

**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	)	CC Docket No. 90-571
Individuals 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

**AT&T PETITION FOR RECONSIDERATION**

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## SUMMARY

The *Wireless Clarification Order* blatantly discriminates in favor of cellular mobile radio service (“CMRS”)-based telecommunications providers. It provides inequitable, selective relief to the CMRS industry yet does not articulate a reasoned basis for such favoritism. In short, it makes a mockery of the Commission’s resolve, stated unequivocally in the *Interim USF Contribution Order*, to “no longer permit carriers—*whether wireline or wireless*—to average contribution costs across all end-user customers when establishing federal universal service line-item amounts.”

The *Wireless Clarification Order* also fails to establish any guidelines to ensure that the company-specific studies on which many CMRS-based telecommunications providers will base their universal service contributions are not subject to gross manipulation. At a minimum, such studies must: determine the percentage of interstate traffic throughout the year, rather than on a particular day; specify the base against which that percentage has been determined; and project that percentage for the coming year, rather than relying on historical data that would reintroduce the problem of discriminatory reporting lags. Additionally, the Commission must keep these traffic studies reasonably current by requiring wireless carriers to update their traffic studies on the same schedule as the Commission true-ups of carriers’ collected revenue projections.

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**AT&T PETITION FOR RECONSIDERATION**

Pursuant to Section 1.429 of the Commission’s Rules,<sup>1</sup> AT&T Corp. (“AT&T”) hereby petitions the Commission for reconsideration of its *Wireless Clarification Order*.<sup>2</sup> In the

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<sup>1</sup> 47 C.F.R. § 1.429.

<sup>2</sup> *In re Federal-State Joint Board on Universal Service; 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability,*

*Wireless Clarification Order*, the Commission once again blatantly discriminated against wireline providers of interstate long distance services by allowing CMRS-based interstate long distance providers to charge averaged universal service recovery fees.<sup>3</sup> In contrast, wireline providers must charge recovery fees based on a specific customer's interstate usage. It is time for the Commission to end this “tangled web” of special relief for CMRS interstate long distance providers.<sup>4</sup>

In addition, the Commission must also reduce the discriminatory aspects of the *Wireless Clarification Order* by prescribing a methodology by which wireless carriers are to conduct and update any traffic studies used as a basis for setting company-specific factors for allocating revenue to interstate telecommunications, and a process for public review of such traffic studies. Without such guidelines and opportunity for public review, these studies could be substantially biased or statistically invalid, leading to undercontribution by at least some CMRS providers and a further erosion of the universal service contribution base.

## **I. BACKGROUND.**

In its *Interim USF Contribution Order*, the Commission limited the universal service recovery line-items to the amount of “the interstate telecommunications portion of the bill times

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*& Universal Service Support Mechanisms; Telecommunications Services for Individuals with Hearing & Speech Disabilities, & the Americans with Disabilities Act of 1990; Administration of the North American Numbering Plan & North American Numbering Plan Cost Recovery Contribution Factor & Fund Size; Number Resource Optimization; Telephone Number Portability; Truth-in-Billing & Billing Format*, Order & Order on Reconsideration, 2003 FCC LEXIS 443, FCC 03-20 (rel. Jan. 30, 2003) (“*Wireless Clarification Order*”).

<sup>3</sup> See *id.* at ¶ 8.

<sup>4</sup> See *Competitive Telecommunications Ass’n v. FCC*, 87 F.3d 522, 533 (D.C. Cir. 1996) (“‘O what a tangled web we weave, when first we practise’—dare we say, ‘to relieve’?”).

the relevant contribution factor.”<sup>5</sup> The Commission further stated that “we will no longer permit carriers—whether wireline or wireless—to average contribution costs across all end-user customers when establishing federal universal service line-item amounts.”<sup>6</sup> In a footnote, the Commission clarified the direct import of its instructions: “Carriers may charge all their end-user customer the same flat federal universal service line-item charge so long as that amount does not exceed the contribution factor times the interstate telecommunications revenues derived from any individual customer.”<sup>7</sup> The Commission then concluded, “We recognize that these changes may require modification in billing practices for certain carriers. Accordingly, this requirement will not become effective until April 1, 2003.”<sup>8</sup>

