

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In The Matter Of)
)
Petition For Declaratory)
Ruling of CTIA On Universal Service)
Contribution Obligations; Petition for) WC Docket No.
Declaratory Ruling of Cingular Wireless, LLC) 06-122
On Universal Service Contribution Obligations)
)

COMMENTS

United States Cellular Corporation ("USCC") hereby files its comments in the above-captioned proceeding pursuant to the relevant public notice.¹ USCC strongly supports the requests for declaratory ruling by CTIA and Cingular Wireless, LLC ("Cingular"). Specifically, USCC asks that the FCC declare that:

1. consistent with its repeated and specific statements in prior orders, wireless carriers have been permitted to determine the interstate/international percentage of all of their end-user telecommunications revenues, including "toll" revenues, using the wireless "safe harbor" percentage; and
2. any requirements arising out of the recent USF contribution order should apply only prospectively and the FCC will not seek to enforce any regulatory contribution obligations or late fees which would arise from a retroactive application of the new rules.

¹ Public Notice, "Wireless Competition Bureau Seeks Comment on Two Petitions For Declaratory Ruling Concerning Universal Service Contribution Obligations, W.C. Docket 06-122, DA 06-1615, released August 10, 2006.

Also, in connection with a possible prospective application of the new rules, we request that the FCC clarify the definition of "toll" revenues in the wireless context.

I. Wireless Carriers Have Been Allowed to Determine The Interstate/International Percentage of All End User Telecommunications Revenues Including Toll Revenues, Using the Wireless Safe Harbor Percentage

In June, 2006 the FCC adopted an order dealing with several Universal Service Fund issues.² In the 2006 Contribution Order, the FCC made its first attempt to define "toll" traffic in the CMRS context. The "definition," not a model of lucidity, is as follows:

"Toll services are telecommunications services that enable customers to communicate outside of their local exchange calling areas. Many wireless telephone customers subscribe to plans that give them fixed amounts of minutes which can be used either for local or long distance service. Other wireless telephone 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. For some wireless telephone providers, toll service revenues include those 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." (Emphasis supplied).

As reflected in the last sentence quoted above, the FCC has now, for the first time, associated itself with an interpretation arguably found in the post 2002 instructions to FCC Form 499-A to the effect that the wireless safe harbor percentage cannot be applied to "toll" revenues for the purposes of calculating USF contributions. As is discussed in exhaustive and definitive detail by both CTIA and Cingular, this view concerning the proper treatment of "toll" revenues is

² Universal Service Contribution Methodology, et al., W.C. Docket Nos. 06-122 et al., Report and Order and Notice of Proposal Rulemaking, FCC 06-94 (rel. June 27, 2006) ("2006 Contribution Order").

flatly contradicted by eight years of Commission orders and Federal Register publications having the force of rules. Those orders state that all telecommunications revenues, including toll revenues, are subject to the safe harbor.³ The prior FCC orders made no distinction between toll and other carrier revenues with respect to the successive "safe harbor" percentages intended to be a reasonable substitute for carriers having to calculate the actual interstate/international percentage of their total revenues.⁴ Nor would there have been any valid reason to do so, since those safe harbor percentages included the types of calls and revenues the FCC now wishes to segregate as "toll,"⁵ thus raising the overall safe harbor percentage.

As CTIA notes (Petition p. 10) and as undersigned counsel can attest, these issues have been repeatedly raised with the FCC. However, the various ex parte filings discussing the glaring discrepancy between the form's instructions and the FCC's prior orders have been ignored. The 2006 Contribution Order also mistakenly assumes the correctness and clarity of Form 499-A's instructions on this issue. The current proceeding offers the Commission a last opportunity, prior to judicial review, of dealing with this matter and making it clear that carriers have had a right under prior FCC orders to include "toll" revenues in their safe harbor calculations. We respectfully urge the FCC to grasp it.

II. Any New Obligations Arising Out of the 2006 Contribution Order and Any Successor Orders Must be Prospective in Nature.

Since the 2006 Contribution Order creates a new obligation, namely that of calculating an "actual" interstate/international "toll" percentage for USF payment purposes, the FCC's attempt to enforce that obligation concerning past USF filings creates the obvious legal difficulty of the

³ See CTIA Petition, pp. 5-10; Cingular Petition, pp. 1-9

⁴ Ibid.

⁵ Cingular Petition, pp. 4-28 and especially Footnote 28.

retroactive application of an administrative rule. The 2006 Contribution Order does not acknowledge the existence of the problem, but that does not eliminate it.

Cingular's discussion of the doctrine of impermissible retroactivity in this context is exhaustive and irrefutable.⁶ Retroactivity is sometimes a difficult concept to apply, but not in this instance. To apply this newly developed definition of toll revenues to previous USF filings would be to: (a) contradict prior clear FCC statements and orders; (b) depart from the requirements created by those statements and orders; (c) disregard the reasonable reliance of wireless carriers on those prior orders; and (d) ignore the unjust financial burden which would be placed on wireless carriers as a consequence of such retroactive rulemaking. Also, as Cingular notes, the equitable case against requiring additional USF payments from carriers bearing an ever larger part of the USF burden is very strong.

III. The FCC Should Clarify The Definition of "Toll" Revenues.

The FCC cannot apply a new rule retroactively but obviously can do so prospectively. However, considerable uncertainty remains even after the 2006 Contribution Order as to what "toll" revenues are in the wireless context.

As CTIA points out (Petition, pp.3-7), the most recent instructions to the USAC Form 499-A worksheet continue to define "toll" services as telecommunication services "that enable customers to communicate outside the local exchange calling area," a definition meaningless in the wireless context. The FCC's attempt at clarification of "toll" charges in the 2006 Contribution Order, described above at page 2 above, refers to "additional" charges besides "airtime" charges, for "long distance" calls. Those "additional" charges are "included" within what some wireless carriers consider to be toll revenues. It is hardly unreasonable to ask what

⁶ Cingular Petition, pp. 17-30.

the FCC considers to be "long distance calls" for these purposes and to clarify whether the type of charges referred to in Paragraph 29 constitute all such charges. The Commission's continuing vagueness and lack of clarity on this issue is very surprising, given the repeated requests for clarification the FCC has received. It is essential and legally required that if the FCC wishes to create a distinct wireless "toll" category for these purposes that it provide a comprehensible definition of that category.

Conclusion

For the foregoing reasons, the FCC should rule: (a) that it has been permissible to use the safe harbor to calculate carriers' interstate/international percentage of toll revenues on Form 499-A; (b) that it will not apply its new toll definition retroactively; and (c) that it will clarify the meaning of wireless toll revenues applicable in the future.

Respectfully submitted,

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