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Federal Communications Commission
Office of Secretary

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
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Petition for Declaratory Ruling of CTIA-The Wireless Association® on Universal Service Contribution Obligations	)	File No. _____
	)	
	)	

To: The Commission

PETITION FOR DECLARATORY RULING OF CTIA-THE WIRELESS ASSOCIATION® ON UNIVERSAL SERVICE CONTRIBUTION OBLIGATIONS

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SUMMARY

CTIA and its member companies support the goals of universal service, and recognize their contribution obligations. Indeed, the wireless industry is a substantial and growing contributor to the universal service fund. In order to contribute accurately and fairly, however, wireless carriers seek clarity from the Commission's contribution rules.

The Commission's recent Order appears to raise questions regarding wireless carriers' reporting of toll revenues. In light of those questions, CTIA offers this Petition as a vehicle for the Commission to clarify: (1) the definition of toll revenues in the wireless context, so wireless carriers can properly report revenue as toll, and (2) the rules for allocating toll revenues to the interstate and international jurisdiction. CTIA also seeks clarification on the use of traffic studies as a means of reporting "actual" interstate and international revenues.

Wireless carriers have reported their revenues in good faith reliance on prior Commission Orders on universal service contribution methodology issues. Specifically, many wireless carriers have used either company-specific traffic studies or the Commission's safe harbor percentage to allocate their toll revenues. CTIA requests a declaratory ruling that such allocation was reasonable in prior periods, along with clarification of how the Commission expects carriers to define and allocate toll revenues in future reporting. Retroactive application of such clarifications would be unjust and unreasonable under the relevant balancing test. Similarly, retroactive application of the new traffic study requirements adopted in the recent order would be impermissible retroactive rulemaking.

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CTIA—The Wireless Association® ("CTIA"), on behalf of itself and its Commercial Mobile Radio Service ("CMRS") carrier members and pursuant to section 1.2 of the Commission's Rules, respectfully requests a declaratory ruling regarding a number of universal service contribution issues arising out of the recent *2006 Contribution Order*[1] and previous Commission and Bureau-level orders. The wireless industry supports the goals of universal service[2] and acknowledges its obligation to contribute to the universal service mechanisms. The wireless industry is a significant and growing contributor to the universal service fund, and will likely contribute over $2.5 billion to the federal universal service mechanisms in the next year. This amount will only grow over time as the size of the universal service fund grows and as wireless industry subscribership and revenues increase.

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[1] *Universal Service Contribution Methodology, et al.*, WC Docket Nos. 06-122 et al., Report and Order and Notice of Proposed Rulemaking, FCC 06-94 (rel. June 27, 2006) (*"2006 Contribution Order"*).

[2] CTIA and its members also support the Commission's efforts in the areas of local number portability, numbering, and Telecommunications Relay Service ("TRS") administration. Contributions to these funds are based on the same reporting as the universal service fund. Throughout this pleading, references to the universal service fund include references to the other funds as appropriate.

In light of the wireless industry's increasing universal service fund contributions, CTIA specifically requests a declaratory ruling: (1) stating that the definition of "toll service charges" for wireless carriers in paragraph 29 of the *2006 Contribution Order* is the comprehensive definition going forward; (2) clarifying how wireless carriers may allocate toll service revenues to the interstate and international jurisdiction; (3) confirming CTIA's current understanding of the connection between reporting "actual" interstate and international revenues and reporting based on a traffic study; and (4) making clear that no new requirements issued in response to this petition or in another Commission action, nor the new traffic study accuracy requirements set forth in the *2006 Contribution Order*, will be applied retroactively prior to the effective date of the order adopting the relevant requirement.

