribution methods that shift funding burdens to the CMRS industry disproportionately, or without regard to interstate service activity, Verizon Wireless is open to evaluating per unit proposals that meet the strict legal requirements of Section 254 and fairly assess all sectors of the communications industry. However, as presented, the three proposals in the *Second Further Notice* reveal significant legal and policy infirmities.

⁴ Federal-State Joint Board on Universal Service, *Further Notice of Proposed Rulemaking and Report and Order*, 17 FCC Rcd. 3752 (2002) ("*First Further Notice*").

⁵ Verizon Wireless Comments to the *First Further Notice*, CC Dockets 96-45 *et al.*, filed April 22, 2002 ("Verizon Wireless Comments").

⁶ Federal-State Joint Board on Universal Service, *Report and Order*, 12 FCC Rcd 8776 (1997) at ¶ 852.

⁷ *Second Further Notice* at ¶¶ 72-73.

II. A REVENUE-BASED SYSTEM IS LEGALLY SUPERIOR, AND WIRELESS CARRIERS CAN ALLOCATE THEIR REVENUES USING TRAFFIC-BASED WIRELESS SAFE HARBORS

Verizon Wireless' prior comments in this proceeding demonstrate how the present revenue-based system meets the statutory requirements under Section 254. Verizon Wireless incorporates by reference those arguments here.

The Commission continues to express concern that “any contribution system based on interstate telecommunications revenues will be dependent on the ability of contributors to distinguish between interstate and intrastate telecommunications and non-telecommunications revenues.”⁸ Wireless carriers' work in developing the *CTIA Traffic Studies Ex Parte*,⁹ however, demonstrates that wireless carriers can fairly estimate their interstate revenues by using interstate minutes of use as a proxy for revenues. Such traffic studies provide a reasonable basis for determining individual carriers' revenue allocations. Individual carrier filings can, in turn, form the basis for a “safe harbor” for use by wireless carriers that are unable, for technical or economic reasons, to perform their own traffic studies – much as smaller LECs currently are allowed to rely on “average schedules” to determine their costs for access charge purposes.

The experience of the *CTIA Traffic Studies Ex Parte* also demonstrated, however, that it would be helpful to have uniform assumptions for carriers to use in performing such traffic studies, to assure the equitable and non-discriminatory nature of the process.

⁸ *Second Further Notice* at ¶ 69.

⁹ *Ex Parte* letter of Michael Altschul, CTIA, CC Docket No. 96-45, filed Sept. 30, 2002 (“*CTIA Traffic Studies Ex Parte*”).

To that end, Verizon Wireless submitted an *Ex Parte* on October 28, 2002, proposing a methodology for wireless carrier traffic studies.¹⁰

The *Verizon Wireless Traffic Study Methodology Ex Parte* proposed using call detail records from wireless carrier switches as the starting point for traffic studies. In order to perform a study, carriers must arrange to capture the relevant data in the switch or switches used in the sample during the study period.

The location of the billed subscriber can be determined by the cell site location at the commencement of the call. The determination of the “other-end” location of the call generally can be accomplished using the NPA-NXX of the number. This basic approach can be used to determine the interstate or intrastate nature of the vast majority of wireless calls.

There are certain special cases that require further analysis, as described in the *Verizon Wireless Traffic Study Methodology Ex Parte*. For example, when the billed subscriber is the *calling* party, the determination of the “other-end” location can be determined by the NPA-NXX of the dialed number, which the carrier will need to complete the call. When the billed subscriber is the *called* party, however, the incoming NPA-NXX may or may not be transmitted with the incoming call. The number of calls where such data are not transmitted is, in Verizon Wireless’ experience, relatively small, and can be overcome either by removing such minutes from both the numerator and the

¹⁰ Letter from L. Charles Keller, Counsel to Verizon Wireless, CC Docket Nos. 96-45 et al., dated October 28, 2002 (“*Verizon Wireless Traffic Study Methodology Ex Parte*”). Verizon Wireless had hoped that the Commission would seek comment specifically on this proposal in the next further notice, and hopes that parties will address it in their reply comments.

denominator of the ratio calculation,¹¹ which reasonably allocates these minutes based on the minutes that can be traced.