In the same order, the Commission also increased to 28.5 percent the so-called “wireless safe harbor”—the percentage of total end user telecommunications revenues that a wireless carrier may allocate to interstate telecommunications if that carrier cannot determine its company-specific amount of interstate end user telecommunications revenue.<sup>9</sup> The Commission found that increasing the safe-harbor percentage was appropriate because the then-existing

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<sup>5</sup> *In re Federal-State Joint Board on Universal Service; 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, & Universal Service Support Mechanisms; Telecommunications Services for Individuals with Hearing & Speech Disabilities, & the Americans with Disabilities Act of 1990; Administration of the North American Numbering Plan & North American Numbering Plan Cost Recovery Contribution Factor & Fund Size; Number Resource Optimization; Telephone Number Portability; Truth-in-Billing & Billing Format*, Report & Order & Second Further Notice of Proposed Rulemaking, FCC No. 02-329, at ¶ 51 (rel. Dec. 13, 2002) (“*Interim USF Contribution Order*”).

<sup>6</sup> *Id.* at ¶ 51.

<sup>7</sup> *Id.* at ¶ 51 n.132.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at ¶ 20.

percentage was “no longer based on actual market conditions.”<sup>10</sup> The Commission selected as the safe-harbor percentage the high end of what the Cellular Telecommunications and Internet Association (“CTIA”) represented to be the results of five studies conducted by five unnamed wireless companies. The Commission stated that doing so should “provide mobile wireless providers an incentive to report their actual interstate telecommunications revenues if they are able to do so.”<sup>11</sup>

In its *Wireless Clarification Order*, the Commission backtracked from the clear statements in the *Interim USF Contribution Order* that precluded any carrier—“wireline or wireless”—from averaging the recovery of contribution costs across all end users. The Commission granted what amounts to a special exemption from this requirement for CMRS providers. The Commission “clarified” that a CMRS provider may report its interstate telecommunications revenues based on a company-specific traffic study, and then the “interstate telecommunications portion of each customer’s bill would equal the company-specific percentage based on its traffic study times the total telecommunications charges on the bill. Accordingly, if such providers choose to recover their contributions through a line item, their line items must not exceed the interstate telecommunications portion of each customer’s bill, as described above, times the contribution factor.”<sup>12</sup> The Commission attempted to justify its action by explaining that, “[j]ust as the Commission did not eliminate the option of reporting actual interstate telecommunications revenues either through a company-specific traffic study or some

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at ¶ 22. Notably, CTIA never put in the record, and the Commission never requested, the actual five traffic studies. There was never any opportunity for any party other than CTIA, including the Commission, to review these studies for methodological soundness. The Commission wholly ignored calculations by WorldCom that indicated that the wireless safe harbor should more appropriately be set at 40 percent.

<sup>12</sup> *Wireless Clarification Order* at ¶ 8.

other means, the Commission did not intend to preclude wireless telecommunications providers from continuing to recover contribution costs in a manner that is consistent with the way in which companies report revenues to USAC.”<sup>13</sup> The Commission, however, failed to evaluate whether its new “clarified” USF line-item recovery rules meet the statutory requirement that universal service contribution be “equitable and nondiscriminatory,” or the basic administrative law prohibition that the Commission may not “treat similar situations in dissimilar ways.”<sup>14</sup> Indeed, the Commission’s rationale for the CMRS exemption from its USF line-item recovery rules is entirely circular.

## **II. THE *WIRELESS CLARIFICATION ORDER* IS BLATANTLY AND UNLAWFULLY DISCRIMINATORY.**

Setting aside the Commission’s artful legal sophistry and looking at the effect of the *Wireless Clarification Order*, the only possible conclusion is that the order is blatantly discriminatory, in violation of Section 254(d) and established administrative law. Consider, for example, a customer who makes 300 minutes of interstate long distance calls. At five cents per minute, that customer would have an interstate long distance bill of \$15, to which a wireline long distance carrier would add an unmarked-up USF line-item of 9.0044 percent, or \$1.35 on this customer’s bill.<sup>15</sup> Now assume that the same customer was offered a wireless plan of 300 minutes of calling for \$15, by a wireless carrier that conducted a company-specific traffic study and that reported 20 percent aggregate interstate traffic (and therefore revenues). For the sake of comparison, assume that this customer uses her wireless plan to make all 300 minutes of

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<sup>13</sup> *Id.*

<sup>14</sup> *Garrett v. FCC*, 513 F.2d 1056, 160 (D.C. Cir. 1975).

