

BEFORE THE  
Federal Communications Commission  
WASHINGTON, D.C.

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
Streamline 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

**TIME WARNER TELECOM REPLY COMMENTS REGARDING CONTRIBUTION  
METHODOLOGY & COMMENTS REGARDING THE STAFF STUDY**

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April 18, 2003

Reply Comments/Comments of Time Warner Telecom  
CC Docket No. 96-45  
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TABLE OF CONTENTS

	PAGE
I. INTRODUCTION AND SUMMARY .....	2
II. DISCUSSION.....	4
III. CONCLUSION.....	15

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CC Docket No. 96-45  
April 18, 2003

Time Warner Telecom Corporation ("TWTC"), by its attorneys, hereby submits reply comments in response to the Second Further Notice of Proposed Rulemaking ("FNPRM") and comments in response to the Staff Study<sup>1</sup> in the above-captioned proceeding.

## **I. INTRODUCTION AND SUMMARY**

It is prudent for the Commission to conduct the instant review of its universal service contribution system. There is some reason to suspect that the growth of bundled offerings and changes in customer demand patterns for interstate service (e.g., customer migration from services subject to contribution obligations to services that are not) could, when combined with an expanding fund, threaten the future viability of the revenue-based methodology. But the recent reforms adopted by the Commission, eliminating the time lag for contributions and adjusting the CMRS safe harbor, addressed the immediate problems with the system. Thus, the Commission can and should examine the factual predicate for major reform thoroughly, and it must be sure that the benefits of undertaking far-reaching reform of the contribution methodology outweigh the costs before taking any such action.

To the extent that the Commission ultimately decides to adopt a new mechanism for contributions, it must be sure that the new rules comply with the requirement in Section 254(d) that "every" provider of interstate telecommunications service contribute "on an equitable and

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<sup>1</sup> *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd. 24952 (2002) ("FNPRM"); *Wireline Competition Bureau Staff Study of Alternative Contribution Methodologies*, CC Docket No. 96-45, Public Notice, FCC 03-31, (rel. Feb 26, 2003) ("Staff Study").

nondiscriminatory basis.” Among the reform proposals that meet this and other statutory requirements, the Commission should choose the alternative that is the most competitively neutral and that has the least impact on customer demand patterns.

Based on these criteria, it is clear that the proposal for Splitting Connection-Based Contributions Between Switched Transport and Access Providers (Proposal Two) is the most viable option currently before the Commission. That proposal appears to comport with the requirement that every provider of interstate telecommunications services contribute on an equitable and nondiscriminatory basis. Especially as recently revised by SBC-BellSouth, Proposal Two also addresses most of the perceived discrimination in the existing system. It is also sustainable, since it relies primarily on the gradually expanding number of carrier connections for imposing contributions.

In contrast, the Connection-Based Methodology with Mandatory Minimum Obligation (Proposal One) includes an inequitable and discriminatory means of ensuring that all interstate carriers contribute. This proposal is therefore unlawful and bad public policy. Similarly, the Telephone Number-Based Assessments proposal (Proposal Three) does not even include a requirement that every provider of interstate telecommunications service contribute. Moreover, Proposal Three would impose extremely large contribution obligations on certain services (e.g., DID-based services) in violation of Section 254(d) and sound policy. Proposal Three would also introduce numerous complicated implementation issues.

## II. DISCUSSION

As several parties have suggested, it is important for the Commission to proceed cautiously with its review of further possible revisions of the universal service contribution requirements. *See, e.g.*, Qwest Comments at 2; TracFone Wireless Comments at 5-17; Consumers Union et al. Comments at 3-4. For example, the Commission should study closely the extent to which bundled services are replacing stand-alone offerings, and the extent to which carriers can readily distinguish between the services in the bundle that are subject to contribution obligations and those that are not. *See* Verizon Comments at 4-5. Many long distance carriers have asserted that, even with the reforms recently adopted, the federal contribution scheme creates significant inefficiencies. *See* WorldCom Comments at 3-18; AT&T Comments at 10-20. The Commission must determine whether these assertions are valid. Furthermore, the Commission must examine the extent to which the size of the federal fund can be realistically expected to grow -- a determination that itself depends on the resolution of some issues (e.g., the circumstances under which an ETC should be eligible to receive reimbursement from the fund) currently being addressed in open proceedings. Finally, the Commission must closely examine the cost of any new contribution scheme.

