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

In the Matter of Petition for Declaratory Ruling of CTIA-The Wireless Association® on Universal Service Contribution Obligations	))))))	WC Docket No. 06-122 DA 06-1615

COMMENTS OF T-MOBILE USA, INC.
IN SUPPORT OF PETITION FOR DECLARATORY RULING

T-Mobile USA, Inc. ("T-Mobile") shares the concerns expressed by CTIA-The Wireless Association® ("CTIA") in its petition for declaratory ruling on Universal Service Contribution Issues.[1] While T-Mobile fully supports the goals of universal service and contributes as required to the Universal Service Fund ("USF" or "Fund"), certain aspects of the Federal Communications Commission's ("Commission's" or "FCC's") most recent universal service contribution order[2] exacerbate already existing confusion for carriers seeking to comply with the Commission's USF contribution regulations. T-Mobile therefore supports CTIA's Petition and urges the Commission to grant the relief requested, including:

(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 jurisdictions;

(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 in response to CTIA's Petition or in another Commission action, nor the new traffic study requirements set forth in the *2006 Contribution Order*, will be applied retroactively prior to the effective date for the order adopting the relevant requirement.[3]

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[1] Petition for Declaratory Ruling of CTIA-The Wireless Association® on Universal Service Contribution Issues, WC Docket No. 06-122, August 1, 2006 ("CTIA Petition").

[2] *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*").

[3] *Id.*

Absent further clarification from the Commission, carriers can only make good faith judgments with respect to contribution reporting and calculations. Considering that the wireless industry contributes approximately $2.5 billion annually to the Fund, what seem to be relatively minor deviations in the Commission's rules and guidance can have a significant financial impact, not only on carriers and their customers, but on the beneficiaries of the USF. Thus, the Commission should foster the public interest in ensuring universal service by providing the relief requested by CTIA.

Moreover, in addition to clarifying its recent order, which is only designed to be an interim reform measure, T-Mobile urges the Commission to move expeditiously to implement a permanent numbers and capacity-based methodology for USF contribution as we have previously outlined.[4]

I. THE COMMISSION SHOULD CLARIFY REGULATIONS REGARDING ALLOCATION OF TOLL REVENUES

Prior to the *2006 Contribution Order*, no FCC order or rule specified that toll revenue should be treated differently from all other carrier revenue. On the contrary, between 1998 and 2005, the Commission's orders consistently directed carriers to contribute a fixed percentage of their total end user revenue without any requirement to separate out toll revenue.

Notwithstanding the plain language consistently set forth in these orders, the USF revenue reporting form (499 Form) and the related instructions were changed in 2002 to require that when carriers use "safe harbors" to determine interstate revenues, they must report "the actual amount of interstate and international revenues" for toll services.[5] While some may now be interpreting this language to require wireless carriers to contribute based on "actual" interstate

[4] *See T-Mobile Ex Parte Letter*, CC Docket No. 96-45, filed April 4, 2006.

[5] "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." FCC Form 499-A, 2003 Instructions at 18.

and international toll revenue, as opposed to application of either a safe harbor or traffic study factor, the 499 Form instructions discuss the separation of toll revenues solely in the context of safe harbors. Accordingly, carriers using traffic studies to calculate interstate revenues have no basis for concluding that toll revenues are to be treated any differently than all other revenues for contribution purposes.[6]

These ambiguities, coupled with the Commission's language in the *2006 Contribution Order* suggesting that some wireless carriers are not reporting toll revenues properly,[7] begs for prompt clarification by the Commission. T-Mobile therefore urges the Commission to issue a ruling as soon as possible confirming that wireless carriers may use the same interstate factor for all categories of end user revenues, including toll revenues.

II. TRAFFIC STUDIES ARE A NECESSARY TOOL FOR CARRIERS TO DETERMINE ACTUAL INTERSTATE AND INTERNATIONAL REVENUES

As CTIA notes, the Commission has made clear that carriers may use traffic studies to report their actual interstate telecommunications revenues,[8] and the Commission just reaffirmed this policy in its *2006 Contribution Order*.[9] Traffic studies have long served as a reliable means of determining actual interstate telecommunications revenues, but to the extent there were any concerns about their accuracy, in the *2006 Contribution Order*, the Commission implemented additional safeguards, including mandating a 95 percent confidence level and submission of

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[6] The term "traffic study" did not appear in the 499 instructions until 2006. *See* FCC Form 499-A, 2006 Instructions at 16.

[7] Although prior orders never raised any concerns regarding wireless carriers' toll revenue reporting, the *2006 Contribution Order* states that "Commission staff analysis, however, raises the concern that some filers are not reporting their separately stated toll revenues correctly." *2006 Contribution Order*, ¶ 29.