I. BACKGROUND

The wireless industry's $2.5 billion contribution figure as a whole amounts to a substantial contribution from each individual wireless telecommunications carrier. The contribution factor currently stands at 10.5% of interstate end-user telecommunications revenues.[3] Monthly bills for universal service, TRS, NANPA, and LNP contributions represent a significant portion of each customer's bill, and relatively small changes in contribution requirements can result in significant changes in contribution amounts expressed in dollar terms. At the same time, the Commission has made clear that it will impose significant forfeitures and penalties on carriers that shirk their reporting and contribution obligations.[4]

In order for wireless carriers to contribute correctly and fairly to the fund, it is important that the contribution rules be clear. As described in more detail below, the Commission's prior

[3] *Proposed Third Quarter 2006 Universal Service Contribution Factor*, CC Docket No. 96-45, Public Notice, DA 06-1252 (rel. June 9, 2006).

[4] *See, e.g., OCMC, Inc.*, Notice of Apparent Liability for Forfeiture, 20 FCC Rcd 14160 (2005) (finding a carrier apparently liable for a forfeiture of over $1.1 million for failure to report and contribute properly to universal service).

contribution Orders unequivocally indicated that wireless carriers could allocate their toll revenues using the safe harbor or a company-specific traffic study. The *2006 Contribution Order*, however, appears to raise new questions about the allocation of toll revenues, and clearly establishes stringent new standards for traffic study accuracy. Because of the high stakes in play in universal service reporting, it is important that the Commission clarify its expectations going forward, and put to rest concerns that its new requirements in each of these areas might be applied retroactively, upsetting carriers' reasonable reliance on the Commission's prior orders. These issues all appropriately can be addressed in a declaratory ruling, and CTIA requests that the Commission do so without delay.

II. THE COMMISSION SHOULD CLARIFY WIRELESS CARRIERS' OBLIGATIONS WITH RESPECT TO TOLL REVENUE REPORTING

A. The Commission Should Clarify the Definition of Toll Revenue in the Wireless Context

Until the *2006 Contribution Order*, the Commission had never defined toll revenues for wireless carriers in any of its Orders. The instructions to the reporting worksheet have defined toll services as telecommunications services "that enable customers to communicate outside of local exchange calling areas."[5] It is unclear, however, how this definition applies in the wireless context. The "local exchange" is generally an element of wireline LECs' networks; it is not generally used by wireless carriers with respect to their end-user billing. Throughout the years that the Commission has required universal service revenue reporting, wireless carriers' calling plans have generally included packages of minutes that could be used for calling within an area substantially larger than ILECs' local exchanges – often an entire state or a group of contiguous states. Today, wireless carriers increasingly sell nationwide plans that allow customers to use a package of minutes for calls anywhere within the United States (but often continue to have

[5] *See, e.g.*, FCC Form 499-A (2006) Instructions at 23.

customers on legacy plans with a variety of other calling options). Wireless carriers typically bill overage charges when customers exceed their monthly minute allowance, and may assess roaming charges when customers leave their home calling area or the provider's home network.

Thus, wireless carriers' rate structures make it difficult to apply the Instructions' "toll services" definition in a meaningful way. At the same time, the Commission has always provided a "Mobile Services" revenue category which includes "roaming charges assessed on customers for calls placed out of customers' home areas," but excludes toll charges (whatever those may be).[6]

Armed with only this limited direction, wireless carriers have made good-faith decisions over the last nine years about whether revenue should be reported in the toll category.[7]

The *2006 Contribution Order* engages in the first effort in a Commission universal service contribution Order to define "toll" traffic, and the first effort anywhere to define it in the CMRS context. The Order explains:

> Toll services are telecommunications services that enable customers to communicate outside of their local exchange calling areas. 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.[8]

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[6] *Id.* at 22-23.

[7] The classification of revenue as toll, taken alone, has no impact on carriers' contribution obligations. End user telecommunications revenue from toll, mobile services, and the other categories on the Form all are included in the contribution base. The classification is only significant if carriers must jurisdictionally allocate toll revenues differently than other end-user telecommunications revenues. *See infra* Section II.B.

