

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)
)
Universal Service Contribution Methodology) WC Docket No. 06-122
)
Petition for Declaratory Ruling of Cingular)
Wireless LLC On Jurisdictional Allocation of)
Wireless Toll Revenues)

To: The Commission

REPLY COMMENTS OF CINGULAR WIRELESS, LLC

In its August 8, 2006 petition in this docket (the “Petition”), Cingular Wireless LLC (“Cingular”) asked the Commission to issue a declaratory ruling regarding the proper allocation of wireless toll revenues between the intrastate and interstate jurisdictions. Because no party has opposed the Petition, Cingular respectfully requests that the Commission promptly render the declarations sought. A prompt decision will prevent unnecessary uncertainty going forward, particularly as carriers prepare to submit their November 1, 2006 Forms 499Q. Cingular also urges the Commission to grant the related petition filed by CTIA – The Wireless Association® (“CTIA Petition”).

Cingular’s Petition asked the Commission to declare that:

- (1) consistent with its repeated and specific statements in numerous orders, wireless carriers have been permitted to allocate *all* of their end-user telecommunications revenues, including “toll” revenues, using the “wireless safe harbor”; and
- (2) to the extent it alters this policy in the future, it will not apply its new approach retroactively prior to the date of such an order and will not seek to enforce any additional regulatory contribution obligations that would arise from such retroactive application or any associated late-payment fees.

The Petition demonstrated that, on at least six occasions between 1998 and 2006, Commission and Wireline Competition Bureau orders – up to and including the recent *2006 Contribution Order*¹ – have stated that carriers electing to allocate revenues using the so-called “wireless safe harbor” are permitted, or even *required*, to allocate *all* of their end-user telecommunications revenues pursuant to the safe harbor.² On at least three occasions, these statements have been published in the Federal Register.³ Nevertheless, the Instructions appended to the Form 499 Worksheets – never themselves published in the Federal Register – are drafted in a manner suggesting that safe-harbor allocation of wireless *toll* revenues may be impermissible.

Noting that the Commission of course remains free to change its policies prospectively, Cingular asked the Commission to recognize that post-hoc application of any prohibition against safe-harbor allocation of toll revenues would be unfair and unlawful. Specifically, Cingular demonstrated that retroactive application of the approach suggested by the Instructions would constitute impermissible retroactive rulemaking, because the Commission’s repeated statements permitting safe-harbor allocation of toll revenues, published in the Federal Register, constitute “rules” under the Administrative Procedure Act, whereas the Worksheet Instructions do not. Further, Cingular showed that such application would be inconsistent with the equitable analysis that courts and the Commission have traditionally applied to matters involving retroactivity. Finally, Cingular explained that retroactive application of the Instructions’ approach would be

¹ *Universal Service Contribution Methodology, et al.*, WC Docket No. 06-122 et al., Report and Order and Notice of Proposed Rulemaking, FCC 06-94 (rel. June 27, 2006) at ¶ 27.

² See Petition at 3-9.

³ See *Federal-State Joint Board on Universal Service*, 63 Fed. Reg. 68208, 68208 (Dec. 10, 1998); *Federal-State Joint Board on Universal Service*, 67 Fed. Reg. 79525, 79526 (Dec. 30, 2002); *Federal-State Joint Board on Universal Service; IP-Enabled Services*, 71 Fed. Reg. 38781, 38783 (July 10, 2006).

improper and unlawful even if the Commission also deemed the Instructions to be rules, because the result would be two directly contrary “rules” that together prevented regulated parties from reasonably ascertaining the obligations to which they were subject.

Filed within days of Cingular’s Petition, the CTIA Petition sought declarations similar to those requested by Cingular. CTIA also asked the Commission to clarify the definition of “toll” revenues in the wireless context, and to confirm that wireless providers that relied on *traffic studies* to allocate their end-user telecommunications revenues were also allowed to allocate their toll revenues in that manner.⁴

Only two parties – United States Cellular Corporation (“US Cellular”) and Qwest Communications International Inc. (“Qwest”) – filed comments regarding Cingular’s Petition.⁵ Neither opposed the Petition in any respect. US Cellular stated that “Cingular’s discussion of the doctrine of impermissible retroactivity in this context is exhaustive and irrefutable”⁶ and noted the practical problems associated with continued uncertainty.⁷ Qwest “agree[d] ... that the manner in which the wireless safe harbor should be applied needs to be clarified in light of the seemingly contradictory instruction language identified,” but focused its comments on “additional concerns as to application of the VoIP safe harbor with respect to the same instruction language.”⁸ T-Mobile USA Inc. filed comments regarding only the CTIA Petition; those comments supported CTIA’s request, and were also entirely consistent with Cingular’s position.

⁴ Petition for Declaratory Ruling of CTIA – The Wireless Association® on Universal Service Contribution Obligations, WC Docket No. 06-122 (filed Aug. 1, 2006).

⁵ These two comments also addressed the CTIA Petition.

⁶ US Cellular Comments at 4.

⁷ *Id.* at 4-5

⁸ Qwest Comments at 2.

Given the absence of any opposition whatsoever, Cingular respectfully asks the Commission to act quickly in granting its Petition, as well as CTIA's. On November 1, 2006, providers of interstate telecommunications will be required to submit their Forms 499Q reporting historical revenues from the third quarter of 2006 and projected revenues for the first quarter of 2007. Wireless carriers (such as Cingular) that rely on the Commission's safe harbor or on traffic studies to allocate their end-user telecommunications revenues will once again need to decide how to identify "toll" revenues and how to allocate those revenues once they are identified.⁹ Absent Commission guidance, carriers choosing to allocate toll revenues using the safe harbor or traffic studies will do so knowing that they might later be subjected to retrospective obligations which they could be unable to recover from end users – notwithstanding clear Commission statements authorizing such allocation. This uncertainty places carriers in an unfair and untenable position. The Commission has the power to resolve lingering uncertainties in this area. It should exercise that power to clarify that whatever policies it might adopt on a going forward basis, carriers' obligations up to now have tracked the language used in repeated Commission orders.

⁹ As described in Cingular's September 15 filing in this docket, Cingular has previously relied on the wireless safe harbor but plans to report and allocate its revenues going forward based on a traffic study. See Cingular Wireless LLC Universal Service Traffic Study Submission, WC Docket No. 06-122 (filed Sept. 15, 2006). Of course, because its Petition addresses the *retroactive* application of new Commission rules, it still has a great interest in the declarations sought with regard to the safe harbor.

