

**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 Contributor Reporting)	CC Docket No. 98-171
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

OPPOSITION TO PETITION FOR RECONSIDERATION

Nextel Communications, Inc. (“Nextel”), by its attorneys and pursuant to rule 1.429, hereby opposes the Petition for Reconsideration filed by AT&T Corp. (“AT&T”) on the Federal Communications Commission’s (“Commission”) Order and Order on Reconsideration, which reconsiders, on the Commission’s own motion, the definition of “affiliate” for assessing telecommunications carriers’ contributions to fund the federal universal service program. The Order also clarifies the options available for the recovery of universal service contribution costs by

wireless telecommunications providers that choose to report actual interstate telecommunications revenues based on a company-specific traffic study.¹

I. INTRODUCTION

Nextel opposes herein AT&T's challenge to the Commission's determination that CMRS carriers are permitted to use their own traffic studies to determine end user interstate revenues to recover their USF contribution costs. Contrary to AT&T's assertions, the *Clarification Order* does not unfairly favor CMRS providers; rather it merely clarifies that CMRS carriers that have developed the capability of sampling traffic flows are permitted to estimate in good faith the breakdown of their interstate and international telecommunications traffic as a proxy for interstate revenues. The Commission has been encouraging and continues to encourage *all* CMRS carriers to develop this capability.² CMRS carriers that have been able to conduct such estimates at the behest of the Commission should not now be penalized, as AT&T suggests, by being forced to either utilize the nearly-doubled interim wireless safe harbor (of 28.5 percent),³ or to invest in the entirely new and unprecedented billing and accounting systems necessary to capture traffic and revenue information on a customer-by-customer basis to be permitted to recover customer-specific contribution costs through a line item. There is no evidence in the record that any wireless carrier

¹ Federal-State Joint Board on Universal Service *et al.*, *Order and Order on Reconsideration*, CC Docket No. 96-45, FCC 03-20 (rel. Jan. 30, 2003) ("*Clarification Order*").

² Federal-State Joint Board on Universal Service *et al.*, *Report and Order and Second Further Notice of Proposed Rulemaking*, 17 FCC Rcd 24952, 24966, ¶ 22 (2002) ("*Report and Order*") ("Setting the safe harbor at the high end of the range of estimates provided by the wireless studies should provide mobile wireless providers an incentive to report their actual interstate telecommunications revenues if they are able to do so.").

³ *See id.* at 24965-66, ¶ 21. In the *Report and Order*, the Commission took several steps it characterized as "interim" in nature. Specifically, the Commission increased from 15 percent to 28.5 percent the safe harbor wireless carriers may use to estimate their interstate end user revenues.

could measure or estimate interstate revenues for contribution purposes other than through aggregated traffic studies, or that customer-specific determinations are in any way necessary to the way CMRS carriers do business. AT&T offers no evidence that wireless estimates in any way result in non-equitable or discriminatory treatment of customers or that they disfavor interexchange carriers.

Nextel also opposes as unnecessary AT&T's request that the Commission establish guidelines to ensure that the company-specific studies on which CMRS providers will base their USF contributions are not subject to "gross manipulation."⁴ In addition to requiring wireless providers to determine the percentage of interstate traffic constantly throughout the year, AT&T urges the adoption of scheduling rules to ensure that any CMRS traffic studies are kept current as well as a public inspection process to "ensure that those studies will, in fact, result in an equitable and nondiscriminatory assessment of universal service contributions."⁵ AT&T's agenda to micromanage this process would impose further unnecessary costs on CMRS carriers and discourage them from conducting their own traffic studies for USF contribution purposes.

Since the start of this proceeding, AT&T and other interexchange carriers have gone out on their way to try to shift the USF funding burden away from their industry towards the CMRS industry. AT&T's Petition for Reconsideration continues in this tradition. AT&T is trying to make it difficult, if not impossible, for wireless providers to conduct their own traffic studies, by making it overly costly and time-consuming to do so, or by requiring wireless carriers to implement billing and accounting systems that serve no commercial business needs. At the same time, however, AT&T is trying to convince the Commission to abandon its current revenue-based USF assessment

⁴ AT&T Petition for Reconsideration at 11.

⁵ *Id.* at 10.

methodology in favor of a connection-based proposal. Under AT&T's "plan," therefore, wireless carriers would be forced to expend significant amounts to further modify their interstate traffic studies (or to comply with the newly adopted *very high* safe harbor which will undoubtedly increase their USF contributions) only to have to abandon these costly and ultimately pointless efforts if a connection-based proposal is adopted. CMRS carriers should not be forced to incur these costs absent justification. There is no rational business basis to require competitive wireless carriers to estimate their interstate end user revenues on a customer-by-customer basis – solely for USF cost recovery purposes – or to require CMRS carriers to comply with unyielding reporting and “public inspection” requirements, particularly when AT&T can offer no evidence that such obligations are in any way justified or warranted by past abuse or realistic future concerns. CMRS carriers do not identify interstate end user revenues on a customer-by-customer basis because jurisdictional separations are not, and have never been, relevant to providing competitive wireless services.