[8] *2006 Contribution Order* at ¶ 29.

The Order thus suggests that toll charges, in the wireless context, are additional charges for "long distance" calls (that is, calls outside of the customer's home calling area, as defined in the customer's plan), distinct from any itemized airtime charges that may apply and also distinct from roaming (whether on-network or off-network). Because the Order says, however, that for "some" wireless telephony providers, toll service revenues "include" such charges, the Order did not specify whether these charges constituted the full extent of wireless toll revenues for revenue-reporting purposes.

Unlike the definition in the Instructions, this definition of toll revenue takes account of the differences in wireless calling scope and service plans. Going forward,[9] CTIA is requesting that the Commission clarify that it intends for wireless carriers to apply a definition consistent with the discussion in paragraph 29 of the *2006 Contribution Order* to determine revenues that should be classified as "toll" for purposes of their revenue reporting. CTIA also requests that the Commission further clarify that revenue meeting this definition is the *only* revenue that wireless carriers must report in the "toll" category. Specifically, CTIA asks the Commission to clarify that only "additional toll charge[s] that appl[y] only to long distance calls" are subject to reporting as "toll" revenues, and that wireless toll revenues do *not* include either (1) any revenues associated with "plans that give [users] fixed amounts of minutes which can be used either for local or long distance service" or (2) any per-minute air time charge "that is the same for local and long distance calls."

B. The Commission Should Clarify How Wireless Carriers Must Allocate Toll Revenue to the Interstate and International Jurisdiction

The Commission has long recognized that wireless carriers' technology, business models, and pricing structures make it difficult or impossible to jurisdictionally classify much of their

[9] The Commission also should clarify that it will not apply this new definition retroactively. *See infra* Section IV.

revenue. To address this problem, the Commission has provided "safe harbor" percentages that wireless carriers may use to allocate their revenues, and also has permitted wireless carriers to rely on traffic studies to report good-faith estimates of their "actual" interstate and international revenues.[10] The Commission's Orders consistently have indicated that both of these methods were applicable to *all* of wireless carriers' revenue, including toll revenue.

In 1998, the Commission stated that it was adopting "a safe harbor percentage of interstate revenues for cellular and broadband PCS providers of 15 percent of their *total* cellular and broadband PCS telecommunications revenues."[11] The allocation problems cited by the Commission in adopting the safe harbor apply to *any* type of CMRS traffic, including what might otherwise be deemed "toll":

> [CMRS] providers maintained that they operate without regard to state boundaries in that their service areas, and areas served by a particular antenna, do not correspond to state boundaries.... CMRS providers explained that because they often use a single switch to serve areas located in more than one state, calls originating and terminating in one state may be transported to a switch in another state. These providers suggested that the mobile nature of CMRS makes it difficult to determine whether the calls made by their customers should be classified as interstate or intrastate. Even if they were able to identify the jurisdictional nature of each call, CMRS providers noted that the jurisdictional nature of the call could change during the course of the call.[12]

When it sought comment on changing the safe harbor or the contribution methodology more generally in 2001, the Commission again noted that "[i]nstead of reporting their actual

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[10] *Federal-State Joint Board on Universal Service*, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 21252 (1998) ("*1998 Safe Harbor Order*"); *Federal-State Joint Board on Universal Service, et al.*, Report and Order and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 24952 (2002) ("*2002 Contribution Order*"); *2006 Contribution Order*. *See also Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service*, Order on Reconsideration, 12 FCC Rcd 12444 (1997) ("*NECA II Order*").

[11] *1998 Safe Harbor Order*, 13 FCC Rcd at 21258-59 ¶ 13 (emphasis added). The safe harbor percentage has been changed in the ensuing years.