<sup>15</sup> The Wireline Competition Bureau has proposed that the contribution factor be 9.0044 percent for the second quarter of 2003. See Public Notice, *Proposed Second Quarter 2003 Universal Service Contribution Factor*, DA 03-689 (rel. Mar. 7, 2003).

interstate long distance calling (perhaps attracted by the wireless company's advertisements for "free long distance"). That customer would have a universal service recovery line-item from the wireless carrier of \$0.27 ( $\$15 \times 20$  percent interstate  $\times 9.0044$  percent, or a surcharge of approximately 1.8 percent). With respect to this customer, the wireline long distance provider is placed at a significant competitive disadvantage—\$1.35 in its USF recovery line-item versus \$0.27 for the wireless carrier. Yet the wireless carrier and the wireline carrier are providing the same service to the customer, at the same underlying price, deriving the same amount of interstate end user telecommunications revenue from serving this customer.

There is no doubt that the wireless carrier is charging an averaged universal service recovery line-item. The customer in this example is using 100 percent of her wireless calling plan to make interstate calls. The revenue that the wireless carrier derives from her usage is 100 percent interstate—*i.e.*, all \$15 for her plan is interstate. If the interstate contribution factor were applied to the amount of interstate revenues attributable to her bill, it would yield a line-item of \$1.35 (9.0044 percent times \$15). It is only because her interstate usage (and thus interstate end user telecommunications revenue) is averaged with the much lower interstate usage of other customers<sup>16</sup> that her wireless universal service line-item recovery can be brought down to \$0.27. Moreover, other subscribers with zero interstate usage would still be paying \$0.27 each to subsidize the reduced universal service assessment incurred by the 100-percent-interstate wireless customer.

It is also crystal clear that the *Interim USF Contribution Order* would prohibit a non-CMRS carrier from doing what the *Wireless Clarification Order* permits the wireless carrier

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<sup>16</sup> As noted above, this hypothetical example is based on a wireless carrier's presumably accurate traffic study showing that all of the carrier's customers have, on average, 20 percent interstate usage.

to do. AT&T could not, under those orders, charge all of its customers an averaged, flat-rate, per-customer USF contribution recovery line-item.<sup>17</sup> If AT&T served exactly the same customers as the wireless carrier, and provided those customers with exactly the same interstate calling that they had previously purchased from the wireless carrier, the 300-interstate-minute caller would still have an AT&T USF line-item of \$1.35,<sup>18</sup> and the zero-interstate-minute caller would have an AT&T USF line-item of \$0. Moreover, this would be true even if AT&T shifted all of its customers to “any distance” plans that mix interstate and intrastate usage, as the wireless carriers do. The *Wireless Clarification Order* fails to base the special treatment given wireless carriers on any defensible distinction—but only on whether the underlying technology is CMRS or something else.

This discrimination is significant in the competitive marketplace because of the impact on competition for high-volume long distance users. Wireless carriers are clearly competing for long distance carriage, advertising “free long distance.”<sup>19</sup> For a high-volume long distance customer, the difference between a 9 percent surcharge on the wireline long distance provider’s bill and a much lower (in our example, 1.8 percent) surcharge on the wireless provider’s bill is significant. If the customer in our example had 1000 minutes of interstate calling per month, she would have faced a wireline USF line-item of \$4.50,<sup>20</sup> versus a wireless line-item of \$0.90

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<sup>17</sup> See *Interim USF Contribution Order* at ¶ 51. This is true regardless of whether the flat-rate line-item would be per customer or per account.

<sup>18</sup> Assuming a long distance rate of \$0.05 per minute, 300 interstate long distance minutes will result in a bill for \$15 and a USF line-item of \$1.35.

<sup>19</sup> All of the national CMRS carriers offer multiple rate plans with no per-minute long distance charges. See, e.g., [http://www.nextel.com/phones\\_plans/plans/rateplancomparison.shtml](http://www.nextel.com/phones_plans/plans/rateplancomparison.shtml) (offering six rate plans, five of which include “nationwide long distance” at no additional fee).