II. THE *CLARIFICATION ORDER* STRUCK A REASONABLE BALANCE BASED UPON HOW CMRS CARRIERS OPERATE.

In support of its Petition, AT&T suggests that the use by CMRS carriers of company-specific traffic studies as a proxy for interstate revenues is discriminatory, because wireline carriers must bill individual customers based on each customer's actual interstate usage.⁶ Without any consideration of the costs and dislocations, AT&T urges the Commission to require CMRS carriers to limit their universal service recovery via the line item “to the amount of interstate end user telecommunications revenue derived from service to that particular customer times the contribution

⁶ *AT&T Corp. v. FCC*, No. 01-1485, 2003 U.S. App. LEXIS 6568, at *17-19 (D.C. Cir. Apr. 8, 2003) (stating that because Congress did not specifically require actual customer authorization when carriers changed a subscriber's service, “actual” authorization could not be required as part of the verification procedures the Commission mandates carriers conduct when changing a customer's carrier). It is ironic that AT&T won this case at the D.C. Circuit based on the court's view that the Commission could not require “actual” knowledge.

factor, or it should permit all carriers to average universal service line-item recovery charges.”⁷ As the Commission itself recognized, CMRS carriers face true limitations in their ability to calculate interstate telecommunications revenues: “[W]e recognize that CMRS providers during the interim period may not have the capability to determine their interstate telecommunications revenues on a customer-by-customer basis. . . .”⁸ Thus, the *Clarification Order* makes plain that CMRS carriers can utilize their own traffic studies as a means to calculate end user interstate revenues when recovering USF contribution costs.

AT&T fails to acknowledge the fundamental differences between wireline and wireless carriers and, as a result, does not have to wrestle with the very obvious reasons why a landline-based cost recovery will not work for a wireless carrier.⁹ Unlike landline carriers that have the ready ability to assess and bill each of their customers on their individual actual monthly interstate (and international) usage, using a new line item pass-through, wireless carriers have never distinguished or separated traffic on an interstate/intrastate basis. Thus, it makes sense to require landline carriers to limit line-item cost recovery to an individual customer’s interstate telecommunications portion of its total bill times the relevant USF contribution factor. In contrast,

⁷ AT&T Petition for Reconsideration at 9-10.

⁸ *Clarification Order* at ¶ 8.

⁹ AT&T’s deliberate misunderstanding of the fundamental differences between landline interexchange service and wireless service can be seen in its attempt to compare the end users of both services. According to AT&T, a situation might arise where an IXC customer is paying a higher USF pass through fee than a “comparable” wireless customer. According to AT&T, 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.” AT&T Petition for Reconsideration at 6. This assertion is factually inaccurate and ignores reality. CMRS carriers offer their customers “bucket-type” plans – and do not distinguish between an interstate and an intrastate call. Wireline and wireless carriers offer different services – tethered versus untethered access – at different underlying prices.

it makes no sense in the context of CMRS services, that typically are purchased by customers on a “bucket of airtime minutes” basis. There is no evidence in the record that any wireless carrier could measure interstate revenues for contribution purposes other than through aggregated traffic studies or that CMRS carriers can determine the proportion of interstate traffic on a customer-specific basis to recover contribution costs from customers. ***Equally important, there is no evidence presented to suggest that CMRS carriers should be required to make the enormous investment that would be necessary to make such customer-specific determinations.***

Recognizing this, the *Clarification Order* makes plain that CMRS carriers can report their interstate telecommunications revenues based on a company-specific traffic study or based on the interim safe harbor and have this same percentage form the basis of individual per line USF customer cost recovery.¹⁰ This is consistent with the Commission’s policy to encourage CMRS carriers to develop the capability to estimate average interstate revenues through traffic studies. Thus, “just as the Commission did not eliminate the option of reporting actual interstate telecommunications revenues either through a company-specific traffic study or some 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.”¹¹

¹⁰ The *Report and Order* states that “[f]or CMRS providers, the portion of the total bill that is deemed interstate will depend on whether the carrier reports actual revenues or utilizes the safe harbor. For wireless telecommunications providers that avail themselves of the interim safe harbors, the interstate telecommunications portion of the bill would equal the relevant safe harbor percentage times the total amount of telecommunications charges on the bill.” *Report and Order*, 17 FCC Rcd at 24978 n.131. The *Clarification Order* clarified the Commission’s position that CMRS carriers can in fact calculate interstate revenues via a traffic study and recover USF costs from customers on that same basis. *Clarification Order* at ¶ 8.