[12] *Id.* at 21255-56 ¶ 6 (internal citations omitted).

interstate and international end-user telecommunications revenues, wireless carriers may simply report a fixed percentage of revenues, which ranges from one to 15 percent."[13]

When it increased the safe harbor to 28.5% in 2002, the Commission reiterated that "[m]obile wireless providers availing themselves of the revised interim safe harbor will be required to report 28.5 percent *of their telecommunications revenues* as interstate."[14] The *2002 Contribution Order* also imposed restrictions on end-user recovery of USF contributions, establishing a maximum permissible line item equal to the "interstate telecommunications portion of the bill times the relevant contribution factor."[15] The Commission stated that, for "CMRS providers, the portion of the total bill that is deemed interstate will depend on whether the carrier reports actual revenues or utilizes the safe harbor. For wireless telecommunications providers that avail themselves of the interim safe harbors, the interstate telecommunications portion of the bill would equal the relevant safe harbor percentage times the *total* amount of telecommunications charges on the bill."[16]

Just three months later, the Commission rejected claims by IXCs that, under the new recovery restrictions, CMRS carriers using traffic studies instead of the safe harbor would be required to compute the amount of interstate and international traffic *on each bill* in order to compute their maximum permissible USF line items.[17] The Commission stated that it "did not intend to preclude wireless telecommunications providers from continuing to recover contribution costs in a manner that is consistent with the way in which companies report

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[13] *Federal-State Joint Board on Universal Service, et al.*, Notice of Proposed Rulemaking, 16 FCC Rcd 9892, 9899 ¶ 11 (2001) (emphasis added).
[14] *2002 Contribution Order*, 17 FCC Rcd at 24966 ¶ 24 (emphasis added).
[15] *Id.* at 24978-79 ¶ 51 & n.131.
[16] *Id.* at 24978 n.131 (emphasis added).
[17] *Federal-State Joint Board on Universal Service, et al.*, Order and Order on Reconsideration, 18 FCC Rcd 1421 (2003) ("*2003 Reconsideration Order*").

revenues to USAC."[18] Accordingly, the Commission clarified that the "interstate telecommunications portion of each customer's bill would equal the company-specific percentage based on its traffic study times the *total* telecommunications charges on the bill."[19] If, as the Commission noted, this recovery is "consistent with the way in which companies report revenues to USAC," then it follows that carriers relying on traffic studies could properly allocate *all* of their telecommunications revenues, including their toll revenues, using their traffic studies. As noted above, safe-harbor carriers clearly could use the safe harbor for the same purpose.[20]

In 2005, the Wireline Competition Bureau stated that the Commission's rules "permit those utilizing the safe harbor procedure to report as interstate, for contribution purposes, 28.5 percent of their *total end user telecommunications revenues* ...."[21] Finally, the *2006 Contribution Order* itself states: "mobile wireless providers that choose to use the revised interim safe harbor must report 37.1 percent *of their telecommunications revenues* as interstate."[22]

Many wireless carriers reasonably relied on these clear statements in Commission Orders, and used either the safe harbors or their company-specific traffic studies, as applicable, to allocate all of their revenues, including their toll revenues.

The instructions to the original USF reporting form, FCC Form 457, were silent with regard to the methodology for carriers' allocation of revenue to the interstate and international jurisdiction. The *Consolidated Reporting Order,* which adopted the new Form 499 for reporting

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[18] *Id.* at 1425 ¶ 8.
[19] *Id.* (emphasis added).
[20] *Id.* at n.26. *See also 2002 Contribution Order,* 17 FCC Rcd at 24978 n.131.
[21] *Federal-State Joint Board on Universal Service, Access Charge Reform, Petition for Reconsideration and Clarification of the Fifth Circuit Remand Order of BellSouth Corporation,* 20 FCC Rcd 13779, 13782 ¶ 8 (WCB 2005) (emphasis added).
[22] *2006 Contribution Order* at ¶ 27 (emphasis added).

beginning in 2000, expressly disavowed any intent to modify substantive contribution obligations.[23] Nevertheless, the new worksheet instructions included language that was curious in light of the clear language in the Orders regarding use of the factors for jurisdictional allocation. In 2000 and 2001, the Form 499 Instructions stated that the safe harbor was available for "revenues associated with Line (309), Line (409) and Line (410)."[24] Those lines include mobile services revenue but exclude toll revenues. The 2000-2001 Instructions did not, however, explicitly preclude the use of the safe harbor as the basis for a "good faith estimate" to allocate revenues reported in the toll category (to the extent a wireless carrier was able to identify revenues as such). The Instructions did not speak to traffic studies.