<sup>20</sup> Assuming a long distance rate of \$0.05 per minute, 1000 interstate long distance minutes will result in an interstate bill for \$50 and a USF line-item of \$4.50 (\$50 x 9.0044 percent). The

(assuming a 1000-minute calling plan at \$50 per month). The wireless carrier competing for this high-volume customer in our example has a competitive advantage of \$3.60 per month solely from the bias of the Commission's universal service rules.

The Commission's rationale for the disparate and highly discriminatory treatment of wireline long distance carriers vis-à-vis wireless carriers is entirely circular. The Commission attempts to define the interstate portion of the wireless carrier's customer's bill as the total bill times the wireless carrier's company-specific average interstate usage, and in so doing concludes that its USF line-item recovery limitation to the interstate portion of the end user's bill times the contribution factor is consistent across all carriers. However, the interstate portion of a particular end user's bill is not equal to the average interstate usage simply because the Commission says it is. In our example above, the 300-minute (or 1000-minute) caller uses her entire wireless plan for interstate calling, and thus 100 percent of her usage is interstate. For other customers, no usage may be interstate. Even if the wireless carrier's average customer usage is 20 percent interstate, the "interstate telecommunications revenue derived from [the] individual customer"<sup>21</sup> is not 20 percent of the individual customer's monthly plan charge.

Moreover, the use of a general, traffic-study-derived allocator to determine the wireless carrier's overall, aggregate universal service assessment does not dictate that the allocator also be allowed for determining the USF recovery line-item, as the Commission argues in the *Wireless Clarification Order*. Use of an allocator (without a safe harbor) to determine overall aggregate contribution could be close to competitively neutral—provided the allocator could feasibly be determined on a prospective basis, not lagged, and kept up-to-date—because all that is being

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wireless customer with a 1000-minute calling plan at \$50 a month with all interstate usage would pay \$0.90 (\$50 x 20 percent interstate x 9.0044 percent) in universal service contributions.

<sup>21</sup> *Interim USF Contribution Order* at ¶ 51 n.132.

determined is the carrier's aggregate payment to USAC.<sup>22</sup> However, allowing CMRS carriers alone to apply that allocator to universal service recovery fees is discriminatory. It allows one set of carriers to average the USF recovery fees charged to individual consumers, while other carriers are required to charge customer-specific USF recovery fees.

In addition, the Commission cannot defend the *Wireless Clarification Order* as merely establishing a transitional rule for the USF recovery line-items charged by wireless carriers. Under the *Wireless Clarification Order*, CMRS providers have a permanent exemption from the requirement placed on all other carriers to charge only customer-specific USF recovery line-items. There is no requirement that they implement the billing systems changes necessary to switch to customer-specific billing, as all other carriers must do.

Section 254(d) and basic principles of administrative law require the Commission to act nondiscriminatorily in designing its USF contribution and recovery rules. The *Wireless Clarification Order* fails to articulate any reasonable basis for its discrimination between CMRS providers and all other providers, nor does it consider whether there are any nondiscriminatory alternatives, such as permitting all carriers to average recovery at least within customer classes.<sup>23</sup> Accordingly, the Commission should reconsider the *Wireless Clarification Order* and require wireless carriers, like all other carriers, to limit their universal service recovery line-items to the amount of interstate end user telecommunications revenue derived from service to that particular

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<sup>22</sup> The "safe harbor" itself is discriminatory because it acts as a cap on CMRS contributions to the extent that a specific carrier's interstate usage exceeds the safe harbor of 28.5 percent. See AT&T *Second Further Notice of Proposed Rulemaking* Comments (filed Feb. 28, 2003), at 21-24; Coalition for Sustainable Universal Service ("CoSUS") *Further Notice of Proposed Rulemaking* Comments (filed Apr. 22, 2002), at 31-34.

<sup>23</sup> See SBC's Petition for Reconsideration of the *Interim USF Contribution Order* (filed Jan. 29, 2003), at 2, 5-7.

customer times the contribution factor, or it should permit all carriers to average universal service line-item recovery charges.