The origin and destination of roaming traffic usually can be determined from the data that are used to generate inter-carrier roaming bills. Again, these data are not routinely retained in the switching or billing systems, but can be collected for purposes of a study.

Such studies are substantial undertakings, but could be performed by carriers at reasonable intervals prescribed by the Commission to ensure that changes in traffic proportions, if any, are reflected in carrier filings. As the *Verizon Wireless Traffic Study Methodology Ex Parte* proposed, carriers could be required to retain records used in their company-specific traffic study to support periodic auditing.

If a revenue-based contribution system is maintained, the adoption of standards such as those described above and in the *Verizon Wireless Traffic Study Methodology Ex Parte* would allow the Commission to ensure that the system remains equitable and non-discriminatory.

III. ALL VARIANTS OF THE CONNECTIONS-BASED PROPOSALS ARE INEQUITABLE AND ILLEGAL

Verizon Wireless previously opposed connections-based proposals that essentially excluded entire industry segments from contributing a fair share of the costs of Universal Service. To comply with the dictates of Sections 254 and Section 2(b), any acceptable unit-based proposal should incorporate the following principles: (1) retain some elements of a revenue-based system beyond mere token cost-sharing for providers without

¹¹ This is the approach suggested in the *Verizon Wireless Traffic Study Methodology Ex Parte*. Although the minutes would not be counted, the revenues they generated would, of

connections to reflect a fair estimate of a carriers' interstate activity; and (2) tie capacity tiers closely to actual interstate revenues or interstate minutes generated by these connections. All of the proposals in the *Second Further Notice* are flawed because they fail to meet one or both of these criteria.

A. The Connections-Based Methodology With Mandatory Minimum Obligation Is Arbitrary And Unexplained

The Connections-Based Methodology with Mandatory Minimum Obligation combines an annual minimum contribution assessable against all telecommunications carriers with a flat monthly fee per connection (exempting lifeline connections).¹² This proposal employs seemingly arbitrary flat fee amounts depending on the type of connection (e.g., residential, pay phone, mobile wireless, single business line, one-way pager, two-way pager). The fee assessment for a multi-line business will be based on capacity using a four-tier structure, depending on the varying residual funding needs of the fund after others' contributions are determined.¹³

The minimum annual contribution levels, presumably for carriers that do not contribute on a per connection basis, would represent a yet to-be-determined percentage of annual interstate revenues. The apparent purpose of this is to ensure that the federal USF is not under-inclusive and does not shift the entire burden of supporting USF to a few industry segments, in violation of the statute. However, the fairness of the minimum contribution percentage depends upon whether the carriers subject to its provisions contribute a proportionate share based on actual interstate revenues or some safe harbor proxy developed for the industry segment based on empirical data.

course, be allocated based on the minutes that can be identified with precision.

¹² *Second Further Notice* at ¶ 75.

¹³ *Id.*

Assuming that the minimum annual contribution will operate like the interim revenue-based procedures developed for the wireless industry, it will face some of the same challenges associated with that system. Furthermore, the Commission has not specified which telecommunications carriers might be assessed an annual minimum contribution, providing no way for parties to evaluate whether the overall proposal includes all providers of interstate telecommunications service, regardless of the mode of transmission.