The 2002 Instructions, like every iteration since then, took an even firmer line (inconsistent with relevant Commission Orders), stating:

> These safe harbor percentages may not be applied to ... toll service charges. ***All filers* must report the actual amount of interstate and international revenues for these services.** For example, toll charges for itemized calls appearing on mobile telephone customer bills should be reported as intrastate, interstate or international based on the origination and termination points of the calls.[25]

Although the highlighted sentence refers to "**all filers**," this passage appears in a section of the Instructions discussing the safe harbors, not traffic study filers. Therefore, a fair reading of the section would be that it is limited to safe harbor users. At a minimum, the admonition in bold type that **"all filers"** must report the actual jurisdictional allocation of toll revenues is unclear. To read this section otherwise would be in sharp contrast to the Commission's concurrent clear statements in the Orders, as discussed above.

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[23] *1998 Biennial Regulatory Review -- Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Services, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms*, Report and Order, 14 FCC Rcd 16602, 16614-17 ¶¶ 23-28 (1999) ("*Consolidated Reporting Order*").

[24] *See, e.g.*, 2000 Instructions at 15.

[25] *See, e.g.*, 2003 Instructions at 18 (**bold in original**; emphasis added).

Although the Commission has delegated authority to the Wireline Competition Bureau over ministerial changes to the Reporting Worksheet, that authority "extend[s] to *administrative* aspects of the requirements, e.g., where and when worksheets are filed, incorporating edits to reflect Commission changes to the substance of the mechanisms, and other similar details."[26] The delegation of authority does not extend to the substance of the underlying contribution obligations.[27]

CTIA and its member companies have been diligent in bringing these issues to the Commission's attention, holding a number of ex parte meetings with Commission staff urging the Commission to clarify both the definition of toll revenues in the CMRS context and the method for CMRS carriers to allocate their toll revenues to the interstate and international jurisdiction.[28] It is CTIA's understanding that individual member companies also have raised these issues before the Commission in response to audits of their revenue reporting.

The *2006 Contribution Order* is the first time that the Commission has raised specific issues regarding wireless carriers' toll revenue reporting in the text of an Order. In it, the Commission felt the need:

> [T]o address concerns that wireless telephony providers who report actual interstate revenues may not be doing so accurately.... 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

[26] *Consolidated Reporting Order,* 14 FCC Rcd at 16621 ¶ 38 (emphasis added).

[27] Likewise, in the absence of Commission rules on point, the opinions of individual staff members as to wireless carrier revenue reporting obligations, while often helpful, do not represent binding legal authority. *See generally Heintz v. Jenkins*, 514 U.S. 291, 298 (1995) (declining to accord weight to Federal Trade Commission staff commentary); *Vietnam Veterans of Am. v. Secretary of the Navy*, 843 F.2d 528, 539 (D.C. Cir. 1988) (where agency indicated no intent to bind itself by staff memorandum, document was not binding).

[28] *See, e.g.*, CTIA *ex parte* letter dated July 14, 2004 (CC Docket No. 96-45); CTIA *ex parte* letter dated May 19, 2004 (CC Docket No. 96-45) (collectively, "*CTIA Ex Parte Filings*"). Cingular also brought this matter to the Commission's attention earlier this year.

