

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

In the Matter of

)

WC Docket No. 06-122

)

Universal Service Contribution

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Methodology

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COMMENTS



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I. Introduction

On June 27, 2006, the Commission released a *Report and Order and Notice of Proposed Rulemaking* in its Universal Service Docket (“*VoIP/USF Order*”).¹ In the NPRM accompanying *the VoIP/USF Order*, the Commission asked whether interconnected VoIP providers could identify the amount of actual interstate and international telecommunications they provide.² Many ACA members offering VoIP report that they cannot.

The NPRM also asks whether the interim 64.9% safe harbor set in the *VoIP/USF Order* is appropriate for interconnected VoIP services. For ACA members offering VoIP, it is not.

In these comments, the American Cable Association (“ACA”) shows that the Commission set the safe harbor arbitrarily. In finding that VoIP services are “inherently interstate,” the Commission did not take into account that all VoIP is not alike. Interconnected VoIP services are used as a substantial replacement for local exchange services, and must be distinguished from peer-to-peer voice services like Skype and Free World Dialup. Accordingly, the presumed level of interstate usage for interconnected VoIP services is far too high. Instead, the appropriate safe harbor should be 12.8%, the most recent reported percentage of wireline interstate and international

¹ *In the Matter of Universal Service Contribution Methodology, Report and Order and Notice of Proposed Rulemaking*, 2006 WL 1765838 (rel. June 27, 2006).

² *Id.* at ¶ 69.

minutes.³ Alternatively, the Commission must lower the safe harbor for interconnected VoIP services to the same level as that for wireless providers (currently 37.1%).

As ACA explains below, setting the safe harbor for VoIP at an inappropriately high level will impede the deployment of competitive voice services and broadband in the smaller markets and rural areas served by ACA's members.

About ACA. ACA represents nearly 1,100 small and medium-sized cable companies that serve more than 8 million cable subscribers, primarily in smaller markets and rural areas. ACA member systems are located in all 50 states, and in virtually every congressional district. The companies range from family-run cable businesses serving a single town to multiple system operators that focus on serving smaller markets. More than half of ACA's members serve fewer than 1,000 subscribers. All ACA members face the challenges of upgrading and operating broadband networks in lower-density markets. ACA members are leading the market in providing competitive VoIP services to smaller-market and rural subscribers.

II. Currently, ACA's members cannot determine their actual amount of interstate/international usage.

Most, if not all, of the ACA members providing VoIP services use a third-party provider such as Level 3 or Net-2-Phone to interconnect to the PSTN. ACA members are therefore reliant on these third-party providers for data on their percentage of interstate/international usage. Many ACA members report that their underlying

³ See FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, *Trends in Telephone Service* (August 2003) ("*Trends in Telephone Report*") at Table 10.1 (most recent reported percentage of interstate Dial Equipment Minutes ("DEM") is 12.8% in 2001). See also *In the Matter of Federal-State Joint Board on Universal Service, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 13 FCC Rcd. 21,252 (1998) at ¶ 13 (setting the wireless safe harbor at 15% based on 1995 DEM).

providers are currently unable to provide them with accurate usage data. Because they cannot determine their actual amount of interstate/international usage, many of ACA's members must use the "safe harbor" when reporting this usage on their Form 499s. Accordingly, it is critical that this safe harbor be equitable and nondiscriminatory, as required by 47 USC § 254(b)(4) and (d). As ACA shows below, however, the 64.9% safe harbor set in the *VoIP/USF Order* is far too high.

III. The Commission's conclusion that interconnected VoIP services are "inherently interstate" was incorrect.

A. Commission precedent has established that interconnected VoIP services are a substitute for traditional local exchange service. In the *VoIP/USF Order*, the Commission relied on information provided by commenters like Skype and pulver.com that VoIP traffic is "inherently interstate."⁴ The Commission then stated, "VoIP services are often marketed as a substitute for wireline toll service. The percentage of interstate revenues reported to the Commission by wireline toll providers is 64.9 percent. We therefore find that establishing a safe harbor of 64.9 percent is reasonable for purposes of this interim action."⁵

This conclusion is incorrect. As the Commission has recognized, interconnected VoIP services are a substitute for POTS, not wireline toll services. In its recent *CALEA Order*,⁶ the Commission stated:

⁴ *VoIP/USF Order* at ¶ 53.

⁵ *Id.* (emphasis added).

⁶ *In the Matter of Communications Assistance for Law Enforcement Act and Broadband Access and Services, First Report and Order and Further Notice of Proposed Rulemaking*, 20 FCC Rcd. 14,989 (2005).

“[I]nterconnected VoIP satisfies the “replacement for a substantial portion of the local telephone exchange service” prong of the SRP because it replaces the legacy POTS service functionality of traditional local telephone exchange service. As we explained in the VoIP E911 Order, customers who purchase interconnected VoIP service receive a service that “enables a customer to do everything (or nearly everything) the customer could do using an analog telephone.” Indeed, the urgency with which the Commission recently addressed 911 requirements for interconnected VoIP was largely related to incidents where consumers had abandoned legacy POTS service in favor of interconnected VoIP.”⁷

Interconnected VoIP can't be a “replacement for a substantial portion of the local telephone exchange service” in the E911 and CALEA context, and an “inherently interstate” service in the USF context. In reaching its conclusion that interconnected VoIP services are “inherently interstate,” the Commission apparently failed to make a distinction between interconnected VoIP services, which functions as a replacement for POTS, and peer-to-peer VoIP services, which function as a replacement for toll services.