This proposal also provides for a flat monthly fee on a per connection basis. For this aspect of the proposal, the Commission proposed specific target amounts based on the type of connection or line.¹⁴ The specific target amounts are arbitrary because the Commission provides no analysis or empirical data to support them.¹⁵ For example, the \$1 a month for each residential line, pay phone, single business line, or mobile wireless connection is unexplained, nor is a reason provided for grouping these types of connections together. There are several problems with dividing up “connections” in this manner: (1) there is no legal or factual nexus between a carrier’s or its customer’s connections to the PSTN and the amount that should be contributed to universal service support (which is supposed to be based on the level of interstate activity).¹⁶ The number of connections or lines only demonstrates the capacity of one’s network, not the volume of interstate activity; and (2) the 1 to 1 equation, and therefore grouping, of different types of connections may allow for easier administration of USF, but has no basis in law or in fact. Why should a single business line, a residential line, a pay phone, and a mobile wireless handset all contribute equally to USF, when they cannot be deemed to

¹⁴ *Second Further Notice* at ¶ 75.

¹⁵ *Id.*

make equal use of the interstate network? There is no justification to assess each of these connections an equal amount.¹⁷ Unexplained assumptions that are not grounded in fact, data or legality underpin this scheme.

Moreover, the flat monthly fee aspect of this proposal is fatally imprecise. The residual funding needs of USF would be used to assess the contribution levels for multi-line business connections based on a 4 tier capacity structure. Not only will the ultimate contribution amount vary from year to year depending on the needs of the Fund, but also upon the contributions of other carriers and their customers. In a given year, this could represent a funding windfall or overcharge for carriers with multi-line business connections. Moreover, there is no apparent nexus between the capacity tiers and actual interstate revenues, or even as a proxy for the amount of interstate calls made by persons with such capacity connections. Given the imprecision of this proposal, it cannot be “equitable and non-discriminatory,” as mandated by Section 254(d).

B. The Variations of the SBC/BellSouth Proposal To Split Connection-Based Contributions Between Switched Transport And Access Providers Do Not Cure The Unlawful Defects

The Commission also seeks comment on variations on what is essentially the SBC/BellSouth proposal from the last comment round.¹⁸ Although some details of the proposal have changed, Verizon Wireless continues to object to this approach. While a split connections-based mechanism may cure one of the statutory flaws of a simple connections-based assessment by requiring contributions from IXC's,¹⁹ the split

¹⁶ Verizon Wireless Comments to the *First Further Notice* at 6.

¹⁷ See *Second Further Notice* at ¶ 75.

¹⁸ See *Second Further Notice* at ¶ 86 & n.181 (citing SBC/BellSouth comments and *Ex Parte* submission); *Id.* at ¶ 87.

¹⁹ Verizon Wireless Reply Comments, CC Dockets 96-45 *et al.*, filed May 13, 2002, at 10 (“Verizon Wireless Reply Comments”).

connection-based assessment contains significant other legal infirmities, and must be rejected.

1. The Commission's Variants On The BellSouth/SBC Proposal Continue To Be Unlawful

The split assessment proposals depend upon administratively unworkable “equivalency ratios” that, as proposed, inequitably and illegally shift a disproportionate share of the USF burden onto CMRS providers.

The first variant of the split connection-based assessment in the *Second Further Notice* would impose capacity-based assessments on carriers that provide access to an interstate network, such as LECs, and a second capacity-based assessment on carriers that provide transport on an interstate network, such as IXC. Because CMRS carriers provide both services, CMRS carriers would be assessed twice for the same connection. Under this first variant, non-pre-subscribed transport providers, such as dial-around IXCs, would continue to contribute based on revenues. The second variant of this proposal would assess all transport providers based on revenues, and the third would do so only if the transport provider is not the same carrier as the access provider.

All three variants of the split connection-based mechanism rely on arbitrary calculations to allocate the contribution burden among different types of contributors. The *Second Further Notice* does not explain how the burdens would be allocated under the first variant.²⁰ Indeed, there is no obvious way to make the allocation other than to begin with an arbitrary per-connection charge, such as CoSUS’s ill-fated \$1, and recover the residual funding requirement from the revenue-based contributors. Such an arbitrary

²⁰ See *Second Further Notice* at ¶¶ 87-89.

approach is precluded by both the Telecommunications Act and the Administrative Procedure Act.