[8] *Federal-State Joint Board on Universal Service, et al.*, Order and Order on Reconsideration, 18 FCC Rcd 1421, 1423 at ¶ 4 (2003) ("*2003 Reconsideration Order*") ("CMRS providers that do not utilize the applicable interim safe harbor will still have the option of reporting their actual interstate telecommunications revenues either through a company-specific traffic study or some other means."); *id.* at ¶ 8.

[9] *2006 Contribution Order* at ¶ 32.

study reports with 499 Form filings.[10] Moreover, as they have done in the past, wireless carriers will retain their underlying traffic study documentation for submission to the Commission upon request.[11] These safeguards are more than adequate to maintain the integrity of USF contributions based on traffic studies.

Many wireless carriers have been relying on the flexibility to report their actual interstate telecommunications revenues through traffic studies.[12] Prohibiting the use of traffic studies now to calculate some or all wireless revenues would require significant investment on the part of carriers to purchase or convert to data processing systems that could track interstate revenues on a call-by-call basis. Such a ban would be particularly wasteful considering that carriers will have to readjust again when the Commission completes more fundamental reform of the contribution methodology in the not-too-distant future.[13] Accordingly, wireless carriers should be able to continue to rely on traffic studies to calculate toll revenues and maintain their current 499 Form allocation processes.

III. THE COMMISSION MAY ONLY APPLY ANY NEW OR CLARIFIED REQUIREMENTS ON CARRIERS PROSPECTIVELY

T-Mobile supports CTIA's request that the Commission confirm that any new or clarified requirements arising out of the *2006 Contribution Order* will be applied solely on a prospective basis.[14] Carriers have reasonably relied on the Commission's past policies, as set forth in published orders and regulations, and any retroactive application of new policies would subject

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[10] *See 2006 Contribution Order* at ¶ 32 and n. 115-116.

[11] *2006 Contribution Order* at n. 115 ("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 FCC upon request.")

[12] *See 2003 Contribution Order* at ¶ 8 ("Because we recognize that some CMRS providers during this interim period may not have the capability to determine their interstate telecommunications revenues on a customer-by-customer basis, we will allow CMRS providers to report their interstate telecommunications revenues based on a company-specific traffic study.").

[13] *2006 Contribution Order* at ¶ 4 ("While we retain the revenue-based approach for now, we are committed to examining more fundamental reform in this proceeding . . . the steps we take today are interim measures. . . .").

[14] *CTIA Petition* at 14-18.

carriers unfairly and without proper notice to operational burdens and significant costs that could not be recovered from customers.

Relevant case law prohibits the Commission from applying any new rules or regulatory clarifications retroactively in accord with "notions of equity and fairness."[15] The Commission itself recognized this mandate when it chose not to seek retroactive payment of USF contributions from providers of menu-driven prepaid calling cards given the state of the law at the time and the providers' reliance on assumptions that their services would not be subject to those USF obligations.[16] Similarly here, the Commission's orders have long provided guidance on toll revenues upon which carriers have reasonably relied.

CTIA's petition accurately describes the Commission's orders permitting wireless carriers to use safe harbors or traffic studies for allocating *all* of their telecommunications revenues.[17] Because these orders were clear, retroactive application of any conflicting interpretation would be unlawful. Moreover, when the industry became aware of the potential discrepancy between the revised 499 Form instructions (noted in section I above), it sought guidance from the Commission.[18] The Commission declined to provide the requested clarification, however, leaving carriers with no alternative but to act in good faith reliance upon the Commission's orders and act in good faith in reporting interstate revenues. Any retroactive interpretation of new laws or clarifications would have significant financial consequences for carriers that cannot recover for such past-due assessments from their customers.[19] Thus, T-

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[15] *Regulation of Prepaid Calling Card Services*, Declaratory Ruling and Report and Order, FCC 06-79 (rel. June 30, 2006) at ¶ 42 (citing *Clark-Colwitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1081-82 & n.6 (D.C. Cir. 1987)); *see also Cassell v. FCC*¸ 154 F.3d 478, 486 (D.C. Cir. 1998).

[16] *Prepaid Calling Card Services* at ¶ 45.

[17] *CTIA Petition*, Section II.

[18] *See CTIA Ex Parte Letter*, July 14, 2004 (CC Docket No. 96-45); *CTIA Ex Parte Letter*, May 19, 2004 (CC Docket No. 96-45) (requesting clarification on the definition and allocation of toll revenues for CMRS carriers).

[19] *See* 47 CFR § 54.712(a).

Mobile urges the Commission to make clear that there will be no retroactive application of new or newly-interpreted USF contribution rules or instructions.

CONCLUSION

For the foregoing reasons, the Commission should grant the relief requested in CTIA's petition.

Respectfully submitted,

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