Before the
Federal Communications Commission
Washington, D.C. 20554

JUN 30 2006

In the Matter of	)	
	)	
Universal Service Contribution Methodology	)	WC Docket No. 06-122
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms	)	CC Docket No. 98-171
	)	
Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990	)	CC Docket No. 90-571
	)	
Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size	)	CC Docket No. 92-237 NSD File No. L-00-72
	)	
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
	)	
IP-Enabled Services	)	WC Docket No. 04-36

REPORT AND ORDER AND NOTICE OF PROPOSED RULEMAKING

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By the Commission: Chairman Martin and Commissioner Tate and Commissioner McDowell issuing separate statements; Commissioner Copps and Commissioner Adelstein concurring in part and issuing separate statements.

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I. INTRODUCTION

1. In this Report and Order (Order) and Notice of Proposed Rulemaking (Notice) we make interim modifications to the existing approach for assessing contributions to the federal universal service fund (USF or Fund) in order to provide stability while we continue to examine more fundamental reform. The interim changes we make in this Order are essential for securing the viability of universal service – a fundamental goal of communications policy as expressed in the Communications Act – in the near-term.[1] In 1996, Congress directed the Commission and the states to take the steps necessary to establish support mechanisms to ensure the delivery of affordable telecommunications services to all Americans in a changing competitive environment.[2] Since then, the Commission has undertaken a number of reforms to

[1] *See* 47 U.S.C. § 151 ("One of Congress's primary purposes in establishing the Federal Communications Commission was to "make available . . . to all the people of the United States . . . a rapid, efficient, Nation-wide . . . communications service with adequate facilities at reasonable charges."). The Communications Act of 1934, as amended (Act or Communications Act), is codified at 47 U.S.C. §§ 151, *et seq*.

[2] *See* 47 U.S.C. §254(d); Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (1996 Act). The 1996 Act amended the Communications Act.

fulfill the universal service goals established by Congress, and today we take additional steps to continue to satisfy these goals.[3]

2. In this Order, we take two critical actions to ensure the stability and sufficiency of the Fund.[4] First, we raise the interim wireless safe harbor from its current 28.5 percent level to 37.1 percent. Second, we establish universal service contribution obligations for providers of interconnected voice over Internet Protocol (VoIP) service.[5]

3. The interim revisions adopted in this Order respond to changes that have occurred in recent years in the telecommunications market, but retain the essential elements of the current approach to USF contributions.[6] Specifically, while stand-alone interstate long distance revenues have been declining, wireless services and interconnected VoIP services, both of which typically include bundled long distance service, have been growing dramatically. As noted below, from December 2000 to December 2004, the number of wireless subscribers grew from approximately 101 million to approximately 181 million,[7] and wireless providers' revenues grew from approximately $70 billion to approximately $122 billion.[8] Similarly, the number of VoIP subscribers has grown from about 150 thousand at the end of 2003 to 4.2 million at the end of 2005.[9] The interim revisions made in this Order respond to these growing pressures on the stability and sustainability of the Fund.[10]

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[3] For example, the Commission has taken steps to remove implicit support from interstate access rates and make that support explicit and portable. *See, e.g.*, *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers*, CC Docket Nos. 96-262, 94-1, Sixth Report and Order; *Low-Volume Long-Distance Users*, CC Docket No. 99-249, Report and Order; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Eleventh Report and Order, 15 FCC Rcd 12962 (2000), *aff'd in part, rev'd in part, and remanded in part Texas Office of Pub. Util. Counsel v. FCC*, 265 F.3d 313 (5th Cir. 2001).

[4] *See 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, and Universal Service Support Mechanisms, Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990, Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size, Number Resource Optimization, Telephone Number Portability*, CC Docket Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, Notice of Proposed Rulemaking, 16 FCC Rcd 9892 (2001) (*2001 Notice*) (initiating an examination of the contribution methodology). Section 254 of the 1996 Act requires the Commission, among other things, to ensure that there are specific, predictable, and sufficient support mechanisms to preserve and advance universal service. 47 U.S.C. § 254(b)(5), (d). Today, approximately 93 percent of American households subscribe to telephone service, in part, as a result of the Commission's universal service policies. *See* Federal Communications Commission, *Telephone Subscribership in the United States*, Table 1 (2006), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-265356A1.pdf.

[5] *See* 47 C.F.R. § 9.3 (defining interconnected VoIP service).

[6] *See* 47 U.S.C. § 254(b)(5), (d).

[7] *See* Federal Communications Commission, *Tenth Annual CMRS Competition Report*, Table 2 (2005), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-173A1.pdf (*2005 CMRS Report*).

[8] *See* Federal Communications Commission, *Telecommunications Industry Revenues*, Table 7 (2002) (*2000 Revenues Report*); Federal Communications Commission, *Telecommunications Industry Revenues*, Table 7 (2006) (*2004 Revenues Report*); *see also* CTIA, *Background on CTIA's Semi-Annual Wireless Industry Survey, at 4, available at* http://files.ctia.org/pdf/CTIAEndYear2005Survey.pdf (visited April 10, 2006) (*CTIA 2005 Year End Survey*).

[9] Telecommunications Industry Association, *TIA's 2006 Telecommunications Market Review and Forecast*, 71 (2006) (*TIA 2006 Report*).

[10] *See* 47 U.S.C. § 254(b)(5), (d).

4. Unlike many of the proposals that would move to a non-revenue-based contribution methodology and require significant time to implement, retaining a revenues-based approach on an interim basis enables us to implement the revisions required in this Order (including reporting requirements) for the fourth quarter 2006 universal service contribution requirements, which provides more immediate stability to the Fund. While we retain the revenue-based approach for now, we are committed to examining more fundamental reform in this proceeding. To the extent that further modifications of the existing approach may be necessary before we complete fundamental reform and because the steps we take today are interim measures, we seek comment in the Notice on whether modifications to the interim safe harbors established in the Order may be appropriate.

II. BACKGROUND

A. Statutory Provisions

5. The assessment of universal service contributions is governed by the statutory framework established by Congress in the Act.[11] Section 1 of the Act states that the Commission is created "[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges," and that the agency "shall execute and enforce the provisions of th[e] Act."[12] Universal service is a key component in communications policy for ensuring that charges are reasonable. Section 254(b) of the 1996 Act instructs the Commission to establish universal service support mechanisms with the goal of ensuring the delivery of affordable telecommunications services to all Americans.[13] Section 254(b) also provides that Commission policy on universal service shall be based, in part, on the principles that contributions should be equitable and nondiscriminatory, and support mechanisms should be specific, predictable, and sufficient.[14] Section 254(d) of the 1996 Act mandates that "[e]very telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service."[15] Section 254(d) also vests the Commission with the permissive authority to require "[a]ny other provider of interstate telecommunications . . . to contribute to the preservation and advancement of universal service if the public interest so requires."[16]

B. The Current Contribution Methodology

6. In 1997, in the *Universal Service First Report and Order*, the Commission determined to assess contributions on end-user telecommunications revenues.[17] The Commission concluded that the

[11] *See* 47 U.S.C. §§ 151, 201, 202, 254.

[12] 47 U.S.C. § 151.

[13] 47 U.S.C. § 254(b).

[14] 47 U.S.C. § 254(b)(4), (5). The Commission adopted the additional principle that federal support mechanisms should be competitively neutral, neither unfairly advantaging nor disadvantaging particular service providers or technologies. *See also Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, 12 FCC Rcd 8776, 8801-03, paras. 46-51 (1997) (*Universal Service First Report and Order*) (subsequent history omitted).

[15] 47 U.S.C. § 254(d).

[16] *Id.*

[17] *See Universal Service First Report and Order*, 12 FCC Rcd at 9206-07, paras. 843-44; *Federal-State Joint Board on Universal Service, Access Charge Reform*, Sixteenth Order on Reconsideration and Eighth Report and Order in CC Docket No. 96-45 and Sixth Report and Order in CC Docket No. 96-262, 15 FCC Rcd 1679, 1685, para. 15 (1999) (establishing a single contribution for all universal service support mechanisms based on interstate and international revenues).

revenues approach would be: (1) competitively neutral; (2) easy to administer; and (3) explicit.[18] The Commission concluded that a contribution methodology based on end-user telecommunications revenues would be competitively neutral because it would avoid distorting how carriers chose to structure their businesses or the types of services that they provided.[19] The Commission also determined that a revenue-based approach would be easy to administer.[20] Although carriers would need to track their sales to end users, carriers already tracked this information for billing purposes.[21] Moreover, the Commission could use existing revenue data to identify inaccurate end-user-revenue filings.[22] Finally, the Commission found that basing contributions on end-user telecommunications revenues satisfied the statutory requirement that support be explicit because carriers know how much they contribute to the support mechanisms.[23]

7. In the *Second Order on Reconsideration*, the Commission set forth the specific methodology for contributors to use to compute their USF contributions.[24] The Commission also designated the Universal Service Administrative Company (USAC) as the entity responsible for administering the universal service support mechanisms, including billing contributors, collecting contributions to the universal service support mechanisms, and disbursing universal service support funds.[25] The Commission required contributors to report their end-user telecommunications revenues to USAC on a Telecommunications Reporting Worksheet (Worksheet).[26]

8. The Commission has also implemented various rules and guidelines intended to reduce administrative burdens for certain categories of contributors. For example, the Commission's rules provide that contributors whose annual universal service contribution is expected to be less than $10,000 are not required to directly contribute to the universal service mechanisms, pursuant to the *de minimis* exemption.[27] The Commission's rules further provide a safe harbor for the reporting of

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[18] *Universal Service First Report and Order*, 12 FCC Rcd at 9206, 9211, paras. 843, 854.

[19] *Id.* at 9207, paras. 845-46.

[20] *Id.* at 9208, para. 848.

[21] *Id.*

[22] *Id.*

[23] *Id.* at 9211, para. 854. Carriers calculate their contributions by multiplying their relevant end-user revenues by the universal service contribution factor. *Id.* Therefore, the cost associated with the preservation and advancement of universal service could be identified without ambiguity. *Id.*

[24] *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service*, CC Docket Nos. 96-45, 97-21, Report and Order and Second Order on Reconsideration, 12 FCC Rcd 18400 (1997) (*Second Order on Reconsideration*).

[25] *Id.* at 18423-24, para. 41; *see also* 47 C.F.R. § 54.701.

[26] *Second Order on Reconsideration*, 12 FCC Rcd at 18475, Appendix B. Contributors are required to file quarterly and annually. 47 C.F.R. § 54.711(a).