To the extent the Commission determines that it must replace the newly reformed revenue-based contribution scheme, any new methodology must comply with the terms of Section 254(d). That provision requires that “[e]very telecommunications carrier that provides interstate telecommunications service shall contribute, on an equitable and nondiscriminatory basis.” 47 U.S.C. § 254(d). To begin with, the plain language of subsection (d) requires that all

those entities that provide interstate telecommunications service, except *de minimis* contributors, contribute to the federal Universal Service Fund. The members of CoSUS have argued that the term “every” does not require that all interstate carriers contribute, but rather that all carriers be subject to an “equitable and nondiscriminatory” contribution regime. *See e.g.*, WorldCom Comments at 28-30. The problem with this interpretation is that it ultimately fails to give “every” an independent meaning. For example, a rule that contributions will only be made by those carriers that began providing service after 1996 would apply to “every” carrier under the CoSUS interpretation, since one would need to examine “every” carrier to determine whether it met this requirement. But such an application would be meaningless if (as was implicitly the case in the original CoSUS plan) the contribution methodology, by its very terms, excludes a class of carriers other than *de minimis* contributors. Thus, under the CoSUS interpretation, the term “every” impermissibly disappears from the statute, and only the “equitable and nondiscriminatory” as well as the “specific, predictable and sufficient” requirements remain.

Nor is it convincing to assert, as CoSUS members have (*see id.* at 26), that the second sentence in subsection (d) (granting the Commission the authority to exempt *de minimis* contributors) shows Congress could not have meant that all providers of interstate telecommunications service must contribute. The fact that Congress felt the need to give the Commission the authority to “exempt” carriers from the contribution “requirement” indicates that, absent such an exemption, a carrier would need to contribute. Moreover, an exemption is only allowed where “a carrier’s telecommunications activities are limited to such an extent” that its contribution would be *de minimis*. This means that a contribution methodology cannot be

designed in a way that classifies any carrier with more than a small amount of interstate activity as a *de minimis* contributor. That is, every firm that provides more than a small amount of interstate telecommunications service must contribute; the exemption cannot swallow the rule. Finally, there is no merit to the argument that the Commission has in the past not required some wholesale carriers (that might provide substantial amounts of interstate service) to contribute (*see id.* at 27), since that aspect of the existing regime has never been subject to legal challenge.

Second, all carriers that provide more than a “limited” amount of interstate telecommunications service must make contributions on an “equitable and nondiscriminatory basis.” Contrary to arguments made by CoSUS members (*see id.* at 21-22) this phrase must mean something more than “competitively neutral.” The Commission adopted the requirement that its universal service rules be competitively neutral pursuant to subsection (b)(7).<sup>2</sup> In so doing, the Commission found competitive neutrality to be consistent with the “equitable and nondiscriminatory” requirement of subsection (d) (among other provisions); in other words, that subsection (d) did not preclude the adoption of competitive neutrality as a guiding principle. *See* USF First Report and Order, ¶ 48. The clear implication is that “equitable” and “nondiscriminatory” mean something other than simply competitively neutral. In fact, in at least one case (excluding pure international service providers from contribution obligations) the Commission concluded that a rule, while not “competitively neutral,” was nonetheless “equitable

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<sup>2</sup> *See In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd. 8776, ¶ 46 (1997) (“USF First Report and Order”).

and nondiscriminatory.” *See id.* ¶ 779. This distinction stands to reason, because the Commission could devise a contribution scheme, such as one that requires contributions solely for connections that carry interstate voice traffic, that could well be specific, predictable and sufficient as well as competitively neutral. But such a scheme could not be understood to spread contributions among every carrier that provides more than a limited amount of interstate telecommunications service (voice and data alike) on an equitable and nondiscriminatory basis.<sup>3</sup>

The Commission must therefore give independent meaning to the “equitable and nondiscriminatory” requirement. As TWTC has explained, this language is most naturally and logically read to mean that carrier contributions bear some reasonable relationship to the volume of interstate services provided by a carrier. *See* Comments of TWTC et al., CC Docket No. 96-45 at 5-9 (Apr. 22, 2002). Moreover, the Commission has found that the goal of competitive neutrality, while important, must yield to the requirements for universal service expressly established by Congress in Section 254. *See* USF First Report and Order, ¶ 779. It follows that the Commission must choose the most efficient and competitively neutral contribution methodology *among* those that (1) require every provider of interstate telecommunications service to contribute (except carriers that provide only a “limited” amount of interstate

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<sup>3</sup> Indeed, even if the Commission were to conclude that either equitable or nondiscriminatory (possibly the latter) actually means competitively neutral in this context, it would still be left with the obligation to give the other term an independent meaning. As explained below, the most logical meaning is to require a reasonable connection between the amount of interstate service provided by a carrier and its contribution obligation.

telecommunications service); (2) require such contributions to be based on some reasonable relationship with the carrier's interstate activity; and (3) are specific, predictable, and sufficient.

