Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

CC Docket No. 96-45
Federal-State Joint Board on
Universal Service

CC Docket No. 98-171
1998 Biennial Regulatory Review-
Streamlined Contributor Reporting
Requirements Associated with Administration of
Telecommunications Relay Service, North
Portability, and Universal Service Support
Mechanisms

CC Docket No. 97-21
Changes to the Board of Directors of the
National Exchange Carrier Association, Inc.

COMMENTS OF CINGULAR WIRELESS LLC

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Date: March 30, 2005

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COMMENTS OF CINGULAR WIRELESS LLC

Cingular Wireless LLC ("Cingular"), through undersigned counsel, hereby comments in support of the Applications for Review ("AFRs") and Petition for Reconsideration ("PFR") of the December 9, 2004 Order, DA 04-3669, of the Wireline Competition Bureau ("Bureau") in the captioned proceeding ("*December 9 Order*").[1] The Commission invited comment on the AFRs and PFR by Public Notice, DA 05-691, released March 16, 2005. For the reasons set forth below, the actions taken in the *December 9 Order* were clearly substantive, requiring Notice and Comment rulemaking prior to adoption. In addition, the actions taken in the *December 9 Order* were arbitrary

[1] Applications for Review of the *December 9 Order* were filed on January 10, 2005 by Business Discount Plan, Inc. ("BDP"), Qwest Communications International, Inc. ("Qwest") and SBC Communications Inc. ("SBC"). Sprint Corporation filed a Petition for Reconsideration on the same date.

and capricious and contrary to statutory mandate. On review, the Commission should vacate the *December 9 Order* and reinstate the prior instructions for Form 499-A.

The procedural history of this proceeding is set forth in detail in the *December 9 Order* and will not be repeated here. It is sufficient to note that the Commission's rules require carriers to report on Form 499-A their interstate and international end-user telecommunications revenues. The information collected on Form 499-A is used to assess federal regulatory fees and contributions to federal universal service, interstate Telecommunications Relay Service, administration of the North American Numbering Plan, and shared costs of local number portability, among other uses.

In the *December 9 Order*, the Bureau modified the Form 499-A Instructions to establish a firm deadline of 12 months after the filing of Form 499-A to make corrections that would result in decreased contribution amounts. No comparable deadline was adopted for corrections that would increase the contribution amount. In a footnote, the Bureau states that these changes to the instructions "are procedural, non-substantive changes to the administrative aspects of the reporting requirements." The footnote goes on to assert that since the changes were purely procedural, no notice and comment opportunity under Section 553 of the Administrative Procedures Act was required.[2] The AFRs and PFR all challenge this conclusion.

Cingular agrees with the parties seeking review of the *December 9 Order* that the adoption of a hard deadline for filing corrections that reduce contributions is substantive, not merely procedural. The clearest illustration is simple: prior to the *December 9 Order* a carrier that discovered an error that reduced its contribution more than 12 months after filing could file an amended Form 499-A and receive a refund; after the *December 9*

[2] December 9 Order, ¶ 10, footnote 31.

Order it cannot. The *December 9 Order* made a substantive change in the rights and obligations of contributors. The failure to utilize notice and comment rulemaking is reversible error.[3]

In addition to being procedurally defective, the changes to the Form 499-A Instructions are substantively invalid as well. The Commission's rules require that information reported on Form 499-A be accurate and truthful, and threaten severe sanctions, including criminal prosecution, if the information reported is inaccurate or untruthful.[4] The revised instructions to Form 499-A prevent carriers who discover errors after one year from correcting those errors. This is inconsistent with the Commission's rules.

The *December 9 Order* also is inconsistent with Section 254(d) of the Communications Act. Section 254(d) requires that carriers' universal service contributions be assessed on an "equitable and non-discriminatory basis."[5] In its AFR, Qwest points out that during an audit it discovered that hundreds of millions of dollars of revenue had been reported by the wrong subsidiary. It filed revised Form 499-A worksheets to remove the revenue from the wrong subsidiary and add the revenue to the correct subsidiary. USAC accepted the change adding the revenue to one subsidiary, but rejected the change to the other subsidiary on the grounds that the error occurred more than 12 months earlier.[6] Thus, a bookkeeping error that had no net effect on Qwest's total contribution obligation would result in double taxation of hundreds of millions of dollars in revenue. This is hardly an "equitable and non-discriminatory" outcome.

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[3] *See* the extensive discussion of the requirements of the Administrative Procedures Act in the BDP AFR at 12-22.
[4] 47 C.F.R. § 54.711(a).
[5] 47 U.S.C. § 254(d).
[6] Qwest AFR at 9.

The revised instructions are arbitrary and capricious as well. The one-way ratchet will result in systematic over-collection of USF contributions and will treat similarly situated contributors differently depending only on when they discover an error. If carrier A discovers an error in month 11 after filing its Form 499-A, it will be allowed to correct its error and receive an appropriate credit. If carrier B discovers the same error in month 13 following its filing of Form 499-A, it will not be allowed to correct its error, and will overpay its appropriate USF contribution. This arbitrary result is hardly consistent with the statutory requirement that USF contributions be assessed in "equitable and non-discriminatory" manner.

Cingular agrees with those parties who assert that if a hard deadline is needed for administrative efficiency purposes, it should be longer than 12 months and should be applied symmetrically.[7] The Commission's rules currently require contributors to maintain records and documentation supporting the data reported on Form 499-A for a period of three years.[8] Adoption of the IRS three-year period for amended returns for all amendments to Form 499-A (whether the contribution would be increased or decreased) would eliminate most of the concerns expressed by the petitioning carriers and would eliminate the arbitrary one-way ratchet that distorts carriers' contribution obligations.

Any substantive change to the Form 499-A Instructions must provide for notice and comment, must be equitable, must not be arbitrary and capricious and must reflect the underlying Commission Orders and Rules. For the reasons set forth above, Cingular supports the AFRs and PFR, and urges the Commission to vacate the *December 9 Order* and restore the Form 499-A Instructions to their prior state.

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[7] *See* Qwest AFR at 17; Sprint PFR at 2-3; BDP AFR at 22;AT&T Comments at 4.
[8] 47 C.F.R. §54.711(a).

Respectfully submitted,

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March 30, 2005

CERTIFICATE OF SERVICE

I, Lydia Byrd, an employee in the Legal Department of Cingular Wireless LLC, hereby certify that on this 30th day of March, 2005, courtesy copies of the foregoing Comments of Cingular Wireless were sent via first class mail, postage prepaid to the following:

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
9300 East Hampton Drive
Capitol Heights, MD 20743

John Muleta, Chief
Wireless Telecommunications Bureau
Federal Communications Commission
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Washington, D.C. 20554

In addition, the document was filed electronically in the Commission's Electronic Comment Filing System on the FCC website.

s/ Lydia Byrd
Lydia Byrd