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

In the Matter of	)	
	)	
Universal Service Contribution Methodology	)	WC Docket No. 06-122
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
	)	

PETITION FOR RECONSIDERATION OR, IN THE ALTERNATIVE, CLARIFICATION OF SUNCOM WIRELESS, INC.

SunCom Wireless, Inc. ("SunCom") 1/ hereby files this Petition for Reconsideration or, in the Alternative, Clarification of the Public Notice released by the Wireline Competition Bureau ("Bureau"). announcing revised instructions for completing the 2007 Form 499-A (*"Revised399-A Instructions*"). 2/ SunCom asks that the Bureau reconsider certain provisions in the *Revised 4YY-A Instructions*, issued only two weeks before the April 2,2007 filing deadline, that improperly and retroactively impose a new substantive requirement not specified or anticipated in any previous Commission order. In the alternative, if reconsideration is denied, SunCom asks that the Bureau clarify that the ***Revised*** *499-A* ***Instructions*** only apply prospectively. 3/

Bureau reconsideration is warranted because the new instructions require a mobile carrier to report interstate revenues in its annual Form 499-A filing based on the "safe harbor" percentage if the carrier used the "safe harbor" percentage for its quarterly Form 499-Q reports – even if the carrier later determines that actual traffic measurements or traffic studies would more

1/ Suncom indirectly owns SunCom Wireless Operating Company, LLC and SunCom Wireless Puerto Rico Operating Company, LLC, both of which are Form 499 filers.

2/ "Wireline Competition Bureau Announces OMB Approval of the 2007 FCC Form 499-A," DA 07-1355, (rel. March 19, 2007). This Petition is filed pursuant to 47 C.F.R. § 1.429.

3/ Thus, the *Revised 499-A Instructions* would be inapplicable to any quarterly or annual Form 499 filings for the calendar year of 2006.

accurately reflect its interstate revenues for the year. 4/ This new policy was not discussed or mentioned in the *2006 USF Contribution Order,* 5/ nor in any other previous FCC order. New substantive policies cannot be adopted without any explanation (let alone notice or comment) by means of instructions on a form. Moreover, the revised policy could potentially impose this new policy retroactively – it construes a carrier's "safe harbor" vs. traffic study election on quarterly Forms 499-Q (filed before the issuance of the new Form 499-A instructions) as restricting the carrier's ability to correct potentially erroneous information via a subsequent annual Form 499-A filing. Even if the *2006 USF Contribution Order* could be construed to incorporate this policy, the new policy should be clarified by the Bureau to exclude quarterly and annual Form 499 filings for the calendar year 2006.

Wireless carriers have long had the option of reporting their interstate revenues either using either the "safe harbor," traffic studies, or other reasonable means. 6/ Prior to the 2006 *USF Contribution Order,* the instructions for the Forms 499-A and 499-Q did not even mention traffic studies. While the old instructions stated that "[a]nnual revenues reported on the FCC Form 499-A should reflect the filer's reporting of revenues in each quarter on FCC Form 499-Q." the context was whether a filer may apply the safe harbor on the basis of all commonly-

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$/ Revised 499-A Instructions at 23 ("if a filer projected revenue based on a safe harbor for the first two quarters and based on traffic studies for the final two quarters, the amounts reported in the FCC Form 499-A for the first two quarters would be based on actual billings for those quarters and the relevant safe harbors, and the amounts reported for the final two quarters would be based on actual billings for those quarters and the traffic studies for those quarters.")

5/ *Universal Service Contribution Methodology,* 21 FCC Rcd 7518 (rel. June 27,2006) *("2006 USF Contribution Order").*

6/ "[T]he Commission did not eliminate the option of reporting actual interstate telecommunications revenues either through a company-specific traffic study or some other means" as well as using the safe harbor. *Federal State Joint Board on Universal Service,* Order and Order on Reconsideration, 18 FCC Rcd 1421, ¶ 8 (2003); *see also Federal State Joint Board on Universal Service,* 17 FCC Rcd 24952,168 (2002) (further NPRM regarding how traffic studies should be conducted).

owned affiliates' revenues or on the basis of each specific operating entity's revenues. There was no mention of whether a carrier could correct erroneous interstate revenue amounts reported on quarterly Forms 499-9 via the annual 499-A. Nor did the 2006 *USF Contribution Order* address whether the new policy on submission of traffic studies applied to Forms 499-Q already submitted for the calendar quarters of 2006. The words "For example" in the sentence promulgating the new requirement are misleading; the new sentence is not an "example" elucidating the preceding statement but an entirely new requirement.

The Revised Form 499-A Instructions are Procedurally Inappropriate: The instructions imposed new regulatory obligations on mobile carriers without due notice, and without any explanation or justification. This is because the Commission's revised Form 499-A instructions were the first definitive FCC issuance of the new policy, and they depart from the 2006 *USF Contributions Order*.

The Revised 499-A Instructions Constitute Retroactive Rulemaking: Even if the revised Instructions were supported by the 2006 *USF Contributions Order* – which they are not – the new Instructions impermissibly purport to apply the new policy retroactively to quarterly filings submitted before the 2006 *USF Contributions Order* **took** effect. 7/ The new instructions alter the legal expectations that carriers had at the time of submitting those quarterly filings. Courts disfavor retroactive application of agency rulemakings as violating the Administrative Procedure Act and basic notions of due process.8/ In addition, Section 254(d) of the Act specifically

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7/ **As** an alternative to reconsideration, the Bureau could clarify pursuant to 47 C.F.R. §1.3 that the *Revised 499-A Instructions* only apply prospectively – and thus not to Form 499A or 499Q filings in the calendar year of 2006.

8/ ***See*** *Bowen v. Georgetown University Hospital*, 488 **U.S.** 204,219-20 (1988); ***see*** *also Federal State Joint Board on Universal Service, 20* FCC Rcd 13,779, ¶ 11 (W.C. Bur. 2005) (holding that an earlier USF Remand Order concerning the CMRS safe harbor applied prospectively).

requires that carriers' USF contributions be "predictable."[9] If the Commission could make existing legal entitlements "unpredictable" through retroactive rulemaking, such action would be contrary to the plain meaning of Section 254.

The Revised 499-A Instructions Arbitrarily Impose Different Requirements on Similarly Situated Carriers: The new statement in the revised Form 499-A instructions creates an arbitrary distinction among like carriers for filing quarterly reports in the year 2006. Prior to the issuance of the revised Form 499-A, all carriers had the same expectation – traffic study data could be submitted later in Form 499-A filings. Now carriers who had the same expectations when filing their 2006 quarterly reports will be treated differently. Those which had filed and submitted traffic studies at the time of submitting the quarterly report will be permitted to use these traffic studies in the Form 499-A revenue true up period. However, those which relied upon the FCC's "safe harbor" interstate revenue projection for their Form 499-4 reports will not be permitted to correct this data through traffic studies. This result is inequitable because "safe harbor" carriers could be paying far above their actual revenue data, and these carriers could have had intentions to complete traffic studies for the Form 499-A. Nor does the new instruction consider the possibility that carriers could refund to consumers any amounts collected and remitted pursuant to the quarterly Form 499-4 filings, but later deemed to be excessive in the context of the annual Form 499-A filing.

9/ 41 U.S.C. § 254(d).

For these reasons, SunCom respectfully requests that the Commission reconsider and vacate the revised Form 499-A instructions issued in late March 2007.

Respectfully submitted,

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April 18, 2007

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