The second and third variants of the split proposal propose to allocate between connection-based and revenue-based contributors by essentially assuming a transport connection for every access connection that is provided, and allocating the cost of those assumed transport connections among the carriers that pay based on revenue, in proportion to their revenues.²¹ Although this approach at least articulates a rationale for the allocation, there is no reason to believe the allocation would be equitable or non-discriminatory, particularly because the size of the connection-based assessments depends upon the “capacity tiers” used to allocate them.

SBC and BellSouth propose using up to 14 capacity tiers to allocate among different types of connections, but the Commission does not specifically propose to use this set, or any other specific set, of capacity tiers.²² The proposed capacity tiers appear to very arbitrary. For example, the *Second Further Notice* states that the mechanism would retain SBC/BellSouth’s proposal to assess one-way pagers one-half of an access connection, while other services are assessed at different levels.²³ The proposal fails to recognize that CMRS customers also would be over-assessed if charged for every handset they own on the same basis as landline connections. Wireless customers with multiple handsets are unlikely to use all of the handsets equivalently, and could in fact use only one handset for interstate calls (under a plan that provides a large bucket of minutes) and

²¹ The assumed transport connection charge would be assessed directly to the transport provider if it is the same as the access provider (under the third variant) or divided among transport providers based on revenues (under the second and third variants). *Second Further Notice* at ¶¶ 92-94.

²² *Second Further Notice* at ¶ 87 & n.184.

the others phones for purely local use (security, teens lines, etc). Moreover if a wireless customer wanted to replace his landline service (where he uses for handsets in his house) with mobile service (and 4 mobile handsets), he would face a significant increase in USF assessments, even if all four handsets are not used to make interstate calls. These examples demonstrate just how difficult it will be for the Commission to derive a fair and equitable connection based or capacity based system, unless the system is in some way linked to actual interstate activity.

All of these proposals also must be rejected because a contribution methodology based on arbitrary weighting of burdens is easily manipulated to benefit individual carriers or classes of carriers. For example, the ISPs have, apparently, already convinced the Commission of the importance of not assessing them.²⁴ As noted above, either providers of non-connection based services (who will continue to contribute based on revenues) or high-capacity services (who will have their contributions determined by capacity tiers) could argue for a structure that reduces their contributions relative to other providers. As Verizon Wireless previously has noted, the proposals in this proceeding, beginning with the IXCs' CoSUS initiative, appear designed primarily to benefit the proponent carrier group, usually by shifting a large share of the burden to the CMRS industry.²⁵ The Commission should resist these calls to shift an even greater – and inequitable – share of the contribution burden onto the CMRS industry.

²³ This same flaw existed in the SBC/BellSouth proposal considered in the earlier proceeding. See Verizon Wireless Reply Comments to the *First Further Notice* at 19.

²⁴ *Second Further Notice* at n.181.

²⁵ Verizon Wireless Reply Comments to the *First Further Notice* at 19-21.

2. Parsing CMRS Into Access And Transport Components Is Inconsistent With Settled Law

As Verizon Wireless explained in its prior Reply Comments, the first SBC/BellSouth proposal failed to recognize that CMRS is a unified service.²⁶ Similarly, the split connection-based proposal in the *Second Further Notice* would divide the CMRS connection into “access” and “transport” components and assess CMRS carriers with at least two (and potentially more) contribution unit obligations for each wireless handset. This attempt to parse CMRS service to achieve cumulative contribution obligations is contrary to years of Commission treatment of CMRS service as a single, integrated, end-to-end service offering.

For example, the Commission relied upon the fact that CMRS carriers’ provision of interstate service is part of an integrated CMRS offering when it de-tariffed these services in 1994.²⁷ Had the interstate services that CMRS carriers offered been considered a separate service for regulatory purposes, the rationale for the Commission’s de-tariffing order would not have made sense. The split connection base proposal improperly separates “CMRS” and “long distance” services.