B. The Commission must distinguish interconnected VoIP services from peer-to-peer services. All VoIP services are not created equally. Peer-to-peer products like pulver.com's Free World Dialup and Skype are expressly marketed as a way to circumvent interstate and international toll charges. The trade name “Free World Dialup” illustrates the interstate/international character of these services. Similarly, Skype markets itself with a cartoon of a globe, and shows two computers at opposite sides of the globe. One has a voice bubble saying “Howdy,” and the other has a voice bubble containing Chinese characters. Next to the globe is this text: “With Skype you

⁷ *Id.* at ¶ 42 (emphasis added).

can talk to anyone, anywhere, for free. Forever.” The application is described as “a little program for making free calls over the internet to anyone else who also has Skype.”⁸

Conversely, interconnected VoIP services are marketed as, and function as, a substitute for POTS – they provide substantial *intrastate* services. For example, ACA member Wide Open West markets its interconnected VoIP services as follows:

“WOW! Phone service provides unlimited local and long distance calling to anyone in the United States. Now you can phone friends and family across the street or across the country, at any time of the day without having to worry about rate plans or watching your minutes. And with WOW! Phone, you can choose to keep your current phone number or receive a new one.”⁹

ACA member Wave Broadband markets its VoIP offering in this way: “Sounds, acts, and feels just like old-fashioned phone service—minus the domestic toll charges!”¹⁰

Contrast this with the Free World Dialup website, which contains this express disclaimer: “FWD is not a telephony replacement service and cannot be used for emergency dialing.”¹¹

C. The VoIP safe harbor should be set at 12.8%. The Commission has recognized that it cannot treat similarly situated contributors differently when determining an equitable and nondiscriminatory contribution methodology.¹²

⁸ See <http://www.skype.com/>, visited on August 3, 2006.

⁹ See <http://www1.wowway.com/wowstory.asp?id=1030>, visited on August 3, 2006 (emphasis added).

¹⁰ See <http://www.wavebroadband.com/art.php?id=phone>, visited on August 9, 2006 (emphasis added).

¹¹ See <http://www.freeworlddialup.com/learnmore/>, visited on August 3, 2006.

¹² *VoIP/USF Order* at ¶ 24.

Accordingly, the Commission must treat interconnected VoIP service like POTS and set the safe harbor at the level of interstate usage attributable to POTS: 12.8%.¹³

D. Alternatively, the Commission should adopt the same safe harbor as for wireless. If the Commission does not adopt 12.8% as the safe harbor, it should, at a minimum, lower the safe harbor to the same level as that for wireless services. As with VoIP, the Commission has found that wireless service is a substitute for POTS.¹⁴ The VoIP/USF Order provides no reasonable basis for attributing a higher amount of interstate revenue to interconnected VoIP services than wireless services.

IV. If the safe harbor for interconnected VoIP services is not lowered, it will impede the deployment of competitive voice services in smaller and rural markets.

ACA's members are leading the industry in providing competitive voice services to smaller and rural markets – virtually all of ACA's 30 largest members already provide VoIP services to their smaller-market customers. For example, Armstrong Utilities, Inc. serves Marshallville, OH (population 826) and East Brady, PA (population 1038). Buckeye CableSystem provides VoIP services to Harbor View, OH (population 99). Millennium Digital Media provides VoIP services to Clarksville, MI (population 317) and

¹³ See note 3, supra. Wireline interstate minutes are a more accurate proxy for VoIP interstate usage than wireline interstate revenues. This is because wireline interstate revenues are skewed upward by the higher cost of wireline toll calls, so wireline interstate revenue does not reflect actual interstate usage. Conversely, VoIP services are generally sold for a single price, with no price distinction made between local and interstate services. Accordingly, wireline interstate minutes are a more accurate method for extrapolating VoIP interstate revenues. In the wireless context, the FCC has used MOUs as a proxy for wireless revenues. See VoIP/USF Order at ¶ 25; *In the Matter of Federal-State Joint Board on Universal Service, Report and Order and Second Further Notice of Proposed Rulemaking*, 17 FCC Rcd. 24,952 (2002) (“2002 Report and Order”) at ¶ 22.

¹⁴ 2002 Report and Order at ¶ 21 (noting the “increased substitution of wireless for traditional wireline service”).

Dansville, MI (population 432). Atlantic Broadband provides VoIP services to Warriors Mark, PA (population 1,635) and Bellwood, PA (population 2,016). These tiny towns are seeing competition in voice services for the very first time. But the 64.9% safe harbor may put a stop to competition in both VoIP and broadband Internet services in these small markets.

The artificially high 64.9% safe harbor raises the cost of providing VoIP services in small and rural areas, and makes VoIP services less competitive with traditional wireline services. ACA's members report that the decision to deploy broadband in a small or rural market is often driven by whether VoIP services will be competitive in that market. As a result, the 64.9% safe harbor will slow the deployment of VoIP and broadband in these markets.

V. Conclusion

Many ACA members providing VoIP are currently unable to determine their actual amount of interstate and international traffic and therefore must use the safe harbor to determine their contributions to the USF. The safe harbor, however, is inappropriately high. The safe harbor violates the Commission's mandate under 47 USC § 254(b)(4) and (d) to establish equitable and non-discriminatory contributions to the USF, and will hobble the deployment of VoIP and broadband in smaller and rural markets. Accordingly, the Commission must set the safe harbor for interconnected VoIP services at 12.8%, the level of interstate minutes attributed to wireline carriers. Alternatively, the Commission must set the safe harbor for interconnected VoIP providers at the same level set for wireless providers.

Respectfully submitted,

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