[27] *See* 47 C.F.R. § 54.708. Section 254(d) of the 1996 Act states that the Commission may exempt a carrier or class of carriers from contributing to the universal service mechanisms if the "carrier's contribution to the preservation and advancement of universal service would be de minimis." 47 U.S.C. § 254(d). The Commission's rules also provide a limited exception to universal service contribution requirements for entities with interstate end-user telecommunications revenues that constitute less than twelve percent of their combined interstate and international end-user telecommunications revenues. *See* 47 C.F.R. § 54.706(c); *See 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, and Universal Service Support Mechanisms, Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990, Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size, Number Resource*

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telecommunications revenues when bundling telecommunications services with customer premises equipment or information services.[28]

9. Of particular note, among those requirements minimizing administrative burdens on contributors, the Commission also established an interim safe harbor for mobile wireless telecommunications providers. Wireless telecommunications providers asserted that they could not identify, without substantial difficulty, the amount of their revenues that are interstate as opposed to intrastate.[29] To address this concern, in 1998, the Commission established suggested, or safe harbor, percentages to approximate the percentage of interstate revenue generated by each category of wireless telecommunications provider.[30] The Commission stressed that the safe harbor for each category of carrier was intended as guidance and that a wireless carrier could report a percentage of interstate revenue that was less than the safe harbor, provided it could document the computation method used and retained the supporting information.[31] The Commission initially set the interim safe harbor percentage for cellular, broadband Personal Communications Service (PCS), and digital Specialized Mobile Radio (SMR) providers at 15 percent of total telecommunications revenues, for paging providers at 12 percent of total paging revenues, and analog SMR providers at one percent of total revenues.[32]

10. In 2002, the Commission revisited the interim safe harbor and raised the percentage for cellular, broadband PCS, and digital SMR providers to 28.5 percent.[33] The Commission found that the original interim safe harbor percentage no longer reflected the extent to which mobile wireless consumers used their wireless phones for interstate calls, especially given the increased substitution of wireless for

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Optimization, Telephone Number Portability, Truth-in-Billing and Billing Format, CC Docket Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, 98-170, Further Notice of Proposed Rulemaking and Report and Order, 17 FCC Rcd 3752, 3806, para. 125 (2002) (*First Further Notice*).

[28] *See Policy and Rules Concerning Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended, 1998 Biennial Regulatory Review – Review of Customer Premises Equipment And Enhanced Services Unbundling Rules In the Interexchange, Exchange Access and Local Exchange Markets*, CC Docket Nos. 96-61, 98-183, Report and Order, 16 FCC Rcd 7418, 7446-48, paras. 47-54 (2001) (*CPE Bundling Order*).

[29] *See Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 21252, 21255, para. 6 (1998) (*First Wireless Safe Harbor Order*).

[30] *Id.* at 21257, para. 11.

[31] *Id.*

[32] *Id.* at 21258-60, paras. 13-15. For cellular, broadband PCS, and digital SMR, the 15 percent safe harbor was based on the nationwide average percentage for interstate wireline traffic reported for purposes of dial equipment minutes weighting program; for paging providers, the 12 percent safe harbor, and for analog SMR providers, the one percent safe harbor, was based on reported revenue on the Telecommunications Reporting Worksheet (FCC Form 499-A) for calendar year 1997. *Id.* at 21259-60, paras. 13-15.

[33] *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, and Universal Service Support Mechanisms, Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990, Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size, Number Resource Optimization, Telephone Number Portability, Truth-in-Billing and Billing Format*, CC Docket Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, 98-170, Report and Order and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 24952, 24965, para. 21 (2002) (*Second Wireless Safe Harbor Order*).

traditional wireline service.[34] Because the original safe harbor percentage no longer reflected actual market conditions, the Commission found it necessary to increase the safe harbor to ensure that universal service contributions remained equitable and non-discriminatory, as required by section 254(d) of the 1996 Act.[35] By ensuring that the contribution base more accurately reflected the marketplace, the Commission improved the continued viability of the Fund.[36] Although the Commission retained use of an interim wireless safe harbor, the Commission sought additional comment on the ability of mobile wireless providers to report actual interstate end-user telecommunications revenue and whether the Commission should eliminate the safe harbor.[37]

C. History of the Current Contribution Methodology Proceeding

11. As part of its efforts to ensure the long-term stability and sufficiency of the universal service support system in an increasingly competitive marketplace, the Commission began a proceeding to revisit the universal service contribution methodology in May 2001.[38] In the *2001 Notice*, the Commission sought comment generally on whether and how to streamline and reform the contribution assessment methodology.[39] Among other things, the Commission sought comment on whether to modify the existing revenue-based methodology, as well as whether to replace that methodology with one that assesses contributions on the basis of a flat-fee charge, such as a per-line charge.[40]

12. Seeking to further develop the record regarding various proposals submitted in response to the *2001 Notice*, the Commission released a Further Notice of Proposed Rulemaking and Report and Order in February 2002.[41] Specifically, the Commission sought more focused comment on a proposal to replace the existing revenue-based assessment mechanism with one based on the number or capacity of connections provided to a public network.[42] The *First Further Notice* invited commenters to supplement the record with any new arguments or data on proposals to retain or modify the existing, revenue-based assessment methodology.[43] The Commission also sought additional comment on possible reforms to the

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[34] *Id.* at 24965, para. 21. The Commission based the 28.5 percent safe harbor percentage on traffic studies from CTIA of six wireless carriers. Five unnamed national large wireless carriers reported interstate minutes of use that ranged from 19.6 percent to 28.5 percent. TracFone, a prepaid wireless provider, reported interstate minutes of use of 10 percent. *Id.* at 24967, para. 22.

[35] *Id.* at 24965-66, para. 21; *see* 47 U.S.C. § 254(d).

[36] *Second Wireless Safe Harbor Order*, 17 FCC Rcd at 24966, para. 21. The Commission did not find it necessary to adjust the "safe harbor" percentages for paging and analog SMR providers. *Id.* at 24966, para. 23. Wireless carriers may also use the safe harbor percentages to report revenue for purposes of Telecommunications Relay Services, the North American Numbering Plan, and the Local Number Portability programs. *Id.* at 24968, para. 27. The Commission also found it was in the interest of consistency, equity, and fairness to adopt an all-or-nothing rule requiring wireless telecommunications providers who chose to report using the safe harbor do so for all affiliated entities. Under this rule, wireless providers may report revenues at either the legal entity level or on a consolidated basis, but are required to report either actual or safe harbor revenues for all of their affiliated legal entities within the same safe harbor category. *Id.* at 24967, para. 25.

[37] *See Second Wireless Safe Harbor Order*, 17 FCC Rcd at 24983-94, para. 68.

[38] *See generally 2001 Notice*, 16 FCC Rcd 9892.

[39] *Id.* at 9894, para. 2.

[40] *Id.*

[41] *See generally First Further Notice*, 17 FCC Rcd 3752.

[42] *Id.* at 3765, para. 31, 3766-89, paras. 34-83.

[43] *Id.* at 3789, para. 84.

manner in which carriers recover contribution costs from their customers.[44] In addition, in the further notice portion of the *Second Wireless Safe Harbor Order*, the Commission sought additional comment on capacity-based proposals that had been developed in the record.[45] The Commission also sought comment on a telephone-number based proposal advanced by AT&T and the Ad Hoc Telecommunications Users Group (Ad Hoc).[46] The Commission subsequently sought comment on a Commission staff study, which estimated potential contribution assessment levels under the then-newly modified revenue-based method and the three connection-based proposals in the further notice portion of the *Second Wireless Safe Harbor Order*.[47]

D. Regulation of Interconnected VoIP Services

13. On March 10, 2004, the Commission initiated a proceeding to examine issues relating to Internet Protocol (IP)-enabled services – services and applications making use of the IP, including, but not limited to, VoIP services.[48] In the *IP-Enabled Services Notice*, the Commission asked commenters to address, among other things, the universal service contribution obligations of both facilities-based and non-facilities-based providers of IP-enabled services.[49] The Commission sought comment on its authority, including mandatory and permissive authority under section 254(d), to require universal service contributions by IP-enabled service providers.[50] The Commission asked, if certain classes of IP-enabled services are determined to be information services, could or should the Commission require non-facilities-based providers of such services to contribute to universal service pursuant to its permissive authority.[51] Parties were asked to comment on whether non-facilities-based providers "provide" telecommunications.[52] The Commission asked commenters to address how it could exercise its permissive authority over facilities-based and non-facilities-based providers of IP-enabled services in an equitable and nondiscriminatory fashion.[53] The Commission sought comment on how, as a practical

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[44] *Id.* at 3791, para. 89.

[45] *Second Wireless Safe Harbor Order*, 17 FCC Rcd at 24983-95, paras. 66-95.

[46] *Id.* at 24995-97, paras. 96-100.

[47] *Commission Seeks Comment on Staff Study Regarding Alternative Contribution Methodologies*, CC Docket Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, 98-170, Public Notice, 18 FCC Rcd 3006 (2003) (*Staff Study*). Comments and reply comments were filed on March 31 and April 18, 2003, respectively, and were incorporated in the record of *Second Wireless Safe Harbor Order*. *Id.* at 3007.

[48] *See IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, 4864, para. 1 n.1 (2004) (*IP-Enabled Services Notice*). Comments were filed by May 28, 2004 and reply comments were filed by July 14, 2004. *See Pleading Cycle Established for Comments in IP-Enabled Services Rulemaking Proceeding*, WC Docket No. 04-36, Public Notice, 19 FCC Rcd 5589 (2004); *Wireline Competition Bureau Extends Reply Comment Deadlines for IP-Enabled Services Rulemaking and SBC's "IP Platform Services" Forbearance Petition*, WC Docket Nos. 04-29, 04-36, Public Notice, 19 FCC Rcd 10474 (2004); *see also* Appendix B (List of Commenters).

[49] *See IP-Enabled Services Notice*, 19 FCC Rcd at 4905, para. 63. Given the comprehensive questions the Commission asked in the *IP-Enabled Services Notice*, and the Commission's well-known use of safe harbors for USF contributions by other types of providers, we reject Vonage's contention that parties received inadequate notice of the actions we take in this Order. Vonage June 14, 2006 *Ex Parte* Comments at 7.

[50] *See IP-Enabled Services Notice*, 19 FCC Rcd at 4905, para. 63.

[51] *Id.* at 4905, para. 64.

[52] *Id.*

[53] *Id.*

matter, providers would identify the portion of their IP-enabled service revenues that constitute assessable telecommunications revenues for universal service purposes.[54]

14. On November 9, 2004, the Commission adopted the *Vonage Order*,[55] in which it preempted an order of the Minnesota Public Utilities Commission (Minnesota Commission) that applied Minnesota's traditional "telephone company" regulations to Vonage's DigitalVoice service[56] – an interconnected VoIP service under the definition subsequently adopted by the Commission.[57] Without classifying Vonage's service as either an "information service" or a "telecommunications service" under the Act, the Commission held that DigitalVoice cannot be separated into interstate and intrastate communications for compliance with Minnesota's requirements without negating valid federal policies and rules.[58] The *Vonage Order* made "clear that this Commission, not the state commissions, has the responsibility and obligation to decide whether certain regulations apply to DigitalVoice and other IP-enabled services having the same capabilities."[59] The Commission further indicated that it intended to "resolve important regulatory matters with respect to IP-enabled services generally, including services such as DigitalVoice, concerning issues such as the Universal Service Fund" in the *IP-Enabled Services* proceeding.[60]

15. Since the *Vonage Order*, the Commission twice has adopted regulations for certain providers of IP-enabled services. On May 19, 2005, the Commission adopted its first Report and Order – the *VoIP 911 Order* – in the *IP-Enabled Services* proceeding.[61] In that order, the Commission defined a particular category of IP-enabled services – "interconnected VoIP services" – as services that (1) enable real-time, two-way voice communications; (2) require a broadband connection from the user's location; (3) require IP-compatible customer premises equipment; and (4) permit users to receive calls from and terminate calls to the PSTN.[62] Declining to determine the statutory classification of interconnected VoIP services at that time, the Commission asserted its ancillary jurisdiction under Title I of the Act to require interconnected VoIP service providers to supply 911 emergency calling capabilities to their customers.[63] On August 5, 2005, the Commission adopted another order in which it determined that providers of interconnected VoIP services, as defined in the *VoIP 911 Order*, are subject to the Communications Assistance for Law Enforcement Act (CALEA).[64] The Commission's decision that CALEA obligations

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[54] *Id.*

[55] *See Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion and Order, 19 FCC Rcd 22404 (2004) (Vonage Order), petition for review pending, *Nat'l Ass'n of State Util. Consumer Advocates v. FCC*, No. 05-1122 (8th Cir.).