²⁶ Verizon Wireless Reply Comments to the *First Further Notice* at 13-18.

²⁷ Prior to the passage of the Omnibus Budget Reconciliation Act of 1993 (“Budget Act”), the Commission lacked the jurisdiction to forbear from requiring common carriers, including CMRS carriers, to file the tariffs required by section 203 of the Act. *Implementation of §§ 3(n) and 332 of the Commissions Act, Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411, 1416-17 ¶ 10 (1994) (“*CMRS Detariffing Order*”) (citing *AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992), *rehearing en banc denied*, Jan. 21, 1993, *cert. denied*, 113 S.Ct. 3020 (1993)). The Budget Act reiterated that CMRS services would be regulated as common carrier services under Title II, but gave the Commission the authority to forbear from certain aspects of Title II regulation for CMRS services, subject to making certain findings. The Commission forbore from permitting the filing of tariffs under section 203 for interstate services offered by CMRS carriers. *CMRS Detariffing Order* at 1480 ¶179.

The Commission also identified CMRS as a service category that provides an integrated, end-to-end service that may include both intrastate and interstate traffic in the Customer Proprietary Network Information (CPNI) proceeding. In that proceeding, the Commission considered carriers' rights, under Section 222 of the Act, to use CPNI derived from providing a customer with one service to market to that customer regarding another service.²⁸ In performing this analysis, the Commission divided telecommunications service offerings into three categories: local, inter-exchange, and CMRS.²⁹ The definition of CMRS as a service category separate from local and inter-exchange service demonstrates its status as a single, integrated service offering. Moreover, in describing the "total service approach" that it adopted for analyzing these questions, the Commission stated that "a carrier whose customer subscribes to service that includes a combination of local and CMRS would be able to use CPNI derived from this entire service to market to that customer all related offerings, but not to market [landline] long distance service to that customer, *because the customer's service excludes any [landline] long distance component.*"³⁰ If a service package that includes CMRS service "excludes any long distance component," then CMRS service must be a separate and integrated category of service apart from interstate or inter-exchange service.

Central to the FCC's decision in the CPNI docket to treat CMRS as an integrated service comprised of both local and long-distance traffic was its conclusion that wireless subscribers themselves viewed CMRS as encompassing and blending together both

²⁸ Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, *Second Report & Order and Further Notice of Proposed Rulemaking*, 13 FCC Rcd 8061 (1998).

²⁹ *Id.* at 8081-85 ¶¶ 27-32.

³⁰ *Id.* at 8083-84 ¶ 30 (emphasis added). *See also id.* at 8084 ¶ 31 (adopting the total service approach).

services – in contrast to landline, where local and long distance were viewed by customers as discrete offerings. On reconsideration, the Commission spoke again to the integrated nature of CMRS. It found that customers understood wireless service to be even broader than just long distance and local telecommunications and also to encompass the sale of CPE and “information services.”³¹ Internet access, voice mail, long distance, other information services – the law establishes that all are fully integrated for CMRS. SBC/Bellsouth’s proposal goes in precisely the opposite tack, by severing rather than integrating the various offerings CMRS providers make, in order to justify charging a separate USF charge for each discrete service.

BellSouth has itself recognized the integrated nature of CMRS, despite its USF proposal. With respect to the separate affiliate requirements that apply to Bell Operating Companies’ (“BOCs”) provision of interLATA services, BellSouth had argued that, “[t]o the extent that a CMRS provider offers inter-exchange services in conjunction with its provision of CMRS, *the inter-exchange service is itself incidental CMRS*, and thus exempt from section 272 separate affiliate requirements.”³² The Commission agreed.³³

The Commission has been reversed by the D.C. Circuit before for attempting to shoehorn landline concepts of “exchange” and “inter-exchange” services onto the

³¹ The FCC held, “information services and CPE offered in connection with CMRS are directly associated and developed together with the service itself. Indeed, we are persuaded by the record and our observations of the development of the CMRS market generally that the information services and CPE associated with CMRS are reasonably understood by customers as within the existing service relationship with the CMRS provider. Customers expect to have CPE and information services marketed to them along with their CMRS service by their CMRS provider.” Telecommunications Carriers’ Use of Customer Propriety Network Information and Other Customer Information, *Order on Reconsideration and Petitions for Forbearance*, FCC 99-223, at ¶ 43 (1999).