### **III. THE COMMISSION MUST ESTABLISH REQUIREMENTS FOR THE COMPANY-SPECIFIC STUDIES AND A PROCESS FOR PUBLIC REVIEW.**

The Commission must also establish requirements for the CMRS company-specific traffic studies and a process for public review to ensure that those studies will, in fact, result in an equitable and nondiscriminatory assessment of universal service contributions. Failure to do so further renders the CMRS contribution and recovery mechanism discriminatory and therefore inconsistent with Section 254(d).

In its *Interim USF Contribution Order*, the Commission set forth no requirements for the wireless carriers' company-specific traffic studies. While this has always been a problem with the CMRS contribution mechanism, it takes on greater importance now that the Commission has increased the wireless safe harbor percentage to 28.5 percent and, in the *Wireless Clarification Order*, has modified the USF recovery restrictions on wireless carriers to permit a greater number of wireless carriers to contribute based on company-specific traffic studies.

At a minimum, the Commission must require wireless carriers to conduct their traffic studies in such a manner as to determine the average percentage of interstate usage throughout the year, not just on a particular day; to specify the base against which that percentage of interstate use is to be determined; and to project those percentages for the coming year, rather than simply relying on historical data. At present, with no guidance from the Commission, a wireless carrier might sample a few days of the year, carefully avoiding high-usage days such as Mothers Day or Christmas, or focusing on lower usage times of the year. There is also no guidance as to what must be included or excluded, even though CTIA's own report of the results of the five anonymous traffic studies admits to substantial variation depending on subjective

determinations as to what to include in or exclude from the base of total minutes.<sup>24</sup> Without basic definitions and standards, these studies will be subject to gross manipulation.

In addition, the Commission should make clear that the wireless carrier should be projecting its percentage of interstate usage during the upcoming contribution periods. Otherwise, the problem of discriminatory reporting lags, which the Commission recently eliminated for contributors generally in the *Interim Contribution Order*,<sup>25</sup> will simply be replicated. A wireless carrier with a growing percentage of interstate usage (caused, for example, by advertising “free long distance”) that reports and pays its universal service contributions based on a time-lagged historical traffic study will always be underreporting its actual projected interstate end user telecommunications revenue. Similarly, the Commission should require wireless carriers to update their traffic studies on the same schedule as the Commission true-ups of carriers’ collected revenue projections, to provide a basis for trueing up projections of growth and to keep these traffic studies reasonably current.<sup>26</sup>

Finally, wireless carriers should be required to file these traffic studies with the Commission, and there should be a mechanism for public review and challenge to these studies. Unlike other areas where the Commission merely relies on carriers to preserve documentation (such as with bundling), these studies will immediately affect a substantial part of the universal service contribution base. Public review and comment (even if subject to a protective order)

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<sup>24</sup> See “Wireless Carrier Interstate Traffic Studies,” *appended to* Letter from Christopher Guttman-McCabe, CTIA, to Marlene H. Dortch, Federal Communications Commission (filed Oct. 15, 2003).

<sup>25</sup> See *Interim USF Contribution Order* at ¶ 19 (requiring submission of projected rather than historical end user interstate telecommunications revenues).

<sup>26</sup> Under current rules, this would require annual studies. If the Commission grants NECA’s petition for reconsideration suggesting quarterly true-ups, the wireless carriers would submit studies quarterly. See *Petition for Reconsideration of the National Exchange Carrier Ass’n* (filed Jan. 29, 2003), at 3-4.

would help to assure that these studies are not “gamed” and that the Commission can take any corrective action necessary to provide additional specifications for such studies.

Failure to take these minimum steps will render the CMRS contribution and recovery mechanism blatantly discriminatory because it will be likely that the CMRS segment will be systematically underreporting interstate and international end user telecommunications revenues. These issues are a direct result of the *Wireless Clarification Order*, which made it much more likely that wireless carriers will report interstate and international end user telecommunications revenues to USAC using company-specific studies rather than the wireless safe harbor.

#### **IV. CONCLUSION.**

For the above-stated reasons, the Commission should reconsider the *Wireless Clarification Order*, which makes the entire universal service contribution and recovery mechanism even more blatantly discriminatory in favor of CMRS-based telecommunications providers. The Commission has spun a tangled web of special relief for the CMRS industry that cannot be reconciled with the Act’s requirement that universal service mechanisms be “equitable