> 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. [The footnote at this point in the Order references the Instructions to FCC Form 499-A.] ... Commission staff analysis, however, raises the concern that some filers are not reporting their separately stated toll revenues correctly.[29]

The Order goes on to compare toll revenue reported by wireless carriers on Form 499-A to Census Bureau estimates and other data sources (without discussing whether the other data sources seek the same type of data as FCC Form 499-A or define terms consistently), and concludes that "additional steps" are needed "to ensure the accuracy of reported revenue data."[30] On that basis, the Commission requires wireless carriers relying on traffic studies to submit them to the Commission and USAC for review.[31] The *2006 Contribution Order* also increases the wireless safe harbor percentage to 37.1%,[32] but does not discuss toll revenue reporting in the context of the safe harbor.

The *2006 Contribution Order*, and particularly the citation to the Instructions in the midst of a discussion suggesting that some wireless carriers may not be reporting toll revenues accurately, creates uncertainty for carriers going forward. The Commission has not expressly repudiated its prior clear statements allowing the use of either the safe harbor or a traffic study, as applicable, to allocate *all* end-user telecommunications revenues, including toll revenues, to the interstate and international jurisdiction, nor has it provided any explicit guidance regarding such allocation issues. Thus, wireless carriers may reasonably conclude that no changes to their Form 499 allocation practices are needed. CTIA therefore has filed this Petition seeking that the

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[29] *2006 Contribution Order* at ¶ 29. The Commission's choice not to define "toll service" charges apparently was not considered as a more plausible explanation for these discrepancies.
[30] *Id.* at ¶ 32.
[31] *Id.*
[32] *Id.* at ¶¶ 25-28.

Commission clarify, going forward,[33] how it expects wireless carriers to allocate their toll revenues to the interstate and international jurisdiction.

III. TRAFFIC STUDIES ARE ONE WAY OF REPORTING ACTUAL INTERSTATE AND INTERNATIONAL REVENUES

In its prior Orders, the Commission generally has permitted CMRS carriers that do not utilize the safe harbor percentages to report "their *actual* interstate telecommunications revenues either *through a company-specific traffic study* or some other means."[34] Thus, traffic studies are one way of reporting "actual" interstate and international revenues. Carriers have always been subject to a "good-faith" standard in submitting actual revenue data, and the Commission has always required carriers relying on traffic studies to retain documentation of their traffic study methodology.[35] In the notice of proposed rulemaking attached to the *2002 Contribution Order*, the Commission sought comment on how wireless carriers should conduct traffic studies, including assumptions and other methodological considerations.[36]

In the *2006 Contribution Order*, however, the Commission imposed a new requirement that carriers relying on traffic studies must submit them to the Commission and to USAC for review.[37] Wireless carriers must submit their traffic studies "no later than the deadline for

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[33] The Commission also should clarify that, as stated in prior Commission Orders, wireless carriers may appropriately have allocated *all* of their revenues, including toll revenues, using the safe harbor or a traffic study. *See infra* Section IV.

[34] *2003 Reconsideration Order*, 18 FCC Rcd at 1423 ¶ 4 (emphasis added), *citing 2002 Contribution Order*, 17 FCC Rcd at 24966 ¶¶ 22, 24.

[35] *See, e.g., 1998 Safe Harbor Order*, 13 FCC Rcd at 21257 ¶ 11 (*citing NECA II Order*, 12 FCC Rcd at 12453 ¶ 21); *2002 Contribution Order*, 17 FCC Rcd at 24966 ¶ 24 ("mobile wireless providers must provide documentation to support the reporting of actual interstate telecommunications revenues upon request").

[36] *2002 Contribution Order*, 17 FCC Rcd at 24985 ¶ 68.

[37] *2006 Contribution Order* at ¶ 32.

submitting the FCC Form 499-Q for the same time period."[38] The *2006 Contribution Order* further specified in a footnote that:

> 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.[39]

These filing requirements and methodological and accuracy standards were new requirements that did not exist prior to the *2006 Contribution Order*.