³² *Bell Operating Company Provision of Out-of-Region Interstate Interexchange Services*, 11 FCC Rcd 18564, 18584 at ¶ 42 (1996) (emphasis added).

³³ *Id.* at 18585 ¶ 44. See also 47 USC §§ 272(a)(2)(B)(i); 271(g)(3).

wireless industry where customers purchase integrated local and long distance service – precisely what SBS/BellSouth propose here. Following enactment of the 1996 Act, the FCC declared that the “rate integration” provisions of Section 254(g) must apply to CMRS, contending that CMRS provided discrete “inter-exchange” and “exchange” services. The agency ignored the CMRS industry’s argument that CMRS was an integrated, end-to-end service. The Court agreed with the industry, reversed the Commission, and vacated its rate integration rule.³⁴

These regulatory actions make clear that the interstate portion of CMRS service has always been but one component of a single, integrated service offering under both the statute and the Commission’s rules. Adoption of a split connection-based proposal – which would subdivide the CMRS offering into a number of discrete connections in order to pile additional contribution obligations onto the CMRS industry – would be flatly at odds with the long line of authority, cited above, in which the Commission has recognized CMRS as an integrated service. CMRS carriers should face only one assessment basis for their CMRS offerings in any per unit contribution mechanism.

3. The Split Connection-Based Proposals Are Logistically Unworkable

In addition to being illegal, the split connection-based proposals present logistical problems that preclude their implementation. As the Commission notes, assessing a transport connection charge on pre-subscribed IXCs presents the same data-sharing nightmare that doomed the Pre-subscribed Inter-exchange Carrier Charge (“PICC”).³⁵ The proposed alternatives – which would assess some or all transport providers based on

³⁴ *GTE Service Corp., et al. v. FCC*, 224 F.3d 768 (D.C. Cir. 2000).

³⁵ *Second Further Notice* at ¶ 88.

revenues – simply acknowledge the logic of retaining a revenue-based assessment mechanism for *all* providers.

In addition, assessing some transport providers on a per-connection basis while assessing other transport providers based on revenues will create incentives for high-volume users to select service arrangements where they would pay on a flat-fee basis (under the proposals, either the use of a pre-subscribed transport carrier or a unified access and transport provider). This in turn would shift an inequitable share of the contribution obligation onto those providers that are still required to contribute based on revenues, simply because their business model does not fit neatly into a connections-based contribution methodology.

There are no ready answers to these logistical problems, all of which are substantially more significant than the process of estimating interstate revenues under a revenue-based assessment mechanism. The existing mechanism has stood judicial scrutiny and the test of time. It should not be replaced by the modified BellSouth/SBC proposal.

C. Telephone Number Based Assessments Would Be Unlawful

The Commission also seeks comment on a proposal supported by AT&T and large business customers to assess connections based on telephone numbers assigned to end users.³⁶ This proposal has several flaws, and worse, has no apparent relationship to actual (or approximate) interstate activity, as it must to comply with Section 254. Telephone numbers have no connection to interstate calling volumes as demonstrated by the fact that IXCs do not even maintain an inventory of telephone numbers.