No connections-based methodology is likely to allocate contribution obligations among interstate carriers as equitably as the existing revenue-based approach. But among the current proposals for reform, Proposal Two, especially with the modifications described by SBC and BellSouth in their comments, comes closest to meeting the statutory criteria. All providers of interstate telecommunications service would likely contribute under Proposal Two.<sup>4</sup> By requiring interstate transport providers (IXCs that provide the bulk of interstate services) to contribute on a per-connection basis or its equivalent, Proposal Two would also require that such contributions bear a reasonable relationship to a carrier's interstate activity. SBC-BellSouth have addressed IXCs' concerns that it would be unworkable to require them to contribute based on the number of switched access connections where the IXC does not provide the switched access connection. Instead of requiring a contribution in these cases from an IXC based on the number or capacity of the end user connections, SBC-BellSouth have proposed that the provider of stand-alone IXC transport associated with switched access connections contribute based on interstate end user revenues generated by this class of end user. *See* SBC-BellSouth Comments

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<sup>4</sup> It should be noted that there may be some telecommunications carriers that provide only wholesale service (and that do not serve ISPs). Such carriers would not appear to have any contribution obligations under Proposal Two. If this is the case, the Commission would need to determine an equitable and nondiscriminatory means of requiring contribution while at the same time attempting to avoid the distortions created by "double-counting." One possible approach would be to require a wholesale provider that would otherwise have no contribution obligations under Proposal Two (likely a very small group) to pay half of the contribution obligation of the carrier that resells its service.

at 9-10. So-called “occasional use” service providers would also contribute based on revenues derived from these services. *See id.* at 10. These contribution requirements bear a reasonable relationship to the carriers’ interstate activity because the total contribution obligation for such carriers is proportionate to the amount they would contribute had they paid on a per-connection basis, and because they contribute based on relative share of interstate services.

Moreover, any concern regarding the revenue-based approach under the SBC-BellSouth proposal for contributions by stand-alone providers of interstate transport should be limited by the largely interim nature of this problem. One of the central concerns driving the examination of reform alternatives is the growth of bundled service offerings. *See FNPRM*, ¶¶ 69-70. Combined offerings of local and long distance are perhaps the prototypical bundled offerings. If the Commission decides that indeed it must replace the existing revenue-based methodology with some other methodology, it will likely have done so based in part on the conclusion that bundled offerings will continue to grow in popularity. Of course, as this happens, the percentage of contributions made based on revenues will shrink, making the issue less and less significant.

In contrast to the SBC-BellSouth proposal, Proposal One (the modified CoSUS proposal) includes a highly flawed means of addressing the requirement that “every” provider contribute on an “equitable and nondiscriminatory” basis. Under Proposal One, carriers with more than \$100,000 in gross annual interstate telecommunications revenues would make a “mandatory minimum” contribution based on a percentage (the Commission suggests one percent) of those gross revenues. *See FNPRM*, ¶ 78. Those firms with end user connections could offset the mandatory minimum contribution with connections-based contributions. *Id.*

There are at least three problems with this approach that do not exist under Proposal Two. First, as commentors and even the Commission recognize, relying on gross revenues causes the same services to be subjected to contributions twice in a resale context. *See* FNPRM, ¶ 79; Comments of Sprint at 9; California PUC Comments at 13. The wholesale service charges paid by a reseller would reflect any contribution made by the underlying wholesaler while the reseller itself would be required to make a contribution on its own revenues. Such arbitrary extra charges on resellers could distort market outcomes by granting facilities-based carriers an artificial market advantage. This problem does not exist under Proposal Two, because any revenue-based contributions apply only to carrier end user revenues.

Second, allowing carriers with end user connections to offset their connection-based assessments against minimum contribution obligations would introduce unnecessary competitive harm. For example, where one provider of stand-alone long distance that has an unrelated service offering causing it to pay connections-based charges and a second provider with no end user connections compete in the provision of stand-alone long distance, the firm without the connections-based contribution obligation will pay a higher contribution on its stand-alone interstate long distance service than its competitor. *See* Sprint Comments at 8-9; California PUC Comments at 13-14; TracFone Wireless Comments at 20-21. This problem does not exist to the same degree under Proposal Two as modified by SBC-BellSouth. While it is possible that a carrier might contribute more or less for a particular stand-alone long distance service connection under Proposal Two (depending on the carrier's relative share of stand-alone interstate long distance revenue associated with switched access connections) than would a carrier that provides

both the access and transport connections (and therefore contributes on a per connection basis for its transport service under the SBC-BellSouth revised proposal), the differences should be relatively minimal. Again, this is because the total amount to be contributed by providers of stand-alone long distance service associated with switched access connections is proportionate to the amount that would have been contributed by those entities had they contributed based on transport connections. Such IXC's also benefit from the fact that occasional use providers contribute to the same funding requirement, leaving the aggregate amount in fact somewhat below what would be required under a connections-based approach. *See* SBC-BellSouth Comments at 11.