[56] Vonage's DigitalVoice service assigns its users North American Numbering Plan (NANP) numbers and provides them the ability to place and receive calls to and from the public switched telephone network (PSTN). *See Vonage Order* at 22407-08, paras. 8-9.

[57] *See IP-Enabled Services*, WC Docket No. 04-36; *E911 Requirements for IP-Enabled Service Providers*, WC Docket No. 05-196, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245, 10257-58, para. 24 (2005) (*VoIP 911 Order*) (defining "interconnected VoIP service"), petitions for review pending, *Nuvio Corp. v. FCC*, No. 05-1248 (D.C. Cir.).

[58] *See Vonage Order*, 19 FCC Rcd at 22411-12, para. 14.

[59] *Id.* at 22405, para. 1.

[60] *Vonage Order*, 19 FCC Rcd at 22411, n.46; 22432, para. 44.

[61] *See generally VoIP 911 Order*, 20 FCC Rcd 10245.

[62] *Id.* at 10257-58, para. 24.

[63] *Id.* at 10246, para. 1.

[64] *See Communications Assistance for Law Enforcement Act and Broadband Access and Services*, ET Docket

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apply to interconnected VoIP services was consistent with the approach taken in the *VoIP 911 Order*, in that the decision rested in part on the fact that interconnected VoIP services allow customers to originate calls to and receive calls from the PSTN.[65]

III. DISCUSSION

16. In this Order, we adopt interim revisions to the existing approach for assessing contributions for the federal USF that will preserve and advance universal service in the short term, while we continue to explore more fundamental reform. These interim revisions comport with the requirements of section 254, and do so in a manner that responds to recent developments in the communications industry marketplace.[66] First, we raise the interim mobile wireless safe harbor from 28.5 percent to 37.1 percent. Second, we establish universal service contribution obligations for providers of interconnected VoIP service.

A. Need for Immediate Interim Measures

17. We conclude that immediate interim measures to revise the existing approach to USF contributions are necessary and in the public interest to preserve and advance universal service.[67] There is widespread agreement that the Fund is currently under significant strain.[68] The size of the Fund has grown significantly, with disbursements rising from approximately $4.4 billion in 2000 to approximately $6.5 billion in 2005, and is projected to grow even further in the coming years.[69] Moreover, changing market conditions, including the decline in long distance revenue and the growth of wireless and

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No. 04-295, RM-10865, First Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd 14989, 14991-92, para. 8 (2005) (*CALEA First Report and Order*), *aff'd*, *American Council on Education v. FCC*, No. 05-1404 (D.C. Cir. June 9, 2006). Based on the independent language of the CALEA statute, the Commission found in the *CALEA First Report and Order* that providers of these services satisfy CALEA's definition of "telecommunications carrier" because these services replace significant functions of traditional telephone service, including circuit-switched voice service. *See id.* at 15001, 15003-04, 15009-10, paras. 23, 27-31, 42.

[65] *Id.* at 15009-10, para. 42.

[66] *See* 47 U.S.C. § 254(b), (d).

[67] *Id.*

[68] *See, e.g.*, Letter from James S. Blaszak, Counsel for Ad Hoc, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 96-45, 01-92, at 3, filed Mar. 1, 2006 (Ad Hoc Mar. 1, 2006 *Ex Parte* Letter) ("There is a serious, looming USF funding problem."); Letter from Paul Garnett, Assistant Vice President, Regulatory Affairs, CTIA, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-45, Attach. at 3, filed Jan. 25, 2006 (CTIA Jan. 25, 2006 *Ex Parte* Letter) ("Accelerating consumer demand of IP-enabled, broadband, and other information services" as well as "[i]nformation service provider self-identification" is "plac[ing] the current universal service contribution system at risk – especially going forward."); Letter from Kathleen Grillo, Vice President, Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-45, Attach. at 1, filed Mar. 3, 2006 (Verizon Mar. 3, 2006 *Ex Parte* Letter) ("Declines in long distance revenues, combined with the proliferation of bundled services and IP-based alternatives to traditional long distance, will continue to destabilize the USF funding base."); Letter from Antoinette C. Bush and John M. Beahn, Counsel for Virgin Mobile, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-45, Attach. at 6, filed Mar. 18, 2005 (Virgin Mobile Mar. 18, 2005 *Ex Parte* Letter) ("The current pool of contributors cannot satisfy the increasing demands placed on the USF.").

[69] *See* Universal Service Administrative Company, *2000 Annual Report*, at 4, *available at* http://www.universalservice.org/about/governance/annual-reports/2000/pg4.asp (visited April 4, 2006); Federal Communications Commission, *Universal Service Monitoring Report*, at 1-36, Table 1.11 (2005) (*2005 Monitoring Report*); *see* Universal Service Administrative Company, *2005 Annual Report*, at 47 (2006), *available at* http://www.universalservice.org/_res/documents/about/pdf/annual-report-2005.pdf.

interconnected VoIP services, are eroding the assumptions that form the basis for the current revenue-based system.

18. When the revenue-based system was adopted in 1997, assessable interstate revenues were growing. The total assessable revenue base has recently declined, however, from about $79.0 billion in 2000 to about $74.7 billion in 2004,[70] while Fund disbursements grew from approximately $4.4 billion in 2000 to approximately $5.7 billion in 2004, and continued to grow to approximately $6.5 billion in 2005.[71] Declines in the contribution base combined with growth in the size of the Fund increasingly have placed upward pressure on the percentage of assessable revenues that must be contributed to the Fund (the "contribution factor"). The contribution factor grew from 5.9 percent in the first quarter of 2000 to 8.9 percent in the fourth quarter of 2004, and is 10.9 percent for the second quarter of 2006.[72] The pressure caused by a declining revenue base combined with growing disbursement needs jeopardizes the immediate sufficiency and stability of the support mechanisms, demonstrating the need for immediate, interim USF improvements, while we continue to pursue long-term fundamental reform of the contribution methodology.[73]

19. At the same time as the Fund has grown and its contribution base has declined, wireless and interconnected VoIP services have experienced dramatic growth. From 2000 to 2004, annual revenues of wireless service providers grew from approximately $70 billion to $122 billion.[74] During this period, the number of wireless subscribers grew from approximately 101 million to 181 million,[75] and continued to grow by more than twenty-five million subscribers in 2005.[76] This compares to negative growth in the number of wireline switched access lines, which declined from approximately 192 million in December 2000 to 177 million in December 2004.[77] Similarly, over the same time frame, interconnected VoIP providers experienced robust growth in subscribership, with the number of subscribers rising from approximately 150 thousand subscribers in 2003 to 1.2 million subscribers in 2004, and to 4.2 million

[70] *See 2000 Revenues Report*, Table 4; *2004 Revenues Report*, Table 4.

[71] *See supra* n.69.

[72] *See* Proposed First Quarter 2000 Universal Service Contribution Factor, CC Docket 96-45, Public Notice, 15 FCC Rcd 3660 (1999); 2005 Monitoring Report, at 1-34, Table 1; Proposed Second Quarter 2006 Universal Service Contribution Factor, CC Docket No. 96-45, Public Notice, DA 06-571 (rel. March 13, 2006). We note that, since 2000, the Commission has modified the contribution factor slightly by adding a circularity adjustment to eliminate contributions on charges passed through to end users. *See Second Wireless Safe Harbor Order*, 17 FCC Rcd at 24971-72, para. 35. This change reduces the contribution base by the amount of universal service pass-through charges theoretically billed during the quarter.

[73] *See* 47 U.S.C. § 254(b), (d). Because any delay in implementation of the interim requirements we establish today would undermine our goal of preserving the stability and sufficiency of the Fund in the short term, we reject requests for a lengthier implementation schedule. *See* Letter from Melissa E. Newman, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-45, at 2 (filed June 13, 2006) (*Qwest June 13, 2006 Ex Parte Letter*).

[74] *See supra* n.8.

[75] *See supra* n.7.

[76] *See* Federal Communications Commission, *Local Telephone Competition: Status as of June 30, 2005*, at 2, Table 14 (2006) (*2005 Local Competition Report*); *CTIA 2005 Year End Survey* at 2. Although the total number of wireless subscribers differs slightly between the *2005 Local Competition Report* and the *CTIA 2005 Year End Survey* (*e.g.*, 181 million versus 182 million, respectively, for December 2004) due to differences in how the data were compiled, both reports show dramatic increase in the number of wireless subscribers since 2000.

[77] *See 2005 Local Competition Report*, Table 1. Wireline switched access lines grew minimally in the first six months of 2005, from 177,827,375 lines to 178,179,552 lines. *Id.*

subscribers at the end of 2005.[78] We, therefore, tailor the interim measures we adopt in this Order to respond to these marketplace developments.[79]

20. We also find that taking the measured interim steps we adopt today will minimize the impact of any changes on consumers, Fund contributors, and USF administration. For example, by retaining the core aspects of the current interstate revenue-based contribution methodology, consumers should expect to see no significant change in their bills as a result of this Order. In particular, the structure of the telephone bills of a typical local exchange company customer should not change as a result of this Order.[80] In addition, we expect that the increase in the interim wireless safe harbor, which wireless carriers may use as one of a few options to account for interstate and international revenues, will have a smaller impact on the amount wireless consumers may be charged via a pass-through line item on their bills than would more fundamental reform, such as changing to a non-revenues-based contribution methodology.[81] Fund contributors, moreover, will continue reporting interstate end-user telecommunications services revenues, and will continue doing so on reporting forms that will remain largely unchanged, thereby minimizing the need for contributors or the Fund administrator to make significant changes to their billing, provisioning, or information collection systems.[82] This contrasts sharply with most of the fundamental reform proposals in the record, which generally claim that transitioning to a new methodology will require at least a year to accomplish.[83] Finally, by continuing to collect based on revenues, the Fund administrator and the Commission should be able to continue to detect inconsistencies in the information filed by contributors, as well as conduct contributor audits as

[78] *See TIA 2006 Report*, at 71. The *TIA 2006 Report* does not report the number of VoIP subscribers before 2003. Estimates are that VoIP subscribership will grow to 19 million by the end of 2009. These figures are for *residential* VoIP service. *Id.*

[79] *See infra* sections III.B (increasing the interim wireless safe harbor), III.C (applying contribution obligations to providers of interconnected VoIP service).