1. Assessments Based On Telephone Numbers Would Illegally Assess Against Intrastate Revenues Because There Is No Logical Way To Jurisdictionally Separate Telephone Numbers

Section 2(b) on its face prohibits application of the Commission’s jurisdiction with respect to charges, classifications, practices, services, facilities, or regulations, over intrastate communications service, which includes universal service.³⁷ The Court in *Texas Counsel* confirmed this when it determined that including intrastate revenues in the federal USF calculation constituted a “charge” and as such could not be lawfully assessed against intrastate revenues.³⁸ If the Commission were to base calculations of USF contributions on the number of telephone numbers assigned by a carrier, such assessments would constitute a charge against intrastate communications. There is no practical or logical way to separate telephone numbers held by carriers by virtue of whether they are used for local/intrastate calls. The telephone numbering administration system managed by the North American Numbering Plan Administrator allocates numbers to carriers based on their need to meet customer demand and does not make assignments based on whether they will be used for intrastate versus interstate calling.³⁹ Lacking a way to jurisdictionally exclude telephone numbers used only to make intrastate calls, this method would be doomed to unlawfully assess against intrastate service.

2. The Commission’s Exclusive Jurisdiction Over Telephone Numbers Pertains To Numbering Administration, Not USF

³⁶ *Second Further Notice* at ¶ 96.

³⁷ See 47 U.S.C. § 152(b); See *Texas Office of Util. Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) (“*Texas Counsel*”).

³⁸ *Id.* at 447.

³⁹ 47 C.F.R. § 52.9

Anticipating that assessing connections on the basis of telephone numbers would constitute an illegal assessment on intrastate revenues under Section 2(b), the Commission seeks comment as to whether its exclusive jurisdiction under Section 251(e) over numbering resources addresses section 2(b) concerns.⁴⁰ It does not. Section 251(e) grants the Commission exclusive jurisdiction over numbering administration.⁴¹ This grant of authority allows the FCC to administer the North American Numbering Plan and facilitates uniform policies for ensuring that scarce numbering resources are available and allocated among telecommunications providers on a nondiscriminatory and equitable basis.⁴² Section 251(e) has no bearing on, nor does it supercede, the bar that Section 2(b) imposes on any attempt to assess intrastate service.

NYPSC v. FCC does not rescue a number-based system from Section 254's mandate.⁴³ In that case, the Court looked at the relationship between Sections 251(e) and 2(b) in response to arguments raised by the New York Commission and the FCC.⁴⁴ The New York Commission argued that the FCC's mandatory ten-digit dialing rule violated Section 2(b)'s prohibition against FCC jurisdiction over intrastate matters such as local dialing patterns. The Court upheld the Commission's rule despite its intrusion into local dialing patterns because Section 251(e) had expressly given the FCC jurisdiction over numbering administration, including intrastate numbering matters.⁴⁵ This examination of the interplay between Sections 251(e) and 2(b) dealt squarely with principles of numbering administration where Section 251 clearly expressed Congress's will that the

⁴⁰ *Second Further Notice* at ¶ 96.

⁴¹ 47 U.S.C. § 251(e).

⁴² *Id.*

⁴³ *See People of the State of New York & Public Service Commission of the State of New York v. Federal Communications Commission*, 267 F.3d 91 (2d Cir. 2001) ("*NYPSC v. FCC*").

⁴⁴ *Id.* at 100-106.

FCC's jurisdiction is plenary.⁴⁶ Here, however, an independent command in both Section 254 and Section 2(b), confirmed by the Fifth Circuit, does not allow the USF contribution system to be tied to intrastate service.⁴⁷

Section 251(e)'s grant of exclusive jurisdiction over numbering administration is not relevant to universal service assessments. All Section 251(e) resolves is the Commission's authority to regulate telephone numbers. Thus, while the Commission has the ability to manage telephone numbers under Section 251(e), it is nevertheless, prohibited by Section 2(b) from levying assessments against intrastate revenues based on telephone numbers or otherwise. Principles of statutory construction instruct courts to reject administrative constructions of a statute, whether reached by adjudication or by rule-making, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement.⁴⁸ The Court in *Texas Counsel* held that including intrastate revenues in the federal USF calculation constituted an illegal charge and was prohibited under Section 2(b).⁴⁹ Utilizing telephone numbers in a manner that would