Third, the minimum contribution obligation does not bear a reasonable relationship to a carrier's interstate activities as required by subsection (d). *See, e.g.,* SBC-BellSouth Comments at 15. In other words, the mandatory minimum could well result in a small contribution for carriers with large amounts of interstate service revenues while the connections-based contributions could result in much larger contributions from carriers with only a small amount of interstate telecommunications revenue. In fact, the Staff Study seems to support this conclusion. The Staff Study shows that IXC's' contributions under Proposal One, even with the minimum contribution obligation, would account for 23 percent of total contributions in 2004. In contrast, IXC's would contribute 34 percent of the funding in 2004 under Proposal Two. IXC's would contribute 48 percent of the funding in 2004 under the existing revenues-based methodology. Given that IXC's have a large amount of interstate telecommunications service revenues, the Staff

Study appears to support the view that the mandatory minimum contributions do not bear a reasonable relationship to a carrier's interstate service volume.

Assessing contributions based on assigned telephone numbers (Proposal Three) carries with it the same problems as Proposal One, as well as numerous other significant flaws that preclude its adoption. First, there does not appear to be any efficient and logical means of ensuring that every interstate carrier contributes on an equitable and nondiscriminatory basis under Proposal Three. As proposed, IXC contributions under the plan are extremely small (only 14 percent of overall contributions in 2004 according to the Staff Study) in relation to other industry groups. Moreover, any attempt to alter this fact with the use of a mandatory minimum contribution would implicate all of the problems discussed above regarding Proposal One.

Second, numbers-based contributions would impose exceptionally large contribution obligations on certain services, even though there is no basis for concluding that such services include a correspondingly large amount of interstate activity. The most obvious example is the category of T1 service configured as 20 exchange service trunks. According to the Staff Study, in 2004, that service would be subject to a \$0.99 contribution when provisioned as a single main number supporting 100 extensions but a \$99.10 contribution when provisioned as 100 direct inward dialing ("DID") phones. But whether an end user in this context configures its service as a single main number with extensions or as numerous DID phones makes no difference in terms of interstate usage. This large disparity violates the requirement that contribution obligations must bear some reasonable relationship to a carrier's interstate activity.

Moreover, such large disparities in contribution obligations could well have a significant impact on demand patterns. This is likely true in the case of DID-based service offerings. Similar distortions have been described in the record for other services. *See e.g.*, J2 Global Comments (describing effect on demand patterns for unified messaging services). The Commission must ensure that any recovery mechanism it adopts does not target a particular class of services so heavily that end user demand is significantly and unnecessarily affected. Such distortions harm consumer welfare because they prevent consumers from acquiring services at the prices that reflect efficient production costs. Consumers instead turn to other, less desirable services and demand for those services then becomes artificially inflated.

Third, a scheme based on assigned numbers would introduce numerous other administrative complexities. For example, there is serious question as to whether Numbering Resource Utilization/Forecast Reports could, as the Commission suggests, be used as the basis for determining how many numbers a carrier has assigned. *See* SBC-BellSouth Comments at 19-22. Perhaps most seriously, SBC and BellSouth point out that different carriers appear to interpret the definition of “assigned numbers” differently, raising the obvious question as to whether that classification could under any circumstances be used as the basis for contributions. *See id.* at 20. Moreover, there are numerous specific contexts in which numbers usage poses complex challenges for a numbers-based contribution system. For example, it appears that 500, 800, and 900 number services,<sup>5</sup> distinctive ringing services,<sup>6</sup> Centrex services,<sup>7</sup> and ported

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<sup>5</sup> *See* Verizon Comments at 11; SBC-BellSouth Comments at 19 n. 25; California PUC Comments at 29.

numbers<sup>8</sup> raise special problems, and no doubt more such issues would come to the fore if a numbers-based approach received more attention. Based on its obvious flaws, however, no such further attention is warranted.

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<sup>6</sup> See Verizon Comments at 11.

<sup>7</sup> See NRTA and OPASTCO Comments at 8.

<sup>8</sup> See California PUC Comments at 28.

### III. CONCLUSION

For the reasons explained herein, the Commission should approach further changes in the universal service contribution methodology with great caution. If it does decide to proceed with reform, the Commission should use the SBC-BellSouth Proposal as the basis for future contributions.

Respectfully submitted,

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