Footnote 116 to the *2006 Contribution Order* states:

> 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.[40]

As originally released on June 27, 2006, the *2006 Contribution Order* included draft revisions to the Instructions to Forms 499-A and 499-Q that would have required carriers submitting traffic studies to include all of the data employed in them, but those provisions were removed in Errata released July 10 and July 18, 2006. It appears, therefore, that the reference in footnote 116 to the

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[38] *Id.*

[39] *2006 Contribution Order* at n.115.

[40] *2006 Contribution Order* at n.116.

submission of data referred to the earlier instruction in this regard, and is no longer relevant to the Order as corrected.

In light of the foregoing, CTIA requests that the Commission, in its declaratory ruling, clarify that: (1) Traffic studies are one method that CMRS carriers may use to submit good faith estimates of their actual interstate and international revenues, and there may also be other methods. (2) CMRS carriers relying on traffic studies in their reporting must submit their traffic studies to the FCC and to USAC by the Form 499-Q filing deadline for the same time period; and (3) No CMRS carriers submitting actual revenue information, whether relying on traffic studies or some other method, must submit underlying data to the Commission or USAC unless requested to do so, such as in the context of an audit.

IV. ANY NEW REQUIREMENTS ARISING OUT OF THE *2006 CONTRIBUTION ORDER* OR THE FCC'S CLARIFICATIONS OF IT SHOULD APPLY ONLY PROSPECTIVELY

In responding to this Petition, the Commission may provide new guidance going forward with regard to how wireless carriers classify and allocate toll revenues. Unquestionably, the Commission has imposed new requirements in the *2006 Contribution Order* on CMRS carriers that rely on traffic studies to submit those studies and conform their studies to new methodological and accuracy requirements. It is also possible that the Commission intended to make other changes but did not say so explicitly and may clarify the nature of such requirements in response to this Petition or in some other context. CTIA respectfully asks the Commission to make clear that none of these requirements will be applied retroactively to carriers' revenue reports in periods prior to the Commission's clarification of these issues (with respect to the toll revenues issues) and prior to the *2006 Contribution Order* (with respect to the new traffic study accuracy requirements).

With respect to any new rules adopted in the *2006 Contribution Order,* the Commission is, of course, prohibited from applying them retroactively.[41] With respect to any new clarifications made in response to this Petition or in any other adjudicatory context, such as Commission review of a USAC audit of a CMRS carrier's revenue reporting, retroactive application would be unlawful under the relevant balancing test. As the Commission has noted:

> The D.C. Circuit has enunciated a non-exhaustive list of five factors to consider when determining whether retroactive application of an adjudicatory decision is appropriate. Those factors are:
>
> > (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.
>
> Ultimately, these factors "boil down ... to a question of concerns grounded in notions of equity and fairness."[42]

It would be inequitable and unfair to apply any new standards and interpretations arising in the adjudicatory context, as described in more detail below, to carriers' prior revenue reporting and traffic studies.

A. Toll Revenue Definition and Allocation

As the discussion above demonstrates, wireless carriers have had to make their best guesses in the face of regulatory uncertainty about how to define toll revenues,[43] and have reasonably relied upon the Commission's prior clear statements that they may use either the safe

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[41] *See, e.g., Bowen v. Georgetown University Hosp.,* 488 U.S. 204 (1988).

[42] *Regulation of Prepaid Calling Card Services,* Declaratory Ruling and Report and Order, FCC 06-79 (rel. June 30, 2006) at ¶ 42 *("Second Calling Card Order") (citing Clark-Colwitz Joint Operating Agency v. FERC,* 826 F.2d 1074, 1081-82 & n.6 (D.C. Cir. 1987)).