⁴⁵ *Id.*

⁴⁶ It is noteworthy that the FCC has considered and rejected proposals to use telephone numbers as a unit for purposes of funding NANP administration. Specifically, the FCC rejected a proposal to use per number charges because, "...per number charges would be inequitable, as they may fall disproportionately on the fastest growing users of numbers such as wireless service providers." Administration of the North American Numbering Plan, *Report and Order*, 11 FCC Rcd. 2588, 2629 at ¶ 100 (1995). In the *Second Numbering Resource Optimization Order and Further Notice*, the FCC proposed a market-based approach to allocating telephone numbers as a conservation measure and to fund NANP administration whereby carriers would be charged on a per telephone number basis. Numbering Resource Optimization, *Second Report and Order, Order on Reconsideration in CC Docket No. 96-98 and CC Docket No. 99-200, and Second Further Notice of Proposed Rulemaking in CC Docket No. 99-200*, 16 FCC Rcd. 306 (2000). The FCC did not adopt this proposal and has not raised it in subsequent NRO Orders.

⁴⁷ See *Texas Counsel*, 183 F.3d 393 (5th Cir. 1999).

⁴⁸ See *Federal Election Commission v. Democratic Senatorial Campaign Committee et al.*, 454 U.S. 27, 102 S.Ct. 38 (1981).

⁴⁹ See *Texas Counsel* at 447.

cause USF assessments to be made against intrastate revenues is not covered or sanctioned by Section 251(e) and would frustrate the intent of Section 2(b).

3. There Is No Conservation Benefit From This Proposal

Some proponents will argue in favor of this proposal on the misguided assumption that tying telephone numbers to USF contributions will promote number conservation. Given the Commission's rules governing the allocation, reporting, and use of telephone numbers by carriers, tying USF contributions to the status of numbers as "assigned" will not have any effect on conservation. Conservation methods are used to prevent carriers from hoarding or otherwise holding numbers in their inventory that they do not need to serve customers. By definition, assigned numbers are those assigned to end user customers.⁵⁰ Carriers cannot take numbers away from their customers and return them to regulators to reduce their USF payments. The public policy end of number conservation policies is not conservation for its own sake, but conservation for the sake of having a reliable and predictable supply of numbers for competing carriers to be able to meet customer demand without expanding the numbering plan.⁵¹

Furthermore, the numbers-based option should be rejected because the use of assigned numbers (or any number status category) as the unit for calculating USF payments is not tied to actual or approximate interstate activity, and like the other proposals in the *Second Further Notice*, will artificially and disproportionately increase

⁵⁰ See 47 C.F.R. § 52.15(f)(iii).

⁵¹ See Numbering Resource Optimization, *Report and Order and Further Notice of Proposed Rulemaking*, 15 FCC Rcd 7574 (2000) at ¶ 1.

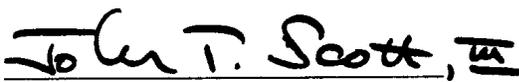
contributions by certain industry segments, enabling the IXC's to avoid their proportionate contribution obligation. Telephone numbers are an invalid proxy for interstate activity.

IV. CONCLUSION

For the foregoing reasons, the Commission has not met its burden under Section 254(d) to fashion a connections-based contribution methodology that is not discriminatory and inequitable. The revenue-based system has met those criteria and can be adjusted, as necessary, to ensure continued sustainability of universal service support. If the Commission continues to pursue a connections-based substitute for the current revenue-based system, the basic tenets of Section 254(d) must be met. None of the proposals of this *Second Further Notice* fulfill the statute's requirements.

Respectfully submitted,

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Certificate of Service

I hereby certify that on this 28th day of February copies of the foregoing “Comments of Verizon Wireless on Second Further Notice of Proposed Rulemaking” in CC Docket 96-45 were sent by US Mail to the following parties:

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