¹¹ *Clarification Order* at ¶ 8.

AT&T's insistence that CMRS carriers be required to calculate end-user interstate revenues on a customer-by-customer basis is nothing more than another unsupported attempt by AT&T to increase unlawfully CMRS carrier contributions to the USF program. AT&T offers no legal or policy basis to require CMRS carriers to comply with landline billing requirements which create additional, avoidable regulatory costs. Importantly, these landline requirements relegate CMRS to a mere adjunct to the landline network, instead of an innovative alternative. Rather, the Commission ought to remain faithful to its basic tenants supporting CMRS – that of reliance on vibrant competition to produce reasonable rates. Permitting CMRS carriers to apply either the new safe harbor or the CMRS carrier's own estimate of interstate revenues to a customer's bill to determine the customer's assessment is the only result that makes sense and must be upheld.

III. UNNECESSARY AND OVERLY BURDENSOME REQUIREMENTS PLACED ON CMRS COMPANY-SPECIFIC TRAFFIC STUDIES ARE UNWARRANTED.

AT&T argues that for the Commission to ensure that CMRS company-specific traffic studies are equitable and nondiscriminatory, a system of public review must be set up for these studies.¹² AT&T apparently regards the already-established good faith estimate requirement and existing audit programs as insufficient deterrents to cheating.

The Commission must balance any concern about potential for abuse against imposing further *unnecessary* costs on CMRS carriers under the USF regime. CMRS carriers already face increased universal service costs, including those associated with implementation of the interim USF modifications, and a safe harbor amount that has nearly doubled. Requiring CMRS carriers to comply with a set of data calculation and reporting requirements designed for services they do not

¹² AT&T Petition for Reconsideration at 10-12.

provide will serve to further increase these USF costs, without any demonstrable showing that they are in any way necessary.

Indeed, such added costs are wholly unjustified. AT&T is essentially asking the Commission to impose an entirely new set of interim traffic study and reporting requirements, which if AT&T had its way, would be unnecessary in the near-term. Indeed, while AT&T is asking the Commission to impose these added requirements on CMRS carriers, it is at the same time urging the Commission to abandon its current revenue-based USF assessment methodology in favor of a connection-based USF proposal. Any change to a connection-based proposal thus would mean that CMRS carriers would abandon their newly implemented traffic studies and all of the capital and other resources that went into creating them would be wasted.¹³ In addition, CMRS carriers would be required to again incur administrative costs to change to a connection-based mechanism. Such simultaneous requests to impose wholly unnecessary expenses on competitive CMRS carriers, underscore AT&T's "hidden" agenda to shift the USF funding burden away from interexchange carriers.

Critically, the Commission already requires CMRS carriers to "provide documentation to support the reporting of actual interstate telecommunications revenues upon request."¹⁴ As such, if the Commission questions the validity of an average on interstate revenues derived through a carrier traffic study, it can request documentation. There is no need to impose unnecessary, up-front

¹³ See Nextel Reply Comments, CC Docket 96-45, at 12-14 (filed on April 18, 2003) (noting that mobile wireless service experiences a far higher elasticity of demand relative to some other telecommunications services, meaning that an increase in price of wireless service due to increases in the overall price from any source, including taxes, fees and assessments, results in a quantifiable decrease in consumer demand).

¹⁴ *Report and Order*, 17 FCC Rcd at 24966, ¶ 24.

regulations on an industry struggling under the weight of this and other expensive mandates in a market where capital is tight.

IV. CONCLUSION

The Commission must affirm its findings in the *Clarification Order* that, in calculating the line-item USF charges for each customer, CMRS carriers can apply either the interim wireless safe harbor or rely on a percentage of interstate revenues derived from a company-specific traffic study. There is no other presently feasible method for carriers to calculate CMRS customer line-item USF charges. There is no evidence in the record of this proceeding to require CMRS carriers to develop measuring capabilities that have nothing to do with the way their business operates.

The Commission should not adopt any of the proposed guidelines proffered by AT&T for CMRS company-specific traffic studies. The guidelines are unnecessary because they ignore already-established requirements that all USF estimates be made in good faith. The Commission already may request documentation regarding the traffic studies. Any additional requirements imposed at AT&T's behest – whose real motive is to impose additional burdens on CMRS carriers in the USF regime – would be redundant and wholly unnecessary.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Cynthia S. Shaw, a legal secretary at Drinker Biddle & Reath LLP do hereby certify that on this 24th day of April, 2003, a copy of the foregoing “**OPPOSITION TO PETITION FOR RECONSIDERATION**” was mailed to the following:

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