[43] *See supra* Section II.A.

harbor or their traffic studies to allocate *all* of their telecommunications revenues, including toll revenues.[44]

Indeed, the Commission's direction with respect to the *allocation* of revenues was clear: CMRS carriers relying on the safe harbor *or* traffic studies could apply the relevant factors to *all* of their telecommunications revenues, including their toll revenues. In light of the puzzling discussion of wireless carriers' toll revenue reporting in the *2006 Contribution Order*,[45] including its citation to the contrary language in the Instructions, however, the Commission should acknowledge its prior clear statements, and so clarify in a declaratory ruling.

It would be grossly inequitable and unjust to apply any new direction on toll revenue reporting retroactively. Wireless carriers' practice of applying the safe harbor or traffic studies to *all* of their revenues is supported by Commission Orders. Any change thus would represent an abrupt departure from well established practice, and upset substantial reliance interests. Perhaps most importantly, retroactive application of different toll revenue allocation requirements would impose a substantial burden on carriers that reported their revenues in reliance on the Commission's Orders, potentially subjecting them to contribution obligations for prior periods which they may be unable to recover from their customers, given the Commission's restrictions on USF line items.[46] Nor is there any substantial statutory interest in applying a new standard retroactively despite CMRS carriers' reliance on the prior Orders – the purposes of Section 254 have been achieved and sufficient support was collected from wireless carriers in all prior periods.[47]

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[44] *See supra* Section II.B.

[45] *2006 Contribution Order* at ¶¶ 29-31.

[46] The Commission's rules preclude USF line items that "exceed the interstate telecommunications portion of that customer's bill times the relevant contribution factor." 47 C.F.R. § 54.712(a).

[47] *See generally* 47 U.S.C. § 254.

In its recent *Second Calling Card Order*, the Commission recognized that retroactive application of a new adjudicative rule is simply inappropriate where parties could not have anticipated that rule based on previous pronouncements. There, the Commission distinguished between calling cards that use IP transport but provide the caller with no additional capabilities, and "menu-driven" calling cards. The Commission held that its prior decisions "provided ample notice" that providers of the former type of cards would be treated as telecommunications carriers, while "prior decisions did not clearly point in the direction of treating providers of menu-driven prepaid calling cards as telecommunications carriers."[48] The Commission applied its decision retroactively as to IP-based calling card providers, and did not apply it retroactively as to menu-driven card providers.[49] Similarly, in this case, the Commission's prior decisions do not clearly point in the direction of requiring wireless carriers to allocate toll revenues other than with the safe harbor or a traffic study. Indeed, the Commission's prior orders point directly to allowing such allocation. Thus, as with the menu-driven cards in the *Second Calling Card Order*, CTIA requests that the Commission not apply any new toll revenue allocation rules retroactively.

Any requirement that wireless carriers utilizing the safe harbor or traffic studies to allocate their revenues apply a different allocation method to toll revenues would be a new requirement that has not yet been clearly enunciated, and should not be applied to reports filed prior to the Commission's future clarification of the applicable standard.

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[48] *Second Calling Card Order* at ¶¶ 43, 45.
[49] *Id.*

B. Traffic Study Methodology and Accuracy Standards

The *2006 Contribution Order* acknowledges that the requirement that CMRS carriers submit their traffic studies is a new provision,[50] and the methodology and accuracy standards are part of the new filing requirement.[51] Thus, given the prohibition on retroactive rulemaking,[52] CTIA does not expect that the new standards would be applied to traffic studies that CMRS relied upon in periods prior to the effective date of the *2006 Contribution Order*. CTIA requests the Commission to so clarify.

[50] *2006 Contribution Order* at ¶ 32.
[51] *Id.*
[52] *See supra* Section IV.A.

CONCLUSION

CMRS carriers recognize their obligation to contribute to universal service, and have complied in good faith with prior Commission Orders regarding the reporting and allocating of toll revenues and the performance of traffic studies. CTIA respectfully asks the Commission to clarify the standards that it intends to apply to these issues on a going forward basis, and recognize that new standards for these issues should not be applied retroactively.

Respectfully submitted,

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