[80] Although we expect that the changes we adopt may impact most interconnected VoIP providers and their customers, the number of affected customers and providers will be considerably fewer than would be affected if we were to adopt more fundamental reform at this time.

[81] *See* Letter from Maureen A. Thompson, Executive Director, Keep USF Fair Coalition, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-45, at 1, filed Mar. 27, 2006 (Keep USF Fair *Ex Parte* Letter); Letter from Mitchell Brecher, Counsel for TracFone, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 96-45, 98-171, 90-571, 92-337, 99-200, 98-170, filed Aug. 17, 2005 (attaching letter from Mary M. Martin, Chairman, The Seniors Coalition, to Kevin Martin, Chairman, FCC, dated Aug. 2, 2005) (Seniors Coalition *Ex Parte* Letter); Letter from David Certner, Director Federal Affairs, AARP, to Michael K. Powell, Chairman, FCC, CC Docket Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, 98-170, at 2, filed Apr. 28, 2003 (AARP *Ex Parte* Letter).

[82] Although raising the interim wireless safe harbor level may increase the amount wireless service providers are required to contribute, it does not require wireless service providers to implement any major billing or other systems changes.

[83] *See, e.g.*, Letter from Melissa E. Newman, Vice President-Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-45, Attach. at 9, filed Mar. 21, 2006 (Qwest Mar. 21, 2006 *Ex Parte* Letter) (estimating a transition period of 18 months); Letter from Kathleen Grillo, Vice President, Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-45, Attach. at 3, filed Mar. 28, 2006 (Verizon Mar. 28, 2006 *Ex Parte* Letter) (estimating a transition period of one year). *See also, e.g.*, Letter from Jeanine Poltronieri, Vice President, Federal Regulatory, BellSouth, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-45, Attach. at 2, filed Oct. 24, 2005 (BellSouth Oct. 24, 2005 *Ex Parte* Letter) (noting previous one year transition period to implement current revenue-based system was facilitated by prior related-work to the effected systems); Letter from Jeanine Poltronieri, Vice President, Federal Regulatory, BellSouth, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-45, Attach. at 10, filed Mar. 23, 2005 (suggesting a three year transition period to migrate long distance revenues to numbers). BellSouth also recommended that, due to the complexity of a numbers-based method, the Commission adopt a numbers-based method and then issue a further notice examining specific and detailed implementation issues. BellSouth Oct. 24, 2005 *Ex Parte* Letter, Attach. at 1.

necessary. Because of the minimal operational affect the changes adopted herein will have on Fund contributors and Fund administration, the changes can and will be implemented in time for contributions for the fourth quarter of 2006.

21. In making our decision today, we considered the voluminous record in light of the current pressures on the Fund.[84] We decline to adopt, at this time, more fundamental changes to the entire

[84] Commenters generally supported telephone number-based proposals or hybrid proposals that would combine a telephone numbers-based system with a revenue- or connection-based component. For example, several commenters, including Ad Hoc Telecommunications Users Committee (Ad Hoc), BellSouth, and the Satellite Industry Association (SIA), propose that the Commission switch from a revenue-based approach to a pure numbers-based contribution methodology. *See, e.g.*, Letter from James S. Blaszak, Counsel for Ad Hoc, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-45, filed Mar. 9, 2006 (Ad Hoc Mar. 9, 2006 *Ex Parte* Letter); Letter from Jeanine Poltronieri, Vice President, Federal Regulatory, BellSouth, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-45, filed Feb. 13, 2006; Letter from Christine Reilly, Counsel for SIA, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-45, filed Mar. 16, 2006. Other commenters, such as Verizon and Qwest, support a contribution system based on both numbers (including working telephone numbers associated with interconnected VoIP services) and revenues (for services that do not use telephone numbers, such as special access, private line, other dedicated services, and prepaid calling cards). Verizon Mar. 28, 2006 *Ex Parte* Letter, Attach. at 2; Qwest Mar. 21, 2006 *Ex Parte* Letter, Attach. at 2, 5, 8. Still other commenters, including CTIA, the Intercarrier Compensation Forum (ICF), and USTelecom, support a hybrid mechanism that would assess contributions based on working telephone numbers and connections. *See, e.g.*, Letter from Gary M. Epstein, Counsel for Intercarrier Compensation Forum (ICF), to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92, Attach. at 3, filed Nov. 22, 2005 (ICF Nov. 22, 2005 *Ex Parte* Letter); Letter from Paul Garnett, Assistant Vice President, Regulatory Affairs, CTIA, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-45, filed Jan. 25, 2006 (CTIA Jan. 25, 2006 *Ex Parte* Letter); Letter from Robin E. Tuttle, Counsel, USTelecom, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-45, filed Jan. 11, 2006 (USTelecom Jan. 11, 2006 *Ex Parte* Letter). In general, these commenters advocate assessing contributions based on switched connections, assessing one contribution unit for each working telephone number. For non-switched connections that do not use telephone numbers, these commenters, in general, would charge one or more contribution units, based on capacity levels, which would be reviewed periodically. These commenters, however, disagree about how to set the tiers and which types of services, if any, should be subject to reduced assessments. *Compare* ICF Nov. 22, 2005 *Ex Parte* Letter *with* CTIA Jan. 25, 2006 *Ex Parte* Letter and USTelecom Jan. 11, 2006 *Ex Parte* Letter.

Finally, other commenters propose that we retain a revenue-based contribution methodology. *See, e.g.*, Letter from Mitchell F. Brecher, Counsel for TracFone, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, 98-170, at 1, filed June 14, 2005 (TracFone June 14, 2005 *Ex Parte* Letter) (suggesting that the contribution base is financially secure); Virgin Mobile Mar. 18, 2005 *Ex Parte* Letter, Attach. at 12 (supporting a revenue-based methodology). These commenters generally suggest that we should broaden the base of contributors by raising or eliminating the wireless safe harbor and by including all voice services, such as VoIP, to safeguard the Fund. *See, e.g.*, Letter David C. Bergmann, Assistant Consumers' Counsel, Chair, NASUCA, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 96-45, 01-92, 03-133, at 2, filed Feb. 27, 2006 (NASUCA Feb. 27, 2006 *Ex Parte* Letter); TracFone June 14, 2005 *Ex Parte* Letter at 1; Virgin Mobile Mar. 18, 2005 *Ex Parte* Letter, Attach. at 6 (proposing that the base be broadened to include VoIP but not addressing changes to the wireless safe harbor); Letter from Daniel Mitchell, Vice President, Legal and Industry, NTCA, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 96-45, 80-286, MB Docket Nos. 05-255, 05-311, WC Docket No. 04-440, USF Contribution Methodology Attach. at 2, 3, filed Mar. 16, 2006 (NTCA Mar. 16, 2006 *Ex Parte* Letter). *See* Letter from L. Charles Keller, Counsel for Sage Telecom, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 95-45, 01-92, Attach. at 2, filed Aug. 31, 2005 ("providers that compete with USF contributors also should contribute to USF"). *See also* Letter from Stuart Polikoff, Director of Government Relations, OPASTCO, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, 98-170, 02-33, 01-92, at 2, filed Dec. 14, 2005 (advocating "broadest possible base of contributors" including "all facilities-based broadband Internet access providers, over all platforms"). Many colleges and universities, which offer telephone service to students, oppose moving to a numbers- or connections-based methodology because they believe they would likely experience dramatic increases in their contribution obligations under such proposals. *See, e.g.*, Letter from Patricia Todus, President, ACUTA, and Mark Luker, Vice President, EDUCAUSE, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-45, filed May 31, 2006 (ACUTA represents over 800 institutes of higher

(continued....)

universal service program or to the contribution methodology. For example, one commenter has suggested that the entire universal service program is "broken" and advocated that a "holistic, coordinated rational reform of all universal support mechanisms" is necessary.[85] It argued that reforming the contribution methodology in isolation, without addressing distribution issues, is ill-advised.[86] Other parties advocate fundamentally reforming the contribution methodology by moving away from a revenue-based approach.[87] The scale of reforming universal service is considerable, and we will continue to work towards stabilizing the Fund, as well as the entire universal service system. We note, however, that a consensus approach to reform has not developed. Thus, while we recognize that there may be merit to fundamental reform of the current USF contribution methodology, we find, at this time, that the discrete interim reforms we make to expand the contribution base will best promote the statutory requirements set forth in section 254 of 1996 Act in the near-term, while providing the Commission with the opportunity to continue to address the challenges of fundamental reform.[88]

22. Accordingly, with the reforms detailed below, we continue to fulfill the Commission's obligation to develop a specific, predictable, and sufficient contribution mechanism to preserve and advance universal service.[89]

B. Wireless Provider Contributions

23. To sustain the sufficiency of the Fund at this time, we raise the current interim safe harbor for mobile wireless providers to a level that better reflects that industry's interstate revenues in light of the extraordinary growth of wireless services since 2002, the last time the Commission revisited this issue. This action will help ensure that the Fund can obtain sufficient revenues in a way that does not disrupt or

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education in the United States and EDUCAUSE represents over 2,000 colleges, universities, and educational associations); Letter from John C. Meets, Vice President for Administration and Finance, Wesleyan University, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-45, at 1, filed Mar. 7, 2006 (estimating contribution increase from $1,182 to $75,600 per year); Letter from George W. Ellis, Associate Academic Vice President Information Technologies, University of South Florida, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-45, at 1, filed Feb. 13, 2006 (estimating contribution increase from $18,000 to over $180,000). Similarly, certain low income, low volume consumers that make no or very few long distance telephone calls – for example, senior citizens or others with low or fixed incomes – object to non-revenue-based proposals, claiming that they would be charged higher universal service pass-through charges. *See, e.g.*, Keep USF Fair *Ex Parte* Letter at 1; Seniors Coalition *Ex Parte* Letter, Attach; AARP *Ex Parte* Letter at 2.

[85] *See* Letter from Craig J. Brown, Corporate Counsel, Qwest, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-45, Attach. at 2-3, filed Sept. 15, 2005 (Qwest Sept. 15, 2005 *Ex Parte* Letter). *But see* Qwest Mar. 21, 2006 *Ex Parte* Letter, Attach. at 2-3 (now advocating a revenue-based numbers-based hybrid approach and including contributions from VoIP providers).

[86] Qwest Sept. 15, 2005 *Ex Parte* Letter, Attach. at 2-3.

[87] *See, e.g.*, Virgin Mobile Mar. 18, 2005 *Ex Parte* Letter at 5 (recommending fundamental reform to expand the base of contributors, limit high cost distribution, and eliminate waste, fraud, and abuse); Letter from Gary M. Epstein, Counsel for Intercarrier Compensation Forum (ICF), to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92, at 2, filed Oct. 5, 2004 (ICF Oct. 5, 2004 *Ex Parte* Letter) (supporting comprehensive reform). Most commenters assert that for any large scale reform of the USF contribution system, a transition period is needed to modify their tracking and billing systems and to begin reporting numbers and capacity using a modified FCC Form 499A, the Telecommunications Reporting Worksheet. *See e.g.*, ICF Nov. 22, 2005 *Ex Parte* Letter, Attach. at 7. The membership of the ICF is comprised of AT&T, Global Crossing, GCI, Iowa Telecom, Level 3, MCI, SBC, Sprint, and Valor (supports a numbers/connections hybrid), and Verizon (supports a numbers/revenue hybrid). ICF Oct. 5, 2004 *Ex Parte* Letter at 1. *See also supra* n.84.

[88] *See* 47 U.S.C. § 254(b), (d)

[89] *See* 47 U.S.C. § 254(b), (d); *see also First Further Notice*, 17 FCC Rcd 3752.

harm consumers. We raise the wireless safe harbor from 28.5 percent to 37.1 percent.[90] We also take additional steps to safeguard the Fund by requiring mobile wireless providers that use traffic studies (rather than use the safe harbor) to report actual interstate revenues to submit those traffic studies to USAC and to the Commission.

24. The 1996 Act directs the Commission to develop the contribution mechanism in a manner that results in carriers contributing on an equitable and nondiscriminatory basis.[91] As the Commission found when first establishing the interim wireless safe harbor, in determining what is equitable and nondiscriminatory, the Commission looks to ensure that the contribution methodology does not treat similarly situated contributors differently.[92] As noted earlier, we have witnessed an explosion of wireless growth since we first established, and then revised, the interim wireless safe harbor. There were approximately 69 million subscribers in 1998 and approximately 141 million subscribers in 2002, whereas by the end of 2005, there were approximately 208 million subscribers.[93] The record demonstrates that the percentage of interstate mobile wireless traffic has grown as well.[94] By raising the interim wireless safe harbor to reflect more accurately current subscribership and usage levels and other marketplace developments, we ensure that mobile wireless service providers' obligations are on par with carriers offering similar service that must report based on actual interstate end-user telecommunications revenue (*e.g.*, wireline telecommunications providers).

25. We now revise the interim safe harbor to 37.1 percent, the highest percentage of interstate and international usage by a wireless company supported in the record.[95] Specifically, according to a traffic study conducted by TNS Telecoms for TracFone Wireless, the (then) seven large national mobile wireless service providers' interstate minutes of use ranged from 11.9 percent to 37.1 percent.[96] Accordingly, consistent with the Commission's previous rationale for raising the interim wireless safe

[90] *See* NASUCA Feb. 27, 2006 *Ex Parte* Letter (noting that the current interim wireless safe harbor likely understates the current level of interstate traffic); NTCA Mar. 16, 2006 *Ex Parte* Letter (urging the Commission to eliminate or increase the wireless safe harbor); TracFone Jun. 14, 2005 *Ex Parte* Letter (urging the Commission to eliminate or increase the wireless safe harbor).

[91] *See* 47 U.S.C. § 254(d).

[92] *See First Wireless Safe Harbor Order*, 13 FCC Rcd at 21257, para. 10.

[93] *CTIA 2005 Year End Survey*, at 5.

[94] *See infra* n.96.

[95] *See* Letter from L. Charles Keller, Counsel to Verizon Wireless, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, 98-170, filed Oct. 28, 2002, Attach. at 1 (Verizon Wireless Oct. 28, 2002 *Ex Parte* Letter) ("A safe harbor, updated to reflect current wireless calling activity, furthers the policy objectives of promoting equitable contributions, fund stability and administrative simplicity.").

[96] *See* TracFone Jun. 14, 2005 *Ex Parte* Letter, Attach. 2 at 13. The survey analyzed call records from the third quarter of 2004 and based on information contained on customer bills, allocated minutes of use to the interstate and intrastate jurisdiction based on the originating numbering plan area (NPA) state and the terminating NPA state. *See id.*, Attach. 2 at 6. Since the survey was conducted, the Commission granted applications from Nextel and Sprint to transfer control of Nextel's licenses and authorizations to Sprint. *See Application of Nextel Communications, Inc. and Sprint Corporation for Consent to Transfer Licenses and Authorizations*, WT Docket No. 05-63, Memorandum Opinion and Order, 20 FCC Rcd 13967 (2005).

This range of the percent of interstate minutes-of-use is consistent with a preliminary Commission staff analysis that shows aggregate wireless service providers' interstate minutes-of-use to have grown to approximately 29 percent. The data analyzed by staff did not lend the numbers to individual company analysis.

harbor to the highest level in the record, and based on the record now before us, we set the revised interim wireless safe harbor at 37.1 percent.[97]

26. We disagree with those parties that assert that the Commission should not rely on the TNS Telecoms traffic study because of concerns with sample size and methodology.[98] Notably, no other wireless provider has proposed an alternative safe harbor level or submitted a traffic study that looks at various wireless providers to support a different, updated, interim safe harbor level. Indeed, none of the parties that criticize the TNS Telecoms study have submitted any data or statistical analysis that would show a specific upward bias in the TNS Telecoms study. Other parties, moreover, claim that the existing safe harbor is too low and should be raised; however, these parties also fail to propose a specific safe harbor level.[99] Although the TNS Telecoms study remains the best evidence in the record because wireless providers have not submitted alternative data,[100] we recognize that individual wireless providers have access to a considerably larger amount of company-specific caller data, which may result in an individual provider calculating a more accurate result for the particular company. It is for this reason that we rely on the TNS Telecoms' traffic study only to establish the revised interim wireless safe harbor level and that each wireless provider retains the option of reporting its revenues based on a company-specific traffic study or on its actual interstate end-user telecommunications revenues.[101] We also invite these companies to provide evidence in response to the Notice that accompanies this Order. The purpose of the interim wireless safe harbor thus remains to give those providers that either cannot or choose not to determine their actual interstate end-user telecommunications revenues or approximate the revenues based on a traffic study another means of computing the necessary revenue information.

27. We therefore find that setting the interim safe harbor at the high end of the range in the record remains a reasonable approach. For these reasons, mobile wireless providers that choose to use the revised interim safe harbor must report 37.1 percent of their telecommunications revenues as interstate beginning with fourth quarter 2006 projected revenues that they will report on the August 1, 2006 FCC Form 499-Q.

28. Although we set the revised interim wireless safe harbor at 37.1 percent, we believe that we could have set it at a higher level. The record established in these dockets shows that, not only has there been tremendous wireless subscriber growth since the interim safe harbor was first established in 1998, but that there has been considerable growth in the percentage of interstate mobile wireless traffic. Thus, we have increased the safe harbor from 15 percent in 1998, to 28.5 percent in 2002, and to 37.1 percent in the instant Order. To avoid having to again reset the safe harbor in a few years, we could have trended

[97] *See Second Wireless Safe Harbor Order*, 17 FCC Rcd at 24966, para. 22. The interim safe harbors for paging and analog SMR dispatch will remain at 12 percent and 1 percent, respectively. *See* Letter from Frederick M. Joyce, Counsel to USA Mobility, Inc., to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-45, Attach. at 4, filed June 8, 2006 ("The current 'safe harbor' percentage that the FCC has assigned the paging industry is fair and reasonable.").

[98] *See* Letter from John T. Scott, III, Vice President and Deputy General Counsel, Verizon Wireless, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-45, at 2-3, filed June 2, 2006 (Verizon Wireless June 2, 2006, Letter). *See also* Letter from Cheryl A. Tritt, Counsel to T-Mobile USA, Inc., to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-45, at 2, filed June 8, 2006 (T-Mobile June 8, 2006, Letter); Letter from L. Charles Keller, Counsel to Cingular Wireless LLC, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, 98-170, at 1, filed June 9, 2006; Letter from Paul Garnett, CTIA, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-45, at 3, filed June 14, 2006.

[99] *E.g.*, NTCA Mar. 16, 2006 *Ex Parte* Letter.

[100] *See* Letter from Mitchell F. Brecher, Counsel for TracFone, to Marlene Dortch, Secretary, FCC, CC Docket No. 96-45, filed February 23, 2005; Verizon Wireless June 2, 2006, Letter; T-Mobile June 8, 2006, Letter.

[101] *See First Wireless Safe Harbor Order*, 13 FCC Rcd at 21258, para. 12.

the data to several years in the future and established a safe harbor at the higher level that would result. Moreover, although we adopted the interim wireless safe harbor in part because wireless providers historically have claimed it difficult to identify interstate versus intrastate revenues, it is the Commission's policy preference that providers contribute to the Fund based on their actual data rather than on a safe harbor percentage where possible.[102] Were we to establish a higher safe harbor than the one we now establish, we would create additional incentives for wireless providers to report their actual revenues. Nevertheless, after carefully balancing the benefits and burdens of a higher safe harbor, we choose not to establish a higher safe harbor level here because we are not convinced that a higher percentage is necessary at this time.[103]

29. In addition to revising the wireless safe harbor, we take an additional step to address concerns that wireless telephony providers who report actual interstate revenues may not be doing so accurately. Specifically, we require any wireless telephony provider that uses a traffic study to determine its actual interstate revenues for universal service contribution purposes to submit the traffic study to the Commission and to USAC for review. Preliminary review by Commission staff of FCC Form 499-A filings and other reports appears to reveal several discrepancies in the data filed by wireless telephony providers. For example, we are concerned that itemized charges for toll service on wireless telephony customers' bills that should be reported as toll service revenues on FCC Form 499-A are not being properly reported.[104] Toll services are telecommunications services that enable customers to communicate outside of their local exchange calling areas.[105] Many wireless telephony customers subscribe to plans that give them fixed amounts of minutes which can be used either for local or long distance service. Other wireless telephony customers, however, pay by the minute for some or all calls. For long distance service, the charge is often made up of an air time charge that is the same for local and long distance calls, and an additional toll charge that applies only to long distance calls. For some wireless telephony providers, toll service revenues include these additional charges for intrastate, interstate, and international toll calls. Commission staff analysis, however, raises the concern that some filers are not reporting their separately stated toll revenues correctly.

30. We note that wireless telephony providers reported a total of $1.3 billion of toll revenues on their FCC Forms 499-A for 2004.[106] The U.S. Department of Commerce, Bureau of the Census, however, estimates that wireless telephony providers earned $7.1 billion in "long-distance" revenues in 2004.[107] Moreover, in 2004, 53 wireless telephony providers reported a total of $31.7 billion in total end-user telecommunications revenues (which is the sum of revenues from fixed local service, payphone service, mobile service other than toll, and toll service, less the revenues from telecommunications service provided for resale) without reporting a single dollar of toll revenues on their FCC Forms 499-A.[108] These facts suggest that some wireless filers may have failed to properly account for toll revenues on their FCC Forms 499-A.

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[102] *See* Letter from Paul Garnett, CTIA, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-45, at 1-2, filed June 2, 2006.

[103] We intend to continue to monitor wireless usage patterns, and may revise the interim wireless safe harbor in the future accordingly.

[104] *See* Federal Communications Commission, Instructions to the Telecommunications Reporting Worksheet, Form 499-A, Section III.C.3, p.20 (2006) (*2006 Instructions for FCC Form 499-A*).

[105] *Id.* at Section III.C.4, p.23.

[106] *2004 Revenues Report*, Table 7.

[107] U.S. Census Bureau, *2004 Service Annual Survey: Information Sector Services*, Table 3.3.8 (2005), *available at* http://www.census.gov/svsd/www/services/sas/sas_data/51/sas51_331-3313_2004.pdf.

[108] This information is based on a staff analysis of the FCC Form 499-A filings. Individual filings are not available to the public in order to protect the confidentiality of the filings.

31. In addition, of the $1.3 billion in toll revenue reported on FCC Forms 499-A in 2004, wireless telephony providers reported that $24 million was attributable to international toll service. According to the FCC Section 43.61 International Traffic Data Report for 2004, however, nine wireless carriers alone reported $596 million of international toll service revenues.[109] These figures indicate that some filers may be underreporting international toll revenues on their FCC Forms 499-A.[110]

32. In light of these apparent data discrepancies, we take an additional step to ensure the accuracy of reported revenue data.[111] Currently, a mobile wireless provider that reports actual revenue data must provide, upon request, documentation to support the reporting of actual interstate telecommunications revenues.[112] We note that a mobile wireless provider may use traffic studies as a proxy for calculating its total amount of actual interstate revenues. We are concerned that the use of traffic studies may be, in part, a cause of these data reporting problems.[113] For example, mobile wireless providers have incentives to bias any traffic studies to minimize their amount of interstate and international end-user revenues and thereby minimize their Fund contributions; there are no countervailing market forces to offset these incentives.[114] Consequently, we now require any mobile wireless provider that uses a traffic study to determine its interstate end-user revenues for universal service contribution purposes to submit the study to the Commission and to USAC for review.[115] Any mobile wireless provider using a traffic study shall submit the traffic study no later than the deadline for submitting the FCC Form 499-Q for the same time

[109] Federal Communications Commission, *2004 International Telecommunications Data*, Tab D (2006), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-264309A1.pdf.

[110] Commission staff has also identified possible discrepancies in reported FCC Form 499-A data that is not restricted to the data submitted by mobile wireless providers. First, staff analysis of FCC Form 499-A filings for 2004 reveals that 306 filers reported a total of $3.1 billion of local exchange revenues, while reporting less than one percent of those revenues as interstate. *See* Federal Communications Commission, Instructions to the Telecommunications Reporting Worksheet, Form 499-A, Section II-A, p. 4. (2004); *see also 2006 Instructions for FCC Form 499-A*, Section II-A, p. 4. We are concerned that some of these filers may be underreporting the interstate revenues associated with their local exchange service. Second, we note that 436 filers reported a total of $508 million of local private line service revenues on their FCC Forms 499-A in 2004, but did not report a single dollar of those revenues as interstate or international. We are concerned that some of these filers may have failed to properly report local private line revenues.

[111] *See* Letter from Paul W. Garnett, CTIA, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-45, Attach. at 4, filed Feb. 22, 2005 (CTIA Feb. 22, 2005 *Ex Parte* Letter) (stating that the Commission should "minimize opportunities for telecommunications providers to avoid contribution obligations").

[112] *See Second Wireless Safe Harbor Order*, 17 FCC Rcd at 24966, para. 24.

[113] *Cf. Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Reply Comments of Montana Independent Telecommunications Systems (MITS), the Montana Telecommunications Association (MTA), Mid-Rivers Telephone Cooperative and Ronan Telephone Company at 25 (filed July 20, 2005).

[114] Letter from Roger C. Sherman, Sprint Nextel Corporation, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-45, WC Docket No. 04-36, at 1-2, filed June 14, 2006 (supporting "reasonable standards, best practices, or guidelines to ensure that traffic studies accurately reflect interstate usage").

[115] Traffic studies may rely on statistical sampling to estimate the proportion of minutes that are interstate and international. Such sampling techniques must be designed to produce a margin of error of no more than one percent with a confidence level of 95%. If the sampling technique does not employ a completely random sample (e.g., if stratified samples are used), then the respondent must document the sampling technique and explain why it does not result in a biased sample. Traffic studies should include, at a minimum: (1) an explanation of the sampling and estimation methods employed and (2) an explanation as to why the study results in an unbiased estimate with the accuracy specified above. Mobile wireless providers should retain all data underlying their traffic studies as well as all documentation necessary to facilitate an audit of the study data and be prepared to make this data and documentation available to the Commission upon request.

period.[116] We also remind wireless carriers that, while they are permitted to continue to report revenues at either the legal entity level or on a consolidated basis, they are required to decide whether to report either actual or safe harbor revenues for all of their affiliated legal entities within the same safe harbor category.[117]

33. Accordingly, we take this opportunity to caution universal service contributors (and other entities reporting data to the Commission) that we will not hesitate to use our enforcement authority to investigate and remedy these and other discrepancies in data reported to the Commission.[118] Moreover, we expect filers that have made reporting errors to re-file the relevant FCC forms or reports as soon as possible (regardless of whether the forms are due to the Commission, USAC, or another entity). To the extent that filers determine that they should have made additional contributions to the Fund, we further expect those entities to work with USAC to resolve their contribution obligations.

C. Interconnected VoIP Services

34. We require providers of "interconnected VoIP services," as defined by the Commission,[119] to contribute to the federal USF under the existing contribution methodology on an interim basis.[120] As described above, the number of VoIP subscribers in the United States has grown significantly in recent years, and we expect that trend to continue.[121] At the same time, the USF contribution base has been shrinking, and the contribution factor has risen considerably as a result.[122] We therefore find that extending USF contribution obligations to providers of interconnected VoIP services is necessary at this time in order to respond to these growing pressures on the stability and sustainability of the Fund.[123]

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[116] For example, if a wireless provider uses a traffic study to determine its projected interstate revenues for its February 1, 2007, FCC Form 499-Q submission, the provider must submit the study to the Commission and to USAC no later than February 1, 2007.

Only mobile wireless providers that rely on traffic studies are required to submit those studies to the Commission and to USAC. Wireless providers that otherwise report actual interstate and international end-user revenues are not required to submit their data, but continue to be required to retain the data and to provide it upon request.

[117] *See Second Wireless Safe Harbor Order*, 17 FCC Rcd at 24967, para. 25.

[118] *See* CTIA Feb. 22, 2005 *Ex Parte* Letter, Attach. at 4 ("The FCC must vigorously enforce its contribution rules."); Letter from Paul W. Garnett, CTIA, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-45, at 2, filed June 7, 2006 ("The Commission also retains the option of auditing traffic studies."). We also note that corporate officers certifying the accuracy of their FCC Form 499 filings should note that filing inaccurate or untruthful information may lead to prosecution under the criminal provisions of Title 18 of the United States Code. *See* 47 C.F.R. § 54.711.

[119] 47 C.F.R. § 9.3. *See VoIP 911 Order*, 20 FCC Rcd at 10257-58, para. 24; *see also CALEA First Report and Order*, 20 FCC Rcd at 15008, para. 39.

[120] To the extent that the Commission adopts another contribution methodology in the future, we expect that interconnected VoIP providers, or the carriers providing VoIP providers their numbers, would be required to contribute under that methodology as well.

[121] *See supra* para. 19.

[122] *See supra* para. 18.

[123] *See* Letter from Jeanine A. Poltronieri, Vice President, Federal Regulatory, BellSouth, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-45, at 1 (filed June 2, 2006) ("[I]t is imperative that VoIP providers contribute to universal service support as soon as is practicable."). *But see* Letter from Staci L. Pies, President, Voice on the Net (VON) Coalition, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-45, WC Docket No. 04-36, at 1 (filed June 5, 2006) (opposing the adoption of an interim approach to USF contribution obligations for interconnected VoIP providers).

35. The Commission has not yet classified interconnected VoIP services as "telecommunications services" or "information services" under the definitions of the Act.[124] Again here, we do not classify these services. To the extent interconnected VoIP services are telecommunications services, they are of course subject to the mandatory contribution requirement of section 254(d).[125] Absent our final decision classifying interconnected VoIP services, we analyze the issues addressed in this Order under our permissive authority pursuant to section 254(d) and our Title I ancillary jurisdiction. Specifically, we find that interconnected VoIP providers are "providers of interstate telecommunications" under section 254(d), and we assert the Commission's permissive authority to require interconnected VoIP providers "to contribute to the preservation and advancement of universal service" because "the public interest so requires."[126] We also exercise our ancillary jurisdiction to extend contribution obligations to interconnected VoIP providers. We note that both Vonage and the VON Coalition have stated on the record in this proceeding their belief that interconnected VoIP providers should be required to contribute to the Fund, apparently conceding that the Commission has the authority to impose such a requirement.[127] Finally, we address implementation issues related to our requirement that interconnected VoIP providers contribute to the USF.

1. Scope

36. We extend universal service obligations to providers of interconnected VoIP services, as previously defined by the Commission. The Commission has defined "interconnected VoIP services" as those VoIP services that: (1) enable real-time, two-way voice communications; (2) require a broadband connection from the user's location; (3) require IP-compatible customer premises equipment; and (4) permit users to receive calls from *and* terminate calls to the PSTN.[128] We emphasize that interconnected VoIP service offers the *capability* for users to receive calls from and terminate calls to the PSTN; the obligations we establish apply to all VoIP communications made using an interconnected VoIP service, even those that do not involve the PSTN.[129] Furthermore, these obligations apply regardless of how the interconnected VoIP provider facilitates access to and from the PSTN, whether directly or by making arrangements with a third party. Finally, we recognize that the definition of interconnected VoIP services may need to expand as new VoIP services increasingly substitute for traditional phone service.[130]

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[124] *See IP-Enabled Services Notice*, 19 FCC Rcd at 4893-94, paras. 43-44.

[125] 47 U.S.C. § 254(d) ("Every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service."); *see also, e.g.*, Virginia Commission *IP-Enabled Services* Comments at 5 (asserting that VoIP is properly characterized as a telecommunications service).

[126] 47 U.S.C. § 254(d).

[127] *See* Letter from Staci L. Pies, President, VON Coalition, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-45, WC Docket No. 04-36, at 1 (filed June 14, 2006) (*VON Coalition June 14, 2006 Ex Parte Letter*) ("The VON Coalition agrees that applying USF contributions to Interconnected VoIP services is primarily a question of 'how' as opposed to 'if' or 'when.'"); Vonage June 14, 2006 *Ex Parte* Comments at 1 ("Vonage believes that VoIP providers, like itself, should pay into the federal Universal Service Fund ('USF'). Thus, Vonage supports the FCC's efforts to comprehensively reform the USF – and even its efforts to adopt interim measures that would include interconnected VoIP providers in the universal service contribution base.").

[128] *VoIP 911 Order*, 20 FCC Rcd at 10257-58, para. 24.

[129] *See id.* at 10257-58, para. 24; *see also CALEA First Report and Order*, 20 FCC Rcd at 15008, para. 39. To the extent that the Commission modifies its definition of interconnected VoIP in the future, we expect that the USF obligations we impose today would continue to apply.

[130] *VoIP 911 Order*, 20 FCC Rcd 10245, 10277, para. 58.

37. We believe that it is appropriate to require USF contributions from interconnected VoIP providers because this approach is consistent with important principles that the Commission has established in its implementation of section 254 of the Act. Specifically, the Commission has previously found it appropriate to extend universal service contribution obligations to classes of providers that benefit from universal service through their interconnection with the PSTN.[131] In addition, in the *Universal Service First Report and Order*, the Commission established competitive neutrality as a principle to guide the development of universal service policies.[132] As discussed in more detail below, we find that these two principles support our conclusion that extending universal service contribution obligations to this particular category of providers is in the public interest.

2. Authority

a. Permissive Authority Under Section 254(d)

38. Section 254(d) states that the Commission may require "[a]ny other provider of interstate telecommunications" to contribute to universal service, "if the public interest so requires."[133] Pursuant to the Act's definitions, a "provider of interstate telecommunications" provides "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[134] Unlike providers of interstate telecommunications services, however, providers of interstate telecommunications do not necessarily "offer" telecommunications "for a fee directly to the public."[135] The Commission has previously used this permissive authority to require private carriers and payphone aggregators to contribute to the Fund.[136] In the *IP-Enabled Services Notice*, the Commission sought comment on, among other things, its authority, including mandatory and permissive authority under section 254(d), to require universal service contributions by IP-enabled service providers.[137]

39. *Providers of Interstate Telecommunications.* We find that interconnected VoIP providers are "providers of interstate telecommunications" as required for the use of the permissive authority pursuant section 254(d). Specifically, using the Act's definitions, we find that interconnected VoIP providers "provide" "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[138]

40. First, we must consider whether interconnected VoIP providers "provide" telecommunications. Congress did not define the term "provide" or "provider," but the structure of the

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[131] *See, e.g.*, *Universal Service First Report and Order*, 12 FCC Rcd at 9184-85, para. 797 (finding it appropriate to require payphone aggregators to contribute to universal service support mechanisms because they interconnect with the PSTN).

[132] *Universal Service First Report and Order*, 12 FCC Rcd at 8801-03, paras. 46-52.

[133] 47 U.S.C. § 254(d).

[134] 47 U.S.C. § 153(43).

[135] 47 U.S.C. § 153(46).

[136] *Universal Service First Report and Order*, 12 FCC Rcd at 9183-86, paras. 794-800.

[137] *See IP-Enabled Services Notice*, 19 FCC Rcd at 4905, para. 63. In the *IP-Enabled Services Notice*, the Commission also asked commenters to address, among other things, the universal service contribution obligations of both facilities-based and non-facilities-based providers of IP-enabled services. *IP-Enabled Services Notice*, 19 FCC Rcd at 4905-08, paras. 63-66. In this Order, we do not distinguish between facilities-based interconnected VoIP providers and "over-the-top" interconnected VoIP providers. *SBC/AT&T Merger Order*, 20 FCC Rcd at 18337-38, para. 86 (describing facilities-based and over-the-top VoIP providers).

[138] 47 U.S.C. § 153(43).

Act informs us that "provide" is a different and more inclusive term than "offer."[139] It is settled law that the determination of what is "offered," under the Act's definitions, "turns on the nature of the functions the end user is offered."[140] Had Congress intended us to look at the same factors in analyzing our permissive authority under section 254(d), it would have referred to "other offerors of telecommunications." Because Congress used a different term – "providers" – we understand Congress to have meant something broader. Common definitions of the term "provide" suggest that we should consider the meaning of "provide" from a supply side, *i.e.*, from the provider's point of view. For example, Black's Law Dictionary defines "provide" to mean "[t]o make, procure, or furnish for future use, prepare. To supply; to afford; to contribute."[141] Transmission is an input into the finished service "offered" to the customer. But from the interconnected VoIP provider's point of view, we believe that the provider "provides" more than just a finished service. We believe that it is reasonable to conclude that a provider "furnishes" or "supplies" components of a service, in this case, transmission.

41. Second, we determine that interconnected VoIP providers provide "telecommunications." As the Commission has recognized, "the heart of 'telecommunications' is transmission."[142] The Commission has previously concluded that interconnected VoIP services involve "transmission of [voice] by aid of wire, cable, or other like connection" and/or "transmission by radio" of voice.[143] Indeed, by definition, interconnected VoIP services are those "permitting users to receive calls from and terminate calls to the PSTN."[144] To provide this capability, interconnected VoIP providers may rely on their own facilities or provide access to the PSTN through others. "Over the top" interconnected VoIP providers generally purchase access to the PSTN from a telecommunications carrier who accepts outgoing traffic from and delivers incoming traffic to the interconnected VoIP provider's media gateway.[145] The telecommunications carrier supplies transmission to or from the PSTN user, or transmits the communication to another carrier that can transmit the communication to the PSTN user. Facilities-based interconnected VoIP providers similarly enter into arrangements with telecommunications carriers to complete communications to and from the PSTN. The telecommunications carriers involved in originating or terminating a communication via the PSTN are by definition offering "telecommunications." Just as the Commission has previously found resellers to be supplying telecommunications to their customers even though they do not own or operate the transmission

[139] We acknowledge that in the past, the Commission has sometimes used the terms "offer" and "provide" interchangeably. *See, e.g.*, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, 11530, para. 59 (1998) ("A telecommunications service is a telecommunications service regardless of whether it is provided using wireline, wireless, cable, satellite, or some other infrastructure."). In those instances, however, the Commission was clearly discussing telecommunications services, and just as clearly did not intend to make any sort of statement about how the two terms should be interpreted relative to each other.

[140] *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4822-23, para. 38 (2002), *aff'd sub nom.* National Cable & Telecomms. Ass'n v. Brand X Internet Servs., 125 S. Ct. 2688, 2702-10 (2005).

[141] *Black's Law Dictionary* 1244 (6th ed. 1990); *see also American Heritage Dictionary of the English Language* 1411 (4th ed. 2000) (defining "provide" as, *inter alia*, "[t]o furnish; supply: and "[t]o make available; afford"); *Merriam Webster's Collegiate Dictionary* 940 (10th ed. 1996) (defining "provide" as, *inter alia*, "to supply or make available").

[142] *Pulver Order*, 19 FCC Rcd at 3312, para. 9.

[143] *VoIP 911 Order*, 20 FCC Rcd at 10261-62, para. 28.

[144] *Id.* at 10257-58, para. 24.

[145] *See, e.g.*, PointOne Comments, CC Docket No. 99-200, at 5 (filed Aug. 16, 2004) ("[M]any IP providers already connect to the PSTN through softswitch technology and the use of gateways . . . .").

facilities,[146] we find interconnected VoIP providers to be "providing" telecommunications regardless of whether they own or operate their own transmission facilities or they obtain transmission from third parties. In contrast to services that merely use the PSTN to supply a finished product to end users, interconnected VoIP supplies PSTN transmission *itself* to end users.[147]

42. Finally, the Commission previously determined that Vonage's interconnected VoIP service is a jurisdictionally mixed service in which part of the service is interstate in nature.[148] We believe that other interconnected VoIP services similarly are jurisdictionally mixed and thus are subject to USF contributions on interstate and international revenues. For these reasons, we conclude that interconnected VoIP providers are "providers of interstate telecommunications" under section 254(d).

43. *Public Interest.* Next, we must consider whether requiring interconnected VoIP providers to contribute to the USF is in the public interest. We conclude that it is.[149] The Commission has previously found it in the public interest to extend universal service contribution obligations to classes of providers that benefit from universal service through their interconnection with the PSTN.[150] We believe that providers of interconnected VoIP services similarly benefit from universal service because much of the appeal of their services to consumers derives from the ability to place calls to and receive calls from the PSTN, which is supported by universal service mechanisms.[151] As the Fifth Circuit explained, "Congress designed the universal service scheme to exact payments from those companies benefiting from the

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[146] *See Universal Service First Report and Order*, 12 FCC Rcd at 9179, para. 787 (identifying resellers as telecommunications carriers that provide interstate telecommunications services for purposes of section 254(d)).

[147] Moreover, interconnected VoIP services are not merely directory services that provide information to Internet users without providing transmission. Interconnected VoIP providers do more than just "use" some telecommunications to connect servers to the Internet. Rather, they self-provide or contract with underlying carriers or providers for transmission services, including interconnection with the PSTN. In this way, interconnected VoIP services are distinguished from services that do not supply connectivity to any PSTN user. *See Pulver Order*, 19 FCC Rcd at 3312, para. 9. For the reasons explained above, we disagree with the VON Coalition's assertion that interconnected VoIP providers do not provide telecommunications and that the use of permissive authority is therefore inappropriate. *See VON Coalition June 14, 2006 Ex Parte Letter* at 8.

[148] *See Vonage Order*, 19 FCC Rcd at 22413, para. 18 ("The nature of DigitalVoice precludes any suggestion that the service could be characterized as a purely intrastate service.").

[149] *See, e.g.*, BellSouth *IP-Enabled Services* Comments at 48-49; CWA *IP-Enabled Services* Comments at 17-18; NTCA *IP-Enabled Services* Comments at 9; SBC *IP-Enabled Services* Comments at 112-13 (all arguing that interconnected VoIP providers should be required to contribute to the USF).

[150] *See supra* n.131.

[151] *See, e.g.*, Minnesota Commission *IP-Enabled Services* Comments at 12; NASUCA *IP-Enabled Services* Comments at 69; Illinois Commission *IP-Enabled Services* Comments at 15; Texas Attorney General *IP-Enabled Services* Comments at 11 (all arguing that universal service obligations are appropriate for service providers who benefit from interconnection with the PSTN). VoIP service providers generally offer "in network" or "IP-to-IP" calls for free. *See, e.g.,* Yahoo! Inc., Voice, http://messenger.yahoo.com/feat_voice.php;_ylt=AmvWJkIiw 3XQ4TH8EsWFUgdwMMIF (visited Apr. 7, 2005) ("Free, Worldwide PC-to-PC Calls"). VoIP service providers are able to charge, however, for PSTN interconnection. *See, e.g.*, Vonage America Inc., Products and Service, http://www.vonage.com/products.php?lid=nav_products (visited Apr. 7, 2006); Skype Rates (Skype per-minute rates for calls to traditional landline and mobile phones). Indeed, PSTN interconnection is the primary, or sole, source of revenue for many VoIP service providers. *See, e.g.,* eBay Inc., SEC Form 10-K at 9-10 (filed Feb. 24, 2006), *available at* http://www.sec.gov/Archives/edgar/data/1065088/000095013406003678/f17187e10vk.htm ("Skype's premium offerings, which are currently Skype's primary source of revenue, provide Skype's users with low-cost connectivity to traditional fixed-line and mobile telephones."); Vonage Holdings Corp., SEC Form S-1 at 1 (filed Feb. 8, 2006), *available at* http://www.sec.gov/Archives/edgar/data/1272830/000104746906001567/ a2167036zs-1.htm.

provision of universal service."[152] Like other contributors to the Fund, interconnected VoIP providers are "dependent on the widespread telecommunications network for the maintenance and expansion of their business," and they "directly benefit[] from a larger and larger network."[153] It is therefore consistent with Commission precedent to impose obligations that correspond with the benefits of universal service that these providers already enjoy.

44. We also find that the principle of competitive neutrality supports our conclusion that we should require interconnected VoIP providers to contribute to the support mechanisms. Competitive neutrality means that "universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another."[154] As the Commission has noted, interconnected VoIP service "is increasingly used to replace analog voice service."[155] As the interconnected VoIP service industry continues to grow, and to attract subscribers who previously relied on traditional telephone service, it becomes increasingly inappropriate to exclude interconnected VoIP service providers from universal service contribution obligations.[156] Moreover, we do not want contribution obligations to shape decisions regarding the technology that interconnected VoIP providers use to offer voice services to customers or to create opportunities for regulatory arbitrage. The approach we adopt today reduces the possibility that carriers with universal service obligations will compete directly with providers without such obligations. We therefore find that the principle of competitive neutrality is served by extending universal service obligations to interconnected VoIP service providers.

45. Thus, based on the record before us, we find that interconnected VoIP providers, like telecommunications carriers, have built their businesses, or a part of their businesses, on access to the PSTN. For these reasons, we find that the public interest requires interconnected VoIP providers, as providers of interstate telecommunications, to contribute to the preservation and advancement of universal service in the same manner as carriers that provide interstate telecommunications services. Finally, we note that the inclusion of such providers as contributors to the support mechanisms will broaden the funding base, lessening contribution requirements on telecommunications carriers or any particular class of telecommunications providers.

b. Ancillary Jurisdiction

46. In addition to permissive authority under section 254(d), we exercise our ancillary jurisdiction under Title I of the Act to extend universal service contribution obligations to interconnected VoIP providers. We conclude that regardless of the statutory classification of these services, the Commission has ancillary jurisdiction to promote universal service by adopting universal service contribution rules for interconnected VoIP services, and commenters largely agree.[157] Ancillary

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[152] *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d at 428.

[153] *Id.* ("Paging carriers such as Celpage benefit from a larger and more universal public network system, because it increases the number of potential locations for paging use.").

[154] *Universal Service First Report and Order*, 12 FCC Rcd at 8801, para. 47.

[155] *CALEA First Report and Order*, 20 FCC Rcd at 15009-10, para. 42.

[156] *SBC/AT&T Merger Order*, 20 FCC Rcd at 18337, para. 85; *cf. Universal Service First Report and Order*, 12 FCC Rcd at 9184-85, para. 797 (finding that payphone aggregators should be required to contribute to universal service support mechanisms "because they directly compete with mandatory contributors to universal service").

[157] *See, e.g.*, AT&T *IP-Enabled Services* Comments at 39 n.28; AFB *IP-Enabled Services* Comments at 4-5; BellSouth *IP-Enabled Services* Comments at 23-24; Cisco *IP-Enabled Services* Comments at 15-16; Cox *IP-Enabled Services* Comments at 22-25; Global Crossing *IP-Enabled Services* Comments at 15-16; U.S. Conference of Catholic Bishops *IP-Enabled Services* Comments at 12-13. *But see, e.g.*, California PUC *IP-Enabled Services* Comments at 39-40; CompTel *IP-Enabled Services* Comments at 18-19; Covad *IP-Enabled Services* Comments at

(continued....)

jurisdiction may be employed, in the Commission's discretion, when Title I of the Act gives the Commission subject matter jurisdiction over the service to be regulated[158] and the assertion of jurisdiction is "reasonably ancillary to the effective performance of [its] various responsibilities."[159] Both predicates for ancillary jurisdiction are satisfied here.

47. First, as we concluded in the *VoIP 911 Order*, interconnected VoIP services fall within the subject matter jurisdiction granted to us in the Act.[160] Second, our analysis requires us to evaluate whether imposing universal service contribution obligations is reasonably ancillary to the effective performance of the Commission's various responsibilities. Based on the record in this matter, we find that section 254 and section 1 of the Act provide the requisite nexus.

48. Section 254 requires the Commission to establish "specific, predictable, and sufficient mechanisms . . . to preserve and advance universal service."[161] The Act requires telecommunications carriers to contribute to those mechanisms on a mandatory basis, and as discussed above, section 254(d) grants the Commission permissive authority to require other "providers of interstate telecommunications" to contribute.[162] As discussed above, we recognize that interconnected VoIP service "is increasingly used to replace analog voice service."[163] We expect that trend to continue. If we do not require interconnected VoIP providers to contribute, the revenue base that supports the Fund will continue to shrink, while these providers continue to benefit from their interconnection to the PSTN. We believe that this trend threatens the stability of the Fund and our action to extend contributions obligations to interconnected VoIP

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22-24 (all questioning whether the Commission can exercise its ancillary jurisdiction to regulate IP-enabled services).

[158] *See United States v. Southwestern Cable Co.*, 392 U.S. 157, 177-78 (1968) (*Southwestern Cable*). *Southwestern Cable*, the lead case on the ancillary jurisdiction doctrine, upheld certain regulations applied to cable television systems at a time before the Commission had an express congressional grant of regulatory authority over that medium. *See id.* at 170-71. In *Midwest Video I*, the Supreme Court expanded upon its holding in *Southwestern Cable*. The plurality stated that "the critical question in this case is whether the Commission has reasonably determined that its origination rule will 'further the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services.'" *United States v. Midwest Video Corp.*, 406 U.S. 649, 667-68 (1972) (*Midwest Video I*) (quoting *Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems; and Inquiry into the Development of Communications Technology and Services to Formulate Regulatory Policy and Rulemaking and/or Legislative Proposals*, Docket No. 18397, First Report and Order, 20 FCC 2d 201, 202 (1969) (*CATV First Report and Order*)). The Court later restricted the scope of *Midwest Video I* by finding that if the basis for jurisdiction over cable is that the authority is ancillary to the regulation of broadcasting, the cable regulation cannot be antithetical to a basic regulatory parameter established for broadcast. *See FCC v. Midwest Video Corp.*, 440 U.S. 689, 700 (1979) (*Midwest Video II*); *see also American Library Ass'n v. FCC*, No. 04-1037, slip op. (D.C. Cir. May 6, 2005) (holding that the Commission lacked authority to impose broadcast content redistribution rules on equipment manufacturers using ancillary jurisdiction because the equipment at issue was not subject to the Commission's subject matter jurisdiction over wire and radio communications).

[159] *Southwestern Cable*, 392 U.S. at 178.

[160] *See VoIP 911 Order*, 20 FCC Rcd at 10261-62, para. 28 ("[I]nterconnected VoIP services are covered by the statutory definitions of 'wire communication' and/or 'radio communication' because they involve 'transmission of [voice] by aid of wire, cable, or other like connection . . .' and/or 'transmission by radio . . .' of voice. Therefore, these services come within the scope of the Commission's subject matter jurisdiction granted in section 2(a) of the Act.'"). This determination has not been challenged in the pending appeal of the *VoIP 911 Order*. *See supra* n.57.

[161] 47 U.S.C. § 254(d).

[162] 47 U.S.C. § 254(b)(4), (d).

[163] *CALEA First Report and Order*, 20 FCC Rcd at 15009-10, para. 42.

providers is "reasonably ancillary to the effective performance of [our] responsibilities"[164] under section 254. Thus, we determine, as required, that the approach we adopt today "will 'further the achievement of long-established regulatory goals'"[165] to preserve and advance universal service through specific, predictable, and sufficient contribution mechanisms.

49. In addition, section 1 of the Act charges the Commission with responsibility to "make available, so far as possible, to all the people of the United States, . . . a rapid, efficient, Nation-wide, . . . wire and radio communication service with adequate facilities at reasonable charges."[166] In light of this statutory mandate, promoting universal service became one of the Commission's primary responsibilities under the Act even before Congress adopted section 254 in 1996. Before the 1996 Act, the Commission relied exclusively on its Title I ancillary jurisdiction to adopt regulations establishing a fund to further this statutory goal.[167] In *Rural Telephone Coalition v. FCC*, the United States Court of Appeals for the District of Columbia Circuit upheld the Commission's assertion of ancillary jurisdiction to establish a funding mechanism to support universal service in the absence of specific statutory authority as ancillary to its responsibilities under section 1 of the Act to "further the objective of making communications service available to all Americans at reasonable charges."[168] We conclude that as more consumers begin to rely on interconnected VoIP services for their communications needs, the action we take here ensures that the Commission continues to "further the achievement of long-established regulatory goals"[169] to "make available . . . communication service with adequate facilities at reasonable charges."[170] Thus, pursuant to our ancillary jurisdiction, we extend USF contribution obligations to providers of interconnected VoIP services.[171]

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[164] *Southwestern Cable*, 392 U.S. at 178.

[165] *Midwest Video I*, 406 U.S. at 667-68 (quoting *CATV First Report and Order*, 20 FCC 2d at 202).

[166] 47 U.S.C. § 151. Our actions today are not in conflict or otherwise inconsistent with any other provision of the Act. We acknowledge that section 230 of the Act provides that "[i]t is the policy of the United States – to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2). We do not, however, believe that this policy statement precludes us from adopting universal service contribution rules for interconnected VoIP providers here. We note that the Commission's discussion of section 230 in the *Vonage Order* as cautioning against regulation was limited to "traditional common carrier economic regulations." *Vonage Order*, 19 FCC Rcd at 22426, para. 35.

[167] *First Decision*, 96 FCC 2d at 795.

[168] *Rural Tel. Coalition v. FCC*, 838 F.2d 1307, 1315 (D.C. Cir. 1988).

[169] *Midwest Video I*, 406 U.S. at 667-68 (quoting *CATV First Report and Order*, 20 FCC 2d at 202).

[170] 47 U.S.C. § 151.

[171] We do not believe that the grant of permissive authority in section 254(d) precludes us from exercising our ancillary jurisdiction in the universal service context. As noted above, before Congress enacted section 254, the D.C. Circuit held that the Commission had ancillary jurisdiction to require universal service contributions. *See Rural Tel. Coalition v. FCC*, 838 F.2d at 1315; *see also NTCA June 14, 2006 Ex Parte Letter* at 5-6. Nothing in the legislative history, text, or structure of the 1996 Act suggests that Congress intended to strip the Commission of its ancillary authority over universal service obligations by adopting section 254. The statutory construction maxim of *expressio unius est exclusio alterius* – the mention of one thing implies the exclusion of another – does not require a different result. This maxim is non-binding and "is often misused." *Shook v. District of Columbia Fin. Responsibility & Management Assistance Auth.*, 132 F.3d 775, 782 (D.C. Cir. 1998). "The maxim's force in particular situations depends entirely on context, whether or not the draftsmen's mention of one thing, like a grant of authority, does really necessarily, or at least reasonably, imply the preclusion of alternatives." *Id.* Here, we believe that the relevant provision in section 254(d) was intended to confirm the Commission's authority to require providers of interstate telecommunications to make universal service contributions and not to limit the Commission's pre-existing authority to require others to make such contributions. *See, e.g.*, *Shook*, 132 F.3d at 782 (noting that Congress sometimes "drafts statutory provisions that appear preclusive of other unmentioned